



A Roadmap for Closing Guantánamo Bay in 2013

I. Introduction

The Center for Constitutional Rights welcomes President Obama's renewed commitment to closing the prison at Guantánamo Bay, Cuba. But the time for high-minded statements about the need to close Guantánamo, and the mutual finger-pointing by the Executive and Congress over who is to blame for the failure to achieve that goal is long past. As most of the 166 men at Guantánamo, including our clients, continue into the fourth month of a hunger strike, with at least 30 men now being forcibly fed with tubes and restraints, President Obama must use the power that he currently has to transfer men from the prison. He must demonstrate immediate, tangible progress toward closure of the prison. The lives of men detained there depend on it.

We urge the President to take several concrete steps without delay to close Guantánamo in 2013. These steps include phased repatriations, resettlements and fair criminal prosecutions.

II. Current State of Affairs

As President Obama stated during his April 30, 2013 press conference from the White House, closing Guantánamo Bay is imperative:

I continue to believe that we've got to close Guantánamo... I think it is critical for us to understand that Guantánamo is not necessary to keep America safe. It is expensive. It is inefficient. It hurts us in terms of our international standing. It lessens cooperation with our allies on counterterrorism efforts. It is a recruitment tool for extremists. It needs to be closed.

President Obama began his presidency by issuing an executive order on his second day in office that mandated closure of the prison within one year. He also established the Guantánamo Review Task Force to review and determine the status of each detainee, clearing most of them for transfer, and appointed Ambassador Daniel Fried as special envoy to negotiate those transfers. During his first two years in office, about 75 detainees were successfully transferred from Guantánamo, including about 40 repatriations and 35 third-country resettlements.

Regrettably, President Obama then surrendered the initiative on closure efforts to his political opponents who have made it difficult – but not impossible – for him to transfer additional men and close the prison. In January 2010, the President acceded to political pressure and imposed a blanket ban on transfers to Yemen. In January 2011, Congress enacted the National Defense Authorization Act (NDAA) of 2011, which included onerous certification requirements restricting the ability to transfer men from Guantánamo. The provisions were extended in the 2012 NDAA, and again in the 2013 NDAA, although those bills added a waiver provision to prevent the certification provisions from serving as an effective barrier to transfers. But neither the certification nor the waiver provisions have been invoked to transfer any detainees from Guantánamo regardless of their status. The ban on transfers to Yemen also remains in force.

Since the NDAA restrictions went into effect in January 2011, only four men have been transferred out of Guantánamo, and none were sent to Yemen. This is the fewest number of transfers in any comparable period of time since the prison opened in 2002. In the same period of time, three detainees died, including Adnan Latif, a Yemeni man who had been approved for transfer four times. Nine men have died in total since 2002, including four since President Obama took office. No one has been convicted at trial before a military commission except by guilty plea since November 2008; and the two detainees who were previously convicted in contested trials have had their convictions vacated by the federal appeals court.

Currently, 166 detainees remain at Guantánamo. Those men are grouped into three categories:

- 86 have been cleared for transfer unanimously by all relevant military, law enforcement and intelligence agencies comprising the Guantánamo Review Task Force, which determined they pose no threat to the United States or its allies. 56 of those men are from Yemen.
- 46 men are purportedly held under “law of war detention,” indefinitely and without charge, based on a determination that they pose a continuing threat but that prosecution is not feasible.
- 34 have been charged by military commission or are designated for prosecution.

The countries with the most citizens still detained are Yemen (89), Afghanistan (17), Saudi Arabia (11), Algeria (7), Pakistan (6), Tunisia (5), Libya (4) and Syria (4).

About a dozen men require safe resettlement based on past persecution and/or credible threats of future persecution in their home countries, notably including the three remaining Uighurs from China and certain detainees from Algeria. But most men simply want to go home.

Many countries have demanded the return of their citizens, and have established programs to facilitate their reintegration into society, including for instance Tunisia and Kuwait. Since the hunger strike that began in early February 2013, and since President Obama’s recent, renewed commitment to closing the prison, other countries have expressed new or renewed interest in helping the Obama Administration close the prison, including countries in the Middle East, Europe and Latin America. Finding somewhere to send the men is not a significant obstacle to closing Guantánamo.

Lastly, several members of Congress have indicated their support for efforts to close Guantánamo Bay, including Senators Dianne Feinstein and Carl Levin, and Representatives Adam Smith, Jim McGovern, and Jim Moran.

