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The always elusive end of Guantánamo Will we get to "celebrate" its XXX anniversary?

As Carol Rosenberg reports, it will be shrouded in more secrecy, as the "current war tribunal room" allowed at least spectators. The new one won't.



Julia Tedesco has collaborated in the necessary research for this article.



Sculpture by José Antonio Elvira, Guantánamo, Cuba

More than 20 years have passed and that American symbol of mistreatment and injustice, the Guantánamo prison in Cuba, is still open. In fact, in late 2021, *New York Times* reporter Carol Rosenberg, who has covered that notorious prison complex since its first day, was reporting on the Pentagon's plans to build a brand-new prefabricated courthouse on that naval base. It is intended to serve as a second, even more secretive facility to house the remaining four trials of war on terror detainees, and is scheduled to be ready "sometime in 2023."

¿Cerrar Guantánamo? Parece que no va a ser pronto. El coste de esa nueva construcción es de apenas 4 millones de dólares, una suma relativamente menor comparada con los 6.000 millones de dólares y pico que se han cobrado las operaciones de detención y juicios en 2019, según la estimación de un [denunciante](#).

It should be noted that the news about the construction of that secret court coincided with the twentieth anniversary of the detention center and the administration of the second president who intends to close the place. Their plans attempt to suggest that the proposed structure will actually contribute to that endless process of closing the world's most

infamous prison camp. Guantánamo is currently holding 39 detainees, 12 of whom are under the military commission system; 18 of them, which have been kept for a long time without charge of any kind, have been [officially authorized](#) to proceed with their release to the chosen countries that agree to host them (which does not mean that they will actually be released); and nine of them, who have also not been charged, are simply awaiting such authorization.

With two chambers instead of one, the trials, more than a year away, could theoretically be held at the same time rather than sequentially. Unfortunately, it's hard to imagine that the number of rooms will have any effect on a faster outcome. As Scott Roehm, Washington director of the Center for Victims of Torture, recently told the *Daily Beast*, "There is consensus that commissions have failed, but that failure has not been for lack of rooms."



Paintings of "Mister X;", a former Guantanamo jailer, who interrogated and tortured The Mauretano detainee Mohamedou Slahi and then repented and became a friend of his former victim.

Consider it a kind of record that, in twenty years, only two trials have been held there, both in 2008. The two led to convictions, one of which was later [overturned](#) and another is still [on appeal](#). This miserable record is another sign of the eternal reality of Guantánamo, where neither the small tweaks nor the big modifications have turned out to be more than a cosmetic ornament for a situation that has proved unsolvable during three presidencies and the beginning of a fourth.

Lately there is a growing consensus on the need to close the prison, especially considering the final debacle of the US exit from Afghanistan. As [Sen.](#) Dianne Feinstein (D-Carolina) wrote in *Lawfare* on the twentieth anniversary of that symbol of American injustice outside the country: "Ending the failed experiment of detention at Guantanamo will not be

easy. But now that the U.S. war in Afghanistan is over, it's time to close the gates of Guantanamo once and for all." That same day, on the Senate floor, Senator Dick Durbin (D-Ill.) also [called for](#) the closure, ridiculing the prison camp as "a symbol of our failure to hold terrorists accountable and our failure to honor the sacrifices of our military personnel. These failures should not be passed on to another generation: they should end the Biden Administration."

But asking for closure is one thing, and closing that prison is quite another.

The challenges of closure

Normally, the closure of Guantánamo is considered to involve a series of [practical steps](#) that I, like so many others, have been suggesting for years. The most recent proposal comes from the Center for Ethics and the Rule of Law at the University of Pennsylvania, which has outlined a [thirteen-step process](#) aimed at permanently closing that facility. This involves resolving the remaining cases in the military commissions (ten still facing trial, two already convicted), while emptying the prison of its remaining 27 prisoners held indefinitely without charge.

