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to

US Senate, Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights and Human Rights

**Hearing on “Closing Guantanamo: The National Security, Fiscal, and  
Human Rights Implications”**

July 24, 2013

Chairman Durbin, Ranking Member Cruz, and other members of the subcommittee, thank you for the opportunity to submit a statement for today's hearing on targeted killings. My name is Laura Pitter and I am the senior counterterrorism researcher at Human Rights Watch, an independent organization dedicated to promoting and protecting human rights around the globe.

On May 23, President Barack Obama gave an important speech at the National Defense University in which he decried the treatment of prisoners at Guantanamo, dozens of whom are on hunger-strike, asking rhetorically, "Is this who we are? Is that something our Founders foresaw? Is that the America we want to leave our children? Our sense of justice is stronger than that." In that speech, President Obama reaffirmed the commitment to closing Guantanamo that he made more than four years ago.

For Guantanamo's prisoners, the president's words seemed to have little effect. The hunger strike continued, swelling to 106 men at its peak, and diminishing at the start of Ramadan, perhaps reflecting a shift by the guard force to allow a return to some of the pre-hunger strike living conditions. As of July 24, 2013, the Defense Department assesses that 69 detainees are on hunger strike. Of those, 45 are being tube-fed twice a day – a procedure that entails being put in a restraint chair while a lubricated plastic tube is inserted down the detainee's nose and into his stomach. Detainees are then held in the chair for approximately two hours to make sure the liquid supplement fed into the tube is digested.

President Obama's words might have carried more resonance with those who have been advocating for the closure of the facility for the better part of a decade, though perhaps more so if he did not place all the blame elsewhere. He reminded the public that he had transferred 67 detainees to other countries before Congress imposed restrictions, and he called on Congress to lift those restrictions. But while it is true that Congress has placed significant obstacles in the way of closing the facility, such as restricting the use of funds to transfer detainees to the United States for trial, there are still a number of steps the Obama administration could have taken – and

can still take now – to begin closing the facility and end the practice of indefinite detention without trial in violation of international law.

The administration should begin by transferring the 86 of the 166 detainees at Guantanamo already slated for release to their home or third countries. In 2011 and again in 2012, Congress enacted some restrictions on the transfer of detainees from the facility, but those restrictions are not insurmountable. They require receiving countries to take certain steps to ensure that those being transferred do not engage in terrorist activity and that the Secretary of Defense certify such steps have taken place. If, however, the Secretary of Defense cannot certify those steps have been taken, he can waive the certification requirement for the most onerous parts of the restrictions, in lieu of "alternative actions" – a term which has no clear legal or procedural definition. The only guidelines are that they "substantially mitigate" the risk that the detainee being transferred may engage in terrorism. Thus the administration has the ability to transfer detainees out of Guantanamo even with congressional restrictions. And with Obama reiterating that keeping Guantanamo open harms US national security, the certification – and even more so the waiver – process seems to offer a clear path toward emptying the facility of more than half its prisoners.

These restrictions, while not insurmountable, are nevertheless onerous and unnecessary. The Senate Armed Services Committee, perhaps recognizing the unnecessary barriers placed on the executive's actions, reported out a version of the National Defense Authorization Act (NDAA) that would permit transfers to the US for medical care, trial in US federal court, and for continued detention.

Those seeking to keep Guantanamo open often cite concerns that detainees released from Guantanamo may engage in terrorism. The Office of the Director of National Intelligence (DNI) has stated that some detainees released from Guantanamo then become involved in terrorist activities, though the number is disputed and the government refuses to publicly release the information on which it is basing those claims. The DNI claims that about 17 percent of the

approximately 600 people released from the facility over the past 12 years are “confirmed” and 13 percent are “suspected” of having engaged in terrorism after their release.<sup>1</sup> However, independent, credible analyses of those figures<sup>2</sup> by researchers at the New America Foundation indicate the actual percentage is closer to 2.8 percent “confirmed” and 3.5 percent “suspected” of engaging in militant activities against US targets and another 2.5 percent against non-US targets.<sup>3</sup> This amounts to 8.8 percent confirmed or suspected to have taken part in any form of militant activity anywhere in the world.<sup>4</sup> Even if the government figures were true, clearly the vast majority of people released from Guantanamo have not engaged in terrorism; in fact, it's well below the 68 percent<sup>5</sup> recidivism rate found by a Bureau of Justice Statistics study of recidivism after general criminal convictions in 15 states.<sup>6</sup> There are many people in the world who may commit crimes in the future, but the United States has not locked them up indefinitely. The bottom line is that the administration needs to assume some risk that those released may become involved in terrorism – even though that risk is objectively low. And that risk must be balanced against the harm to national security that occurs every day that Guantanamo remains open.

