

# Center for Constitutional Rights

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

<https://ccrjustice.org/ccr-position-obama-s-new-plan-close-guant-namo>

### Campaign and Advocacy

President Obamas proposed plan is too little, too late. First, the presidents plan cannot achieve the fundamental goal of ending indefinite detention without trial because central to its design is the continuation of that infamous feature of [Guantanamo](#): by choosing to warehouse indefinitely detained prisoners inside the United States, he is only changing Guantnamos ZIP Code. As a practical matter, the plan is also unlikely to achieve the presidents stated goal of closing Guantanamo because inexplicably, and over the course of many years, the administration has failed to carry out the obvious measures identified in this plan that would have already substantially reduced the detainee population. Too much time has passed. Absent sweeping changes, the president will not accomplish what he has said is a signature policy objective.

For too long the president has not used his ample, existing legal authority to transfer cleared detainees or to prosecute detainees the government believes have committed crimes in federal court, rather than in unfair and hapless military commissions. The Periodic Review Board (PRB) process is moving too slowly to meaningfully reduce the number of men slated for indefinite detention purportedly under the laws of war. Transferring those men to the U.S. for continued detention simply relocates and thus preserves the core injustice of Guantanamo. The Center for Constitutional Rights strongly opposes importing the regime of indefinite detention into the U.S., except in the cases of certain detainees with particular circumstances.

The Plan consists of four parts: (1) repatriate or resettle the 30+ detainees currently approved for transfer; (2) increase the rate of PRB hearings by devoting more resources to them; (3) individual dispositions, including transfer to the U.S. for prosecution (military commissions and federal courts) and foreign prosecutions; and (4) transfer the rest to the U.S. for continuing indefinite detention.

#### 1. Cleared Detainees Should Be Repatriated or Resettled Immediately

After 14 years of indefinite detention, we agree that cleared detainees must be repatriated or resettled without further delay. But this has been true since President Obamas Guantanamo Interagency Task Force completed its work more than five years ago and yet over the course of his administration, transfers of detainees have occurred only at glacial pace. Although in the most recent months, more significant transfers have occurred, with less than a year left in Obamas presidency, the pace of transfers has to increase. Tangible action on this part of the plan is and has always been the most significant and clear path to closing Guantanamo.

Among those cleared men the president could and should transfer immediately include CCR clients [Ghaleb Al-Bihani](#), [Mohammed Al-Hamiri](#), [Mohammed Kamin](#), [Zahir Hamdoun](#), and [Muhammadi Davliatov](#). To act on his authority, the president should compel the Secretary of Defense to decide on potential transfers within 30 days of their arrival on his desk, and ensure that the DOD ceases to undermine proposed transfers through [bureaucratic inaction](#) or harmful leaks to the media. In addition, the president should request that the Department of Justice end its reflexive defense against every Guantanamo petition, particularly those brought by men the administration has already agreed to transfer through the clearance process. Conceding to court-ordered releases arising from habeas petitions brought by cleared men would exempt those detainees from the foreign transfer restrictions contained in the National Defense Authorization Act (NDAA) and do not require the Defense Secretarys certification under those legislative provisions. CCRs severely sick client, [Tariq Ba Odah](#), who has been cleared for release since 2009 and who has sought release on humanitarian law grounds over the Justice Departments opposition, is an obvious example of where the DOJ should stand down and expedite the release of a cleared detainee. None of these self-evident steps are being taken; instead the longstanding practice (which this plan does not significantly alter) has been to run out the clock, whereby the administration transfers a few men each year to give a superficial appearance of compliance with the presidents closure mandate while DOD continues to behave as if the prison will remain open long into the future.

Most of the cleared men have been waiting for transfer for more than five years. Unless the White House expedites the pace of transfers immediately, not even all of the cleared detainees will be released prior to the end of this administration.<sup>1</sup> As a result, under the Plan, some cleared prisoners might have to be transferred to the U.S. for further detention, possibly in harsher conditions, which will represent concrete failure of the Plan and a legacy of shame for President Obama.

#### 2. The PRB Process Should Be Strengthened and Expedited

The Center for Constitutional Rights does not believe there are any detainees who cannot either be released safely or prosecuted fairly. Nor does CCR believe that the law supports the continuing detention without charge of men already held for 14 years. Yet, at a minimum, the administration should adhere to its own administrative process for the periodic review of men slated for continuing detention in order to determine who among this group should be cleared for transfer. Four years after the president ordered the initial PRB reviews of men in this category, dozens are still waiting for their reviews to begin. There is no excuse for the slow pace of PRB hearings. At the current rate of proceedings, many men in this group will not have their cases considered before the end of the Obama

presidency. The administration needs to devote additional resources to the PRB process immediately to quicken the pace and strengthen the process. In addition, for this process to be meaningful, prisoners who are ultimately cleared by a PRB must be transferred without delay.

### **3. Military Commissions Should Be Abandoned, and Detainees Should Be Transferred to the U.S. or Foreign Jurisdictions for Fair Trials**

As a policy matter, the Center for Constitutional Rights does not oppose the transfer of men to the U.S. for prosecution in the federal courts. Some men may also be transferred to foreign jurisdictions for prosecution under the administrations plan. Regardless of the forum, the charges, proceedings, and conditions of confinement must be fair, transparent, and humane.

The military commissions have proven to be a failure substantively and procedurally and should be abandoned. The administration should rely on the federal courts to try detainees it believes have committed crimes rather than persist with a separate, second-class system of justice created to hide evidence of torture. Having a viable system for trials would enable those few detainees the administration decides to prosecute to negotiate plea bargains or cooperation agreements through which they would voluntarily provide information useful to law enforcement and the intelligence agencies. CCR understands that a handful of detainees would consider such plea agreements, rather than continue to endure the desperation that indefinite detention or the flawed military commission process produces.

It also bears emphasis that regardless of Congress transfer ban in the NDAA, the federal courts have authority to clarify that detainees who enter into agreements to plead guilty to federal crimes are not subject to that ban, or, if necessary, to strike down that ban as unconstitutional as applied to those prisoners.

### **4. Transferring Detainees to the U.S. for Indefinite Detention Is Unacceptable**

The Center for Constitutional Rights strongly opposes continuing Guantanos regime of indefinite detention, whether at Guantamo or at a prison on U.S. soil. While we speak only for our clients, we have several additional concerns with transferring detainees to the U.S. for detention.

Transferring detainees to the U.S. for continued detention without charge, after more than a decade of uncertainty, anguish, and despair in Guantamo, would psychologically break some men and invite predictable, disastrous consequences.

CCR is particularly concerned about conditions of confinement, which are being described in the news media as beyond supermax. Supermax prison conditions, including prolonged solitary confinement, constitute torture, as is increasingly being recognized in the United States, and would violate the Geneva Conventions.

We are also concerned that any deal that might be struck with Congress to allow transfers to the U.S. would come at a high cost, including establishment of a permanent facility to indefinitely detain not only detainees from Guantamo, but also future captives, which may also be accompanied by new detention authority and efforts to limit detainees legal rights.

The plan does not address these concerns, and the public should not accede to it without having these critical concerns addressed.

1 At the current rate of transfers (the average from August 2013 to the present), the men currently cleared will not be released until May 2017, several months into the next presidents term. (Of course, additional men will likely be cleared by the PRB process in the interim.)

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