Let's start with the military commissions. The new courtroom — which will be completed sometime in 2023, which could take nearly two years — is designed to "speed up" the trial process. However, in the past twenty years, there have only been eight convictions, most due to plea deals. Three of them have been [annulled](#) and three others are still on appeal. In other words, we are talking about a staggering picture of widespread failure.

It is true that there have been dozens of preliminary hearings for the four trials that are pending. But previews are one thing and trials are another. The most incredible thing is that the trials of the alleged co-conspirators of September 11 have not yet begun.

And there is little hope that it will be resolved. For starters, the individuals who are to be tried were first tortured in black CIA locations before being brought to Cuba, and much of the evidence and testimony relevant to their cases stems largely from those torture practices. Even with the resolution, it is almost impossible to imagine how these proceedings could lead to justice.

How (not) to get out of Guantanamo

There are at least two suggested ways to finally resolve military commissions in the relatively near future. Human rights lawyer and military commission advocate Michel

Paradis recently [laid them out](#) in a *Lawfare* podcast. One would be for the government to remove the death penalty from the table and open the door to plea deals. Numerous experts have supported this route. Colleen Kelly, director of September 11th Families for Peaceful Tomorrows, an organization of relatives of September 11 victims, has also [expressed support](#) for this option, as she recently testified before the Senate Judiciary Committee. Another option, Paradis said, would be to move the trials to U.S. federal courts. Unfortunately, it's an unlikely possibility, given [Congress' ban on bringing](#) Guantanamo detainees into this country, in place for more than a decade.

In 2010, one of these detainees was tried in federal court. That was then-Attorney General Eric Holder's idea — as a prelude, he hoped, to take the other trials to federal courts — and it was a correct idea. The case in question was that of [Ahmed Ghailani](#), accused of participating in the 1998 bombings of embassies in Kenya and Tanzania that killed 224 people. Like other detainees at Guantanamo, he had been tortured in a black CIA location, evidence that was excluded from trial. He was eventually acquitted of 284 of the 285 charges. However, the case has been settled and, based on that last charge, he is [serving a life sentence](#) in a federal penitentiary in Kentucky.

On the other side of the Guantanamo quagmire are the detainees who will never be charged, those who Carol Rosenberg originally called the "prisoners forever." The prison's Periodic Review Board has already authorized the release of eighteen of them. However, the release of these prisoners forever depends on diplomatic agreements with other countries.

To date, these detainees have been sent to [60 countries in](#) Europe, Central Asia, the Middle East and Africa. [At least 150 of them](#) were sent to nations other than those of which they were citizens. Those transfers were organized by the special envoy of the State Department's Guantanamo closure office, which in turn was shut down during Donald Trump's presidency and remains so today. Reopening it is a necessary step to empty Guantánamo of its detainees forever.

Sadly, it is most likely that, over time, new ways to kick the closing ball endlessly will be discovered. As lawyer Tom Wilner, who has worked as a human rights lawyer on behalf of several of the detainees, said at a panel held to mark the prison's twentieth anniversary: "Military commissions are never going to work."

In the meantime, with regard to those who have not yet been charged with any charges, but who have been authorized to be transferred, there is no guarantee that such releases will occur shortly.

The longest legacy

In the legal quagmire that the United States has created, there is, in fact, no easy solution to closing Guantanamo.

It should also be noted that even if the Biden administration were able to implement an immediate and aggressive strategy to close the prison, the horrors it unleashed are guaranteed to endure into the future. "There are some problems at Guantanamo that will never go away," Daniel Fried, President Barack Obama's first special envoy for the shutdown, recently [admitted](#) to the *Guardian*.

On the one hand, the decades-long inability of the U.S. legal system to try those prisoners, whether at home or abroad, has left a stain on the competence of the country's judicial system, civilian and military, as well as on Congress' ability to create legitimate and viable alternatives to that same system. The fact that it cannot, among other things, even take the alleged co-conspirators of the September 11 attacks, already detained at Guantanamo Bay, to any court, sends the message that the American justice system of the twenty-first century is incapable of handling such incredibly important cases.

