

Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

<https://www.hrw.org/news/2010/12/22/us-detainee-transfer-ban-will-hinder-terror-fight>

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Action Delays Trial of 9/11 Suspects and Guantanamo Closing

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(Washington, DC) - The US Senate's passage on December 22, 2010, of a ban on the use of government funds for the transfer of [Guantanamo](#) detainees to the US, even for prosecution, will severely undermine US efforts to fight terrorism, Human Rights Watch said today.

"The Senate vote banning the transfer of Guantanamo detainees is a reckless and irresponsible affront to the rule of law and efforts to protect the US from terrorism," said Tom Malinowski, Washington director at Human Rights Watch. "By hindering the prosecution of Guantanamo detainees in federal court, Congress has denied the president the only legally sustainable and globally legitimate means to incarcerate terrorists."

The provision in the National Defense Authorization Act changes a prior funding ban that blocked the transfer of Guantanamo detainees to the US except for prosecution, thereby preserving the Obama administration's option of trying Guantanamo detainees in US federal courts. The new provision completely strips the government of the federal court option until September 2011 or until a new authorization bill is passed, effectively blocking closure of the Guantanamo detention facilities in the near future. The House of Representatives passed a similar provision on December 17, 2010. The Senate made unrelated changes to the bill, requiring it to be sent back to the House where it is expected to be passed immediately.

Should [military commissions](#) be the only avenue for prosecution of the 9/11 suspects, it is very likely the trials will be even further delayed, Human Rights Watch said. Military commissions have prosecuted only five cases in the last eight years, three of them by plea bargain. Federal courts during the same period have prosecuted hundreds of terrorism cases, many of high-level terrorism suspects such as 9/11 co-conspirator Zacarias Moussaoui and convicted "shoe bomber" Richard Reid.

Attorney General Eric Holder strongly opposed the proposed funding ban, issuing a statement on December 9, 2010, that it would undermine his ability to prosecute cases in federal court and "tak[e] away one of our most potent weapons in the fight against terrorism." Holder announced in November last year that the appropriate place to prosecute the 9/11 suspects was federal court, not military commissions.

"The congressional ban effectively prevents the president from bringing to trial those charged with the murder of thousands of Americans nearly 10 years ago," Malinowski said. "If the Congress has its way, detainees are now just going to sit in Guantanamo indefinitely, and as evidence grows stale, prosecution down the road is only going to become more difficult."

Human Rights Watch said that the bill also contains new rules requiring that, prior to transferring a detainee even to his home country, the US must certify certain factors exist related to that country's ability to monitor and control the detainee and its past experience with terrorism. With more than half of the remaining Guantanamo detainees from Yemen and others from places like Saudi Arabia and Pakistan, it may be extremely difficult for the administration to certify these factors exist. As a result, detainees who have already been cleared for release, some of whom have been held for more than eight years, may continue to be held indefinitely in violation of US obligations under international law.

The new rules also prevent the transfer of a detainee to a country if there are any recorded cases of "confirmed recidivism," which is not defined. While US government reports claim rates of recidivism among released Guantanamo detainees as high as 25 percent, these reports have been soundly discredited by academics and experts who have closely analyzed the figures and cross-referenced them with publicly available information. The US government has never released a list of names of alleged recidivists or details of their alleged conduct.

Currently, 174 detainees are imprisoned at Guantanamo. The Obama administration has indicated that it intends to hold 48 of those

detainees without trial under purported laws-of-war-detention and prosecute another 36. It has cleared for transfer the remaining 90 detainees.

"There is simply no justification for continuing to hold detainees already slated for release," Malinowski said. "As long as Guantanamo remains open, terrorists will continue to use it as a recruiting tool. Congress should be helping President Obama close Guantanamo, not making that task more difficult."

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