It is therefore essential that President Obama capitalize on momentum toward closing the prison, and follow through on his commitment to do so. It also bears emphasis that he needs no new legislative authority or additional administrative process to close the prison. There are a

series of actions that he can – and must – undertake immediately in order to transfer men from Guantánamo. And in doing so, he must also order the military to improve conditions of confinement at the prison so that they are consistent with Common Article 3 of the Geneva Conventions and international human rights law. These actions are the only way that the government can end the ongoing hunger strike and staunch the frustration and hopelessness that has driven the detainees to starve themselves as a last resort for their freedom.

III. Specific Steps to Close the Prison

First, President Obama must immediately instruct the Secretary of Defense to consider a slate of detainees for transfer pursuant to the certification and waiver process created by Congress under the NDAA. Transfers can occur pursuant to agreements with home countries or third countries, like those successfully negotiated in 2009 and 2010 which resulted in the repatriation and resettlement of more than 70 men. As Senator Carl Levin recently pointed out in a letter to President Obama, the national security waiver provides a “clear route” for transfers to occur.

Second, in conjunction with the resumption of transfers of cleared men, the President must lift his self-imposed ban on repatriations to Yemen. As 89 of the remaining 166 detainees are from Yemen, including 56 who are approved for transfer, Guantánamo is devolving into a prison for Yemenis. Many of these men want to go home, but languish at Guantánamo because of a moratorium on repatriations to Yemen imposed by President Obama himself. The UN’s top human rights experts recently condemned the moratorium as a “clear violation” of the fundamental principle of non-discrimination based national origin. President Obama can unilaterally lift his self-imposed ban. He should do so immediately and ensure that case-by-case determinations about the transfers of individual Yemenis proceed swiftly. These men should not continue to be punished collectively on the basis of their national origin.

There are several obvious candidates for immediate certification or waiver consideration, including cleared detainees like Algerian Djamel Ameziane, who has viable resettlement opportunities, and Yemeni Mohammed Al Hamiri, whose family lives in Saudi Arabia. Blocks of cleared detainees might also be repatriated to countries like Tunisia, which have developed reintegration programs.

Third, in cases where NDAA certifications or waivers are not possible, as in the case of transfers to Sudan, or where they may not be feasible for other reasons, the President should direct the Department of Justice to negotiate the settlement of detainee habeas cases. These settlements may include court-approved stipulations that particular detainees should be transferred to particular countries, or uncontested court orders of release, which would be exempt from the NDAA transfer restrictions.

Fourth, while the President alone bears ultimate responsibility for ensuring he does not fail a second time to meet his promise to shutter Guantánamo, he must appoint a senior government official to spearhead that effort. That official must have stature and be vested with authority directly from the White House to carry out the President’s mandate to close the prison, including by resolving interagency disputes regarding the transfer of detainees. There has been



no such individual in the White House for years. Moreover, the State Department office tasked with negotiating with other countries for resettlement and repatriation of detainees, which closed in 2012 despite successfully transferring dozens of men, must be reopened to facilitate the White House official's efforts to shutter the prison.

Fifth, the President should transfer the detainees currently designated for indefinite detention if he does not intend to prosecute them for criminal offenses. There are currently 46 individuals whom the Administration has stated it does not intend to charge, but are considered "too dangerous to release," and consequently are languishing in Guantánamo. But under the laws of war, civilians captured during the course of an armed conflict can only be interned for so long as they pose an imperative security threat, and they must be afforded fair and meaningful periodic reviews to determine whether they remain a threat. Otherwise, they must be charged or released. The Administration's middle ground – which since 2009 has been to do nothing while holding these men indefinitely – has no support in international law. The Administration must fairly try or release the individuals it does not plan to charge. As President Obama himself stated on April 30, it is unsustainable to continue holding people "in perpetuity" who have already been detained without charge for over eleven years, particularly as the United States begins winding down in Afghanistan and talks of defeating Al Qaeda.

Short of rapidly processing their transfers, these men must be afforded – at a minimum – fair and meaningful hearings before Periodic Review Boards, which the President ordered to be conducted more than a year ago but have not even begun. In 2011, the President issued an Executive Order providing for the administrative review within one year of men whom the Administration has deemed "too dangerous for release" or slated for prosecution. Two years later, such reviews have yet to begin. If the President does intend to convene review boards, they should begin immediately. And if they are to have any semblance of credibility, counsel for the detainees and the detainees themselves must be afforded reasonable notice and opportunity to participate in the review boards, must be allowed to appear before the review boards in person, and must have access to all the government information being used to assess the individual's detention status. Moreover, information obtained through torture must be excluded; and the boards must have the power to effect immediate release from Guantánamo.

Sixth, the President should abandon all military commission prosecution. He should transfer to the United States any detainee who has committed a crime, and should afford those individuals fair trials in federal court. In order to achieve this, he must veto any legislation that attempts to renew the ban on transfers to the United States contained in the NDAA.