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## **Determination of Guantanamo Cases Referred for Prosecution**

This protocol governs disposition of cases referred for possible prosecution pursuant to Section 4(c)(3) of Executive Order 13492, which applies to detainees held at Guantanamo Bay, Cuba.

1. **Process for Determination of Prosecution.** When a case is referred, it will be assigned to a team composed of Assistant United States Attorneys, attorneys from the National Security Division (NSD) of the Department of Justice (DOJ), and personnel from the Department of Defense (DOD), including prosecutors from the Office of Military Commissions, which will further investigate and develop the case for prosecution.

Thereafter, the prosecution team will recommend, based on the factors set forth below, whether the case should be prosecuted in an Article III court (including venue) or a reformed military commission. If the prosecution team concludes that prosecution is not feasible in any forum, it may recommend that the case be returned to the Executive Order 13492 Review for other appropriate disposition.

NSD and the participating DOD entities will then jointly determine whether the case is feasible for prosecution, and the appropriate forum (and if necessary, venue) for that prosecution. They will transmit that determination to the Attorney General through the Deputy Attorney General, along with materials from any DOJ or DOD entity that disagrees with the determination. The Attorney General, in consultation with the Secretary of Defense, will make the final decision as to the appropriate forum and (if necessary) venue for any prosecution. Where a case is to be prosecuted, both DOJ and DOD will be expected to support the prosecution regardless of forum and venue.

2. **Factors for Determination of Prosecution.** There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there. That inquiry turns on the following three broad sets of factors, which are based on forum-selection factors traditionally used by federal prosecutors:

A. **Strength of Interest.** The factors to be considered here are the nature of the offenses to be charged or any pending charges; the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities.

B. Efficiency. The factors to be considered here are protection of intelligence sources and methods; the venue in which the case would be tried; issues related to multiple-defendant trials; foreign policy concerns; legal or evidentiary problems that might attend prosecution in the other jurisdiction; and efficiency and resource concerns.

C. Other Prosecution Considerations. The factors to be considered here are the extent to which the forum, and the offenses that could be charged in that forum, permit a full presentation of the wrongful conduct allegedly committed by the accused, and the available sentence upon conviction of those offenses.

3. Independence of Authorities. Nothing in this protocol is intended to restrict, and will not restrict, the appropriate exercise of independent discretion within the respective justice systems, including disposition of cases not referred to trial. Federal prosecutors will evaluate their cases under traditional principles of federal prosecution, including the standards set forth in Sections 9-27.220 and 9-27.240 of the United States Attorneys' Manual.

4. Disclaimer of Rights. This document is not intended to create any rights, privileges, or benefits to prospective or actual defendants in any forum. See *United States v. Caceres*, 440 U.S. 741 (1979).