

I. President's Executive Order on Closure of Detention Facilities

[Source: United States Government, "Executive Order. Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009; available on http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

EXECUTIVE ORDER

REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTÁNAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions.

As used in this order:

[...]

c. "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals

currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

- a. Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.
- b. Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.
- c. The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention. [See United States, Habeas Corpus for Guantánamo Detainees]
- d. It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.
- e. New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.
- f. Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.
- g. It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, [...] as well as of the military commission process more generally. [See United States, Military Commissions]

Sec. 3. Closure of Detention Facilities at Guantánamo.

The detention facilities at Guantánamo 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. If any individuals covered by this order

remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. Immediate Review of All Guantánamo Detentions.

- a. Scope and Timing of Review. A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

[...]

- c. Operation of Review. The duties of the Review participants shall include the following:

1. Consolidation of Detainee Information. The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.
2. Determination of Transfer. The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.
3. Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.
4. Determination of Other Disposition. With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.
5. Consideration of Issues Relating to Transfer to the United States. The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts.

The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement.

No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. Military Commissions.

The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted. [See United States, Military Commissions]

Sec. 8. General Provisions.

- a. Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.
- b. This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- c. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

THE WHITE HOUSE,

January 22, 2009.

II. Presidential Memorandum on the Closure of Detention Facilities

The White House
Office of the Press Secretary

For Immediate Release

December 15, 2009

Presidential Memorandum – Closure of Detention Facilities at the Guantánamo Bay Naval Base

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL

SUBJECT: Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantánamo Bay Naval Base

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force [...], and in order to facilitate the closure of detention facilities at the Guantánamo Bay Naval Base, I hereby direct that the following actions be taken as expeditiously as possible with respect to the facility known as the Thomson Correctional Center (TCC) in Thomson, Illinois:

1. The Attorney General shall acquire and activate the TCC as a United States Penitentiary, which the Attorney General has determined would reduce the Bureau of Prisons' shortage of high security, maximum custody cell space and could be used for other appropriate inmate or detainee management purposes. The Attorney General shall also provide to the Department of Defense a sufficient portion of the TCC to serve as a detention facility to be operated by the Department of Defense in order to accommodate the relocation of detainees by the Secretary of Defense in accordance with paragraph 2 of this memorandum.
2. The Secretary of Defense, working in consultation with the Attorney General, shall prepare the TCC for secure housing of detainees currently held at the Guantánamo Bay Naval Base who have been or will be designated for relocation, and shall relocate such detainees to the TCC, consistent with laws related to Guantánamo detainees and the findings in, and interagency Review established by, Executive Order 13492 of January 22, 2009.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Secretary of Defense is authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA

[**N.B.:** On 21 January 2010, the Interagency Task force mandated by President Obama to conduct the Review of the Guantánamo detainees' files submitted its conclusions. It recommended that Guantánamo detainees be divided into three groups:

1. About 35 detainees should be prosecuted in federal or military courts
2. About 110 should be released
3. About 50 must be detained without trial.

On 31 March 2010, the Guantánamo detention facilities were still operative.]

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