

APRIL 8, 2022

POSITION STATEMENT AND OPEN LETTER TO PRESIDENT BIDEN REGARDING AN END TO THE 20-YEAR DETENTION OF MUSLIM MEN NEVER CHARGED WITH ANY CRIME

The Chicago Council of Lawyers joins the International Committee of the Red Cross in calling on President Biden to release forthwith the nineteen (19) men held without charge at Guantánamo for two decades, who already have been cleared by our government for release or transfer. In aid of these releases and of further releases once clearances are granted, we also ask President Biden to (a) reinstate the Office of Guantánamo Closure, to be staffed with State Department personnel knowledgeable of and authorized to negotiate and monitor diplomatic agreements with other countries willing to resettle those Guantánamo prisoners who cannot be safely repatriated; (b) lobby Congress for the easing of limitations on the release or transfer of Guantánamo prisoners; and (c) instruct the Department of Justice to consent immediately to the entry of writs of habeas corpus in all cases involving prisoners cleared for release or transfer.

Over twenty (20) years ago, in January 2002, the United States began detaining Muslim men at the Naval Station at Guantánamo Bay. Most of the men came into U.S. custody in Afghanistan or Pakistan, while U.S. troops were fighting the Taliban. Many of them were turned over in exchange for generous bounties that the United States offered for suspected enemies.¹ The prison at Guantánamo was designed to be a legal black hole that would effectively prevent prisoners from having or enforcing their basic civil and human rights. The prison has become an embarrassment to our nation and its allies and a symbol that our enemies use to justify their worst human rights transgressions.

President George W. Bush, like every president who followed him, has claimed that the 2001 Authorization for Use of Military Force (“AUMF”) authorizes the detention of the men at Guantánamo. The Supreme Court held in *Hamdi v. Rumsfeld* that the AUMF permits the United States to detain Taliban combatants who fought against the United States, but only for the duration of “[a]ctive combat operations” by United States troops in Afghanistan.² President Donald Trump reached a peace agreement with the Taliban in February 2020, agreeing to withdraw all United States forces from Afghanistan by the middle of 2021.

When President Biden took office, forty (40) men were still detained at Guantánamo. Six of them were already cleared for release or transfer, but only two men have been released

¹ Mark Denbeaux, *et al.*, *Report on Guantánamo Detainees as a Profile of 517 Detainees Through Analysis of Department of Defense Data*, Seton Hall Public Law Research Paper No. 46 (Feb. 2006), <https://law.shu.edu/policy-research/guantanamo-reports.cfm>. United States bounty flyers offered, *inter alia*, “millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers.” *Id.*

² 542 U.S. 507, 521 (2004).

during the Biden Administration. Each year United States taxpayers pay at least \$13 million per prisoner to hold them at Guantánamo.

On August 31, 2021, President Biden completed the removal of all United States troops from Afghanistan and declared an end to the war with the Taliban.

Of the thirty-eight (38) men who remain imprisoned at Guantánamo today, half (19) have been cleared for release by multi-agency task forces that included representatives of the Departments of Homeland Security, Defense, Justice, and State, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff. Indeed, three (3) men remain imprisoned at Guantánamo after two decades, despite having been cleared for release over twelve (12) years ago, in January 2010. Seven (7) additional men at Guantánamo are awaiting either a decision or a hearing by the current task force (now called the Periodic Review Board).

None of the twenty-six (26) men who are cleared for release or awaiting clearance has been charged with terrorism or any other crime.³

Meanwhile, in habeas corpus litigation, the Biden Administration continues to oppose releasing the men on the ground that its detention authority extends beyond the United States' cessation of active hostilities against the Taliban. During oral arguments in *United States v. Zubaydah* on October 6, 2021, Justice Stephen Breyer expressed skepticism of the Administration's position, calling it inconsistent with the Supreme Court's ruling in *Hamdi*.⁴

On January 18, 2022, the International Committee of the Red Cross issued a rare public statement calling for the United States to transfer "today" the prisoners already cleared for release or transfer. The ICRC noted it "is gravely concerned that the remaining people held at Guantanamo Bay have been behind bars for so many years with little or no clarity as to what will happen to them." An ICRC representative stated: "After 20 years and well over 100 visits, we see that the more time passes for these detainees, the more they and their families suffer."⁵ The Chicago Council of Lawyers agrees, and we call on the Biden Administration to stop detaining these cleared men without any legal, moral, or national security justification.

³ Only twelve (12) men held at Guantánamo are involved in the military commission process. Two men are serving their sentences after pleading guilty to crimes. Ten more men are years or even decades away from trial, their cases bogged down in pretrial litigation over various aspects of the heretofore untested military commission process.

⁴ *United States v. Zubaydah*, No. 20-827 (U.S.), involves the government's assertion that the "state secrets" doctrine bars testimony in a Polish investigative proceeding by the two men who designed and witnessed Abu Zubaydah's "enhanced interrogation" in a CIA prison in Poland. When Justice Breyer asked why Abu Zubaydah himself could not provide the testimony, he was shocked to learn that Abu Zubaydah still languishes at Guantánamo, despite the end of the war in Afghanistan, and that his habeas petition languishes in district court 14 years after it was filed. *Id.*, Oral Arg. Tr. at 54-56, 72-73.

⁵ *After 20 Years of Visits, ICRC Calls for Transfers of Eligible Guantánamo Detainees*, <https://www.icrc.org/en/document/icrc-calls-transfers-eligible-guantanamo-detainees>.