And when it comes to detainees who have been transferred to other parts of the world, the story is no less grim. As *The Guardian* has reported, envoys to third countries regularly face new forms of deprivation, cruelty, imprisonment or torture. "Released" detainees, who are often unfamiliar with the language of their host countries, denied travel documentation and stigmatized for their past at Guantanamo, discovered, as a *Washington Post* report summarized, that "life after Guantanamo is its own kind of prison."

Mansur Adayfi, a detainee transferred to Serbia rather than his home country of Yemen, has described the appalling conditions of life after prison in his book *Don't Forget Us Here*, referring to it as "Guantanamo 2.0." As he recently told Cora Currier of *The Intercept*: "Being released, I have been detained, beaten, arrested; they have also harassed and interrogated my friends." And that, of course, after he, like so many other prisoners on that island-jail, has been regularly beaten, force-fed and kept in solitary confinement while there.

In such a context, the project of a new courtroom takes on a new meaning.

The courtroom, then and now

Since the beginning of Guantanamo, the tribunal at that U.S. base on the island of Cuba has served as a revealing symbol of the prison's venality.

In the early days of that war on terror detention camp, as I described in my book *The Least Worst Place: Guantanamo's First 100 Days*, Captain Bob Buehn, then commander of the naval base, tasked himself with finding suitable ground on which to build a court to try detainees arriving by plane. He considered it his duty to do so, only to quickly realize that no one in power considered that to be the goal of the prison and that there would be no such plans anytime soon.

As Major General Michael Lehnert, commander of that detention centre at the time of its opening, reminded me recently, the initial mission was to "gather information", not to hold trials. Consequently, it was not until two years later that hearings began for the detainees, and then only for some of them.

Initially, those proceedings took place in a windowless room built to ensure security and secrecy, a room too small for its purpose. Once Congress authorized a formal version of military commissions in the [Military Commissions Act of 2006](#), new facilities were built that included a state-of-the-art compartmentalized sensitive information (SCIF) enclosure, a carefully "secured" room intended to be a classified framework. However, it was an ugly irony that under that room was a toxic waste dump, with every danger imaginable to lawyers and others. At times, reeking too literally of the environmental misdeeds of the past, the new room has gone its own poisoned path, trying to somehow avoid the information extracted through torture that lies at the heart of cases awaiting trial.

Now a new building is being built, even more linked with secrecy, as well as with the suppression of the torture that the defendants suffered at the hands of the United States. As Carol Rosenberg reports, it will be shrouded in more secrecy, as the "current war tribunal room" allowed at least spectators. The new one won't. "Only people with secret authorization," Rosenberg reports, "such as members of the intelligence community and guards and lawyers with special authorization, will be able to enter the new chamber." Observers, including relatives of the victims, will have to watch it by video.

Fifteen years ago, when plans for the current chamber were presented, the [ACLU](#) asked senators to block funding for the court's construction, arguing that "there is no need for an elaborate and permanent judicial complex at Guantanamo ... Even President Bush has expressed interest in substantially reducing the number of detainees at Guantanamo and eventually closing it." It is remarkable how little progress has been made since then.

What former commander Bob Buehn discovered so long ago as an absence of desire for trials of any kind has evolved over time into a system of "trials" of endless delays that only contribute to perpetuating the worst of Guantanamo, while eternally prolonging the life of that prison camp. now known worldwide.

As Lee Wolosky, who was President Obama's special envoy for the closure of Guantánamo, [wrote](#) on the occasion of the twentieth anniversary of that prison, "The Guantanamo disaster is, in large part, self-inflicted, the result of our own decisions to practice torture, keep detainees indefinitely without charge, establish dysfunctional military commissions, and attempt to avoid oversight by federal courts... It is time," he concluded, "to liquidate this relic of eternal wars."

The country would do well to heed his words once and for all and thus avoid a XXX anniversary of an American institution that has violated both the norms of justice, decency and the rule of law.

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