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<https://www.hrw.org/news/2012/04/09/letter-secretary-defense-leon-panetta-repatriate-or-resettle-detainees-cleared>

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Re: Periodic Review of Individuals Detained at Guantanamo Bay

Dear Secretary Panetta:

On March 7, 2011, President Obama issued an Executive Order for Periodic Review of Individuals Detained at [Guantanamo](#) Bay Naval Station Pursuant to the Authorization for the Use of Military Force (Executive Order). While we oppose the continued detention without trial that the order permits, we write to provide some recommendations for the implementation of the order in a manner that is as fair and transparent as possible.

Human Rights Watch has long opposed indefinite detention without trial. The Executive Order was a serious disappointment in that it affirmed the US governments intention to continue to detain people indefinitely without trial in violation of international law. The standard requirement that individuals deprived of their liberty should be tried or released is not satisfied by the periodic review process established by the order. A periodic review is not a trial. Nevertheless, we acknowledge that the administration has attempted to limit the damage by restricting the orders applicability to [detainees](#) already at Guantanamo who either have been identified for continued detention or have been identified for prosecution but not yet charged. We hope that this restricted scope signals that the administration remains committed to ultimately ceasing detention at Guantanamo altogether, thereby ending the system of indefinite detention and the disregard for the rule of law and due process protections that it represents.

Quite apart from the administrations decision to continue detention without trial in these limited cases, we are disappointed that the 89 detainees already cleared for repatriation or resettlement remain in confinement, and that the system established by the order for the periodic review of detainees has, over a year later, not been implemented.

The Executive Order required the initial review to commence not more than one year from the date of the order. That deadline has come and gone. Indeed, not only has no detainee been provided with an initial review, but to date there have been no procedural guidelines promulgated that would allow for such a review. Section 1023 of the National Defense Authorization Act for fiscal year 2012 (NDAA), which requires a report to Congress not later than June 28, 2012 regarding certain details of the periodic review under the Executive Order, does not justify any additional delay.

While we recognize that the creation of new guidelines and procedures can take time, given that the Guantanamo detainees have already been held for up to 10 years without charge, failure to implement the Executive Order within one year is difficult to understand. We urge you to redouble your efforts to facilitate the repatriation or appropriate resettlement of those detainees already cleared for transfer and to implement as soon as possible the Periodic Review Board (PRB) process to facilitate the identification of additional detainees for repatriation or resettlement.

We make the following recommendations regarding implementation of the Executive Order:

Transfer of detainees. The Executive Order requires an annual review of sufficiency and efficacy of transfer efforts for detainees currently held at Guantanamo. The 89 detainees already cleared for transfer represent the most pressing area of focus for such a review. The NDAA makes clear that Congress intended detainees to be released from Guantanamo using either a certification set forth in Section 1028 or a waiver also provided for in that section. Provisions should be made immediately for the repatriation of those detainees to their home countries or, for those who would face torture or other ill-treatment, resettlement to third countries.

In addition, once the PRBs are commenced, more detainees may be identified for trial or release from Guantanamo through repatriation or resettlement. The implementing guidelines should set forth a timeline for the release of those detainees and set forth details on how such releases will be effectuated.

Access to counsel/personal representative. Section 1024 of the NDAA requires that a military judge oversee status determination for persons who will be held in long-term detention under the law of war pursuant to the Authorization for the Use of Military Force. Section 1024(c) makes the provision of a military judge and military lawyer optional for detainees who have access to habeas review (i.e., those currently held at Guantanamo). Implementing guidelines for that section were due to Congress by March 30, 2012; if they have been submitted, they have not been made public. We urge you to implement procedures guaranteeing all persons held in US military detention access to a lawyer and a judge. Should you choose not to apply this standard universally such that some persons are assigned only a personal representative (a decision we would oppose), we urge you to make clear that communications between a detainee and the personal representative assigned to his case would be kept confidential in a manner similar to the rules governing attorney-client privilege. We further urge you to make clear that private counsel selected by the detainee in accordance with the Executive Order have access to all relevant inculpatory, exculpatory, and mitigating evidence, including classified evidence, provided they have the appropriate clearances.

Access to evidence. The Executive Order provides that a detainee will receive an unclassified summary of the evidence against him, but that his personal representative and private counsel may be provided with other evidence; while not explicit, it appears that classified information may not be available to the detainee. In addition, the representative and counsel may, at the discretion of the PRB, be provided with substitutes or summaries of certain information on national security grounds. The ability of the detainees representative and/or counsel (but not the detainee himself) to access classified information does not alleviate the inherent unfairness of a system in which a person may be detained on the basis of information to which he cannot meaningfully respond. Should protection of national security truly require the use of some classified information, the implementing guidelines should make clear that the detainee be provided with as much information as possible and that the information be sufficient to allow him to contest the factual allegations against him.

Moreover, the Executive Order does not provide for a mechanism by which the detainee or his representative can challenge the adequacy of the production of the evidence. We urge you to include in the implementing guidelines a mechanism by which such challenges may be raised to an independent, preferably judicial, authority.

Access to witnesses. The Executive Order provides that a detainee may call witnesses who are reasonably available and willing to provide information that is relevant and material to the PRBs review of continued detention. During the Combatant Status Review Tribunals held at Guantanamo, many detainees sought to call witnesses under a similar standard but were denied that right. The implementing guidelines for the PRBs should make clear that reasonably available means an individual witness can be identified and located and is willing to provide testimony, and sufficient resources should be provided for PRB personnel to locate and facilitate the testimony of such witnesses (either in-person or otherwise, where appropriate). They should also make clear that relevant and material information is any information that may tend to suggest that a detainee does not meet the detention standard.

Public access. The PRB hearings should be made available for observation by both the press and the public. Detainee Review Boards conducted at the detention facility in Parwan are open to the press and to nongovernmental organizations; Human Rights Watch has observed them several times over the last two years. The individuals detained at Parwan are alleged or suspected to have engaged in conduct similar to that of individuals detained at Guantanamo. There is no reason not to follow similar practice in Guantanamo. Indeed, as many detainees have been held for 10 years and the PRBs contemplate hearings well into the future, there will likely be great public interest in the process and the outcome, as well as a heightened need for openness and transparency. Any claim of legitimacy for the PRBs or fairness of treatment of the detainees appearing before them will depend upon such public scrutiny.

Detention without trial at Guantanamo has been a stain on the US governments reputation for over a decade. As we have stated repeatedly, we oppose indefinite detention without trial by the US government or anyone else and will continue to do so until the practice is ended. PRBs, while insufficient, provide some additional measure of process beyond what detainees are currently afforded. It is essential that this additional process be implemented as fairly and transparently as possible.

Sincerely,

Kenneth Roth
Executive Director
Human Rights Watch

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