

October 7, 2013

President Barack Obama
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

RE: More than Four-Month Delay in Meeting Two of Your Key Commitments on Closing Guantanamo and Ending Indefinite Detention

Dear President Obama:

The undersigned human rights, religious, and civil liberties organizations strongly urge your administration to promptly and fully carry out two key commitments you made as steps toward closing the Guantanamo Bay prison and ending indefinite detention. Specifically, we urge you to 1) appoint an envoy in the Defense Department to lead the effort to close Guantanamo, and 2) direct Secretary of Defense Chuck Hagel to use his existing statutory authority, including any applicable certifications or national security waivers specified by the National Defense Authorization Act for Fiscal Year 2013 (“NDAA-FY13”), to transfer cleared detainees from Guantanamo to foreign countries that will respect their human rights.¹ These actions would help to fulfill your renewed promise to end indefinite detention and close the Guantanamo prison.

More than four months have passed since you delivered your May 23, 2013 speech at the National Defense University, in which you recommitted the United States to the goal of closing the Guantanamo prison. Shortly before that speech, at your April 30, 2013 White House press conference, you committed the United States to ending indefinite detention at Guantanamo, stating: “the idea that we would still maintain forever a group of individuals who have not been tried, that is contrary to who we are, it is contrary to our interests, and it needs to stop.” You reiterated your commitment to closing the Guantanamo prison last month, in your speech at the United Nations. We greatly appreciate these important statements of a renewed commitment.

However, despite your personal commitment and engagement, the population at Guantanamo over the past four months has been reduced by only two detainees, moving only from 166 to 164. Of the detainees who remain, 84 were cleared for transfer by national security officials more than four years ago.

¹ Although the Guantanamo transfer provisions of the NDAA-FY13 expired last week, at the end of the fiscal year, this letter assumes that Congress could follow past practice and use the next continuing resolution to apply all policy provisions to federal funds spent during the next funding period, or at least until the next NDAA is enacted. As of the date of this writing, the only Guantanamo transfer statute that binds the Executive Branch is a 30-day advance notice provision from the Intelligence Authorization Act for Fiscal Year 2012.

We are particularly concerned that two of your specific commitments have not yet been met:

Lengthy Delay in Appointment of a Senior Envoy at the Department of Defense: In your National Defense University speech, you stated, “I’m appointing a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries.” The White House clarified later that same day that there would be separate envoys for State and Defense. While Secretary of State John Kerry appointed Clifford Sloan as the envoy for State in June, Secretary Hagel has yet to appoint an envoy at the Defense Department. The problems caused by the lack of an envoy at the Defense Department have been compounded by the recent departure of the Pentagon head of Detainee Affairs and the absence of a permanent General Counsel. Vacancies in these critical positions have resulted in a leadership void within the Defense Department, which has delayed decisions and actions needed to reduce the population at Guantanamo by transferring cleared detainees to foreign countries that will respect their human rights.

Delays in Transferring Detainees out of Guantanamo Due to Internal Administration Disagreements on Scope of Existing Statutory Authority: In the National Defense University speech, you also stated, “To the greatest extent possible, we will transfer detainees who have been cleared to go to other countries.” Many of our groups wrote to you on April 11, 2013 to urge you to use your existing statutory authority to “transfer the remaining detained men to their home countries or other countries for resettlement, or to charge them in a court that comports with fair trial standards.” Your press conference and speech more than four months ago expressed your determination to do so.

Despite your order to fully use existing authority to transfer cleared detainees, some administration officials have an exceedingly cramped view of that authority. As a result, after more than four months only two detainees have been transferred out of the 166 men who were held at Guantanamo on the day of your speech.

While we recognize that transfer restrictions in the NDAA-FY13 had needlessly complicated some transfers, the NDAA-FY13, if it again becomes applicable, includes a waiver that provides that the Secretary of Defense can waive the most onerous certification requirements if the government has taken steps to substantially mitigate risk. Particularly for the 84 men who have long been cleared for transfer, there is no reason why the Departments of Defense and State cannot work swiftly towards transferring all of them to foreign countries that will respect their human rights.

The Chairmen of the Senate and House Armed Services Committees have expressed their frustration with the overly narrow view of the NDAA-FY13 transfer provisions taken by some administration officials. Senate Armed Services Committee Chairman Carl Levin wrote to the White House Counsel, on May 6, 2013, explaining that “more than a year ago, I successfully fought for a national security waiver that provides a clear route for the transfer of detainees to third countries in appropriate cases, i.e., to make sure the certification requirements do not constitute an effective prohibition.” Similarly, House Armed Services Committee Chairman Buck McKeon wrote in the Washington Post on May 2, 2013 that

the certification requirements were not a prohibition. The Senate Armed Services Committee itself, in its committee report for the NDAA for Fiscal Year 2014, wrote, “the committee emphasizes that the certification requirements [in the NDAA-FY13] were never intended to constitute an absolute prohibition on the transfer of Guantanamo detainees to countries other than the United States.” Other senior members of the Senate and House Armed Services Committees have made similar comments.

The statutory waiver authority created enough flexibility in the certification requirements that there should have been far more than two detainees transferred during the more than four months since your speech. Your order to fully use your existing authority to transfer cleared detainees “to the greatest extent possible” appears to have been largely thwarted by some administration officials applying exceedingly narrow interpretations of that authority, and of the certification requirements. Their interpretations defy a plain reading of the statute and cut against the stated intent of both its authors and the Senate committee of jurisdiction.

While we join your administration in strongly supporting statutory changes to the transfer provisions, which are included in the National Defense Authorization Act for Fiscal Year 2014, as reported by the Senate Armed Services Committee, there is no reason to wait for a change in the law. Enactment of the transfer provisions in the Senate bill is important because it will restore much more of your authority to transfer detainees out of Guantanamo, but you already have significant transfer authority under the NDAA-FY13, if the provision again becomes applicable.

A number of countries are clearly interested in receiving transferred detainees, and have the ability to reintegrate detainees back into society. Unless a detainee objects to a transfer based on a fear of denial of human rights, including a fear of treatment that would violate the Convention Against Torture, the United States should transfer detainees to these countries. In fact, the list of governments seeking the return of their citizens is long, and includes important allies of the United States. Leaders of these countries - including British Prime Minister David Cameron - have made public statements to that effect. In addition to these calls, your lifting of the moratorium on transfers of Yemeni detainees should allow for transfer of the majority of already cleared detainees. There is no reason for further delay in the transfer overseas of many of the detainees.

In both your press conference and speech more than four months ago, you eloquently and forcefully argued why the United States must prioritize the work to close the Guantanamo prison and end indefinite detention, and you set out some concrete steps toward that end, including the two steps discussed in this letter. We strongly support you in your commitment to close the Guantanamo prison and end indefinite detention. It is in this effort to support you that we want to make clear our concern that the more than four-month delay in your administration carrying out two key steps could jeopardize your ability to close the Guantanamo prison and end indefinite detention during your presidency.

Thank you for attention to these concerns.

Sincerely,

American Civil Liberties Union
Amnesty International USA
Appeal for Justice
Bill of Rights Defense Committee
Center for Constitutional Rights
Center for the Victims of Torture
Constitution Project
Council on American-Islamic Relations
Defending Dissent Foundation
Friends Committee on National Legislation
Human Rights Watch
International Justice Network
Japanese American Citizens League
National Association of Criminal Defense Lawyers
National Religious Campaign Against Torture
Presbyterian Church (USA)
Physicians for Human Rights
Win Without War