

**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?

As I am no longer working at the Department of Defense (DOD) overseeing detainee policy, I am not aware of the current protocols, processes, or metrics used to evaluate a detainee and whether he is an acceptable candidate for recommendation for transfer.

That said, in general terms, I am aware of the following, which may provide some assistance.

Since at least 2005, the DOD Office of Detainee Policy has had an annual process of evaluating each detainee held under law of war detention at Guantanamo to determine if he was an acceptable candidate for a potential transfer off the island. During the George W. Bush administration, the Deputy Secretary of Defense was the person charged with deciding if a detainee was to be transferred off the island. At that time, he was the Deciding Civilian Official (DCO). Before deciding whether to approve a transfer, the DCO would receive input from across DOD, the Intelligence Community, the Department of Justice, and other stakeholders in the federal government.

Once the DCO approved a transfer, the State Department would work with the detainee’s home country, or other countries, to effectuate a transfer that would mitigate the threat that particular detainee posed, but also ensure that the transfer would not violate the principle of non-refoulement.

Over the years, that process became more formalized and various entities within DOD were created to institutionalize the process. When I served at DOD, the process was handled within the Office of Detainee Affairs and was called the Annual Review Board (ARB) process. The process was eventually moved out of the Office of Detainee Affairs into a newly created office called the Officer for the Administrative Review of the Detention of Enemy Combatants (OARDEC).

During the Obama administration, via Executive Order 13567, the process was modified and housed in a newly named organization within DOD called the Periodic Review Secretariat (PRS), which continues to this day. In my opinion, besides the new name, the process is essentially the same as in previous years.

There are, quite frankly, very few prerequisites to a transfer of a detainee from Guantanamo to his home country or a third country that is willing to take him. As long as the country receiving him will abide by the terms of the transfer agreement and honor the principle of non-refoulement, any administration can transfer any detainee from Guantanamo. It all depends on the amount of risk an administration is willing to accept.

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

It depends on a number of factors. The first, and most important factor, is the risk that particular detainee poses. Second, the terms of the transfer agreement between the United States and the receiving country. Will the receiving country prosecute that detainee under their domestic law? Jail him? Monitor him, and how? Pull his passport? Report back to the United States periodically on the detainees activities and whereabouts? Monitor his communications? Third, what is the country's track record with prior detainees they have received from Guantanamo, or even from U.S. terrorist detention facilities we used in Iraq or Afghanistan? These, and other factors, should be factored in when deciding whether a country willing to accept a detainee should be the recipient of a detainee.

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

See my answer above.

- 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?

The United States, since at least 2005, has engaged in robust, ongoing, and comprehensive (whole of government) efforts to locate and work with countries willing to accept terrorist detainees housed in Guantanamo. Dozens of countries have accepted detainees. And many other countries are willing to accept detainees, but the United States, for a variety of reasons, is not willing or able to send detainees to those countries. The Bush and Obama administration went above and beyond to find countries willing to take Guantanamo detainees.

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

No. Each detainee transfer from Guantanamo is governed by a particular individualized transfer agreement. The terms of those agreements lay out the terms and conditions for his transfer. I am not able to provide details of those agreements for two reasons: (1) I can't remember them (2) even if I could, they are executive branch agreements and not, as I understand it, provided to the legislative body of either country.

- 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?

I do not know the answer to this question. However, it is an important question to ask, and one which the current administration should be asked. Knowing the "track record" of a potential recipient country should be a critical factor in deciding whether to accept the risk of sending another detainee to that country.

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

No.

- 2) Some majority witnesses suggested that the remaining detentions at Guantanamo could be ended by pleas or pre-charging statements as to their terrorist acts.

- a. What does it mean to dispose of a case at Guantanamo by plea? To obtain a plea in the civilian system, prosecutors must make attractive deals to criminals that limit their time in confinement. Is there a strong likelihood of a detainee at Guantanamo now entering a serious plea without receiving some form of early release?

Most of the detainees held at Guantanamo since they first arrived in 2002 were held as law of war detainees. Like any prisoner of war during war time, they are held because of their status---i.e. they are a member of the opposing enemy force. They can, under standard law of war principles, be held for the duration of the war. The fact that we don't know when the war will end does not change their status, nor does it require us to let them go during ongoing hostilities.

Some detainees at Guantanamo are not only members of the opposing enemy force (al Qaeda and Afghan Taliban), but also committed war crimes, punishable under the laws of war and the Military Commission Act of 2009. If there is sufficient evidence to charge them with a violation of the criminal laws spelled out in the Military Commissions Act of 2009, the U.S. government has the option (not the obligation) to charge them with those crimes in a military commission.

Military commissions are criminal trials. Most criminal cases are resolved by plea bargain, and military commissions are no different.

The fact is, however, that even if a terrorist detainee at Guantanamo pleads guilty at a military commission, he can (at least in theory) continue to be held as a law of war detainee. That said, no criminal defense attorney representing a Guantanamo detainee would agree to such a provision as part of a plea agreement, as that would defeat the very purpose of the plea---to accept responsibility for his crimes and get off the island at some point certain.

- b. Given the success of defense attorneys in delaying and challenging proceedings at Guantanamo, what would cause them to counsel a client to plead? Is there anything besides early release that would be an adequate inducement?

As a former criminal defense attorney, I can assure the Committee that clients decide to plead guilty for a variety of reasons. Clients plead guilty on advice of counsel, against the advice of counsel, to get the case over with, to clear his conscience, to move the process along, or other reasons.

I have no personal insight into how or why terrorist detainees at Guantanamo have decided to plead guilty. They are represented by superb attorneys, who no doubt have worked hard to explain all the legal issues and options available to their clients.

- c. It violates prosecutorial ethics to charge a case solely to obtain a plea when there is insufficient evidence to take a case to trial. The Guantanamo Review Task Force determined that only a small percentage of Guantanamo detainee cases were chargeable due to issues like run statutes of limitations and lack of jurisdiction at the time of the offense. Is there reason to believe there are viable charges that have not been brought but could still be brought for Guantanamo detainees?

I do not know, but I am doubtful given how thoroughly each case has been scrutinized over the decades over several administrations.

- 3) 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?

As I stated in my written and oral testimony, the ODNI has confirmed that 125 of 729 (17.1%) of detainees have reengaged in terrorist activity, and an additional 104 of those 729 (14.3%) are suspected of having reengaged in terrorist activity. As a matter of common sense, those numbers are likely wrong, as they must be too low. We simply don't know how many others who have been released have committed additional terrorist acts because they haven't been caught and may never be detected or caught.

There are published reports, discussed at the hearing, and others that are classified, that detail how terrorists transferred or released from Guantanamo have killed American military or other personnel. Those were preventable deaths had we not transferred or released those detainees.

Furthermore, by trading five senior Taliban leaders for Sgt Bowe Bergdahl, the Obama administration re-armed the Taliban leadership in Afghanistan.

We will never know the full extent of the damage we have done to ourselves, our military or intelligence personnel, or our allies, by releasing and transferring hundreds of terrorist detainees from Guantanamo Bay since the spring of 2002.