In his speech, President Obama announced that he was lifting his moratorium on returning detainees to Yemen – a ban that affected 56 of the 86 detainees slated for release. The moratorium on returns to Yemen was imposed after Umar Farouk Abdulmutallab, a Nigerian trained in Yemen, tried to blow up a Detroit-bound airliner with explosives hidden in his underwear on Christmas Day 2009. Abdulmutallab was convicted in federal court and is now serving a life sentence. The lifting of the ban is important, but it now needs to be implemented.

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<sup>1</sup> Director of National Intelligence, “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba,” undated, <http://www.dni.gov/files/documents/March%202013%20GTMO%20Reengagement%20Release.pdf>, (accessed July 23, 2013)

<sup>2</sup> Peter Bergen, Andrew Lebovich and Katherine Tiedemann, “How Many Gitmo Alumni Take Up Arms?” *Foreign Policy*, January 11, 2011, (accessed July 23, 2013), [http://www.foreignpolicy.com/articles/2011/01/11/how\\_many\\_gitmo\\_alumni\\_take\\_up\\_arms](http://www.foreignpolicy.com/articles/2011/01/11/how_many_gitmo_alumni_take_up_arms).

<sup>3</sup> Peter Bergen, “Terror Threat From Gitmo Prisoners is Exaggerated,” CNN, May 8, 2013, (accessed July 23, 2013), <http://www.cnn.com/2013/05/07/opinion/bergen-gitmo-terror-threat>; *see also*, “Seton Hall Law Issues Report Debunking Government GTMO Recidivism Rate Claims with Data and Statement from Government Public Affairs Officer for Detainee Policy,” April 2, 2012, [http://law.shu.edu/About/News\\_Events/releases.cfm?id=285480](http://law.shu.edu/About/News_Events/releases.cfm?id=285480) (accessed July 23, 2013).

<sup>4</sup> Bergen, “Terror Threat From Gitmo Prisoners is Exaggerated,” CNN, May 8, 2013.

<sup>5</sup> Bureau of Justice Statistics, “Recidivism” undated, <http://www.bjs.gov/index.cfm?ty=tp&tid=17> (accessed July 23, 2013).

<sup>6</sup> *Ibid.*

The Yemeni detainees cleared for release should be returned home or transferred to a third location as quickly as possible, as should the others. Continued detention out of fear of instability in a detainee's home country is never a valid basis to imprison someone.

Of the other 80 detainees at Guantanamo, the administration has designated 46 for indefinite detention. When the Obama administration's task force reviewed these detainees, it identified them as "too dangerous" to release, yet the administration's specific basis for that determination was not made clear. At the time, the administration said it either did not have sufficient admissible evidence against them to prosecute or concluded that their acts did not amount to a chargeable crime. Their continued detention – whether at Guantanamo or in the US – violates international law prohibitions on indefinite detention without trial and damages the US reputation and ability to promote human rights abroad.

On March 7, 2011, President Obama signed an executive order<sup>7</sup> providing these detainees the ability to challenge their designation via Periodic Review Boards (PRBs), which were to be set up within a year. The boards were intended to review whether the men designated for continued detention still pose a threat to the US. Despite the one year deadline for the PRBs to be created, the Department of Defense only announced on July 21, 2013 that they had been set up and no hearings have taken place. And while 31 detainees were identified for prosecution, only six of those – including the five men accused in the September 11 attacks, face any formal charges. Some of those may be suspected only of crimes, such as conspiracy and material support for terrorism, for which the military commissions lack jurisdiction because they are not offenses under international law. They will simply languish in detention waiting for the PRBs to commence.

Human Rights Watch remains deeply concerned about the military commissions and believes no detainees should be tried before them. Despite revisions to the military commissions rules of

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<sup>7</sup> White House, Executive Order 13567--Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, March 7, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava> (accessed July 23, 2013).

procedure, they still fall short of international fair trial standards. Among other things, they lack judicial independence, allow the admission of certain coerced testimony, and fail to protect privileged attorney-client communications. In February, defense attorneys in one of the only two cases currently being prosecuted at Guantanamo discovered listening devices<sup>8</sup> disguised as smoke detectors in attorney-client meeting rooms. Additionally, proceedings were halted because a courtroom feed to the media and observers that supposedly only the judge was able to control was cut off by an unnamed US agency. Then in mid-April, hearings were further delayed by two months<sup>9</sup> because an enormous number of prosecution and defense files disappeared from the server that both legal teams are required to use to process the highly classified documents in the case. Furthermore, it's not entirely clear why even the court's supporters would be so in favor of continuing the status quo – the only two military commission verdicts obtained by full trials were recently overturned on appeal.

While federal courts are not perfect, they provide much greater procedural protections than the military commissions; and, with 200 years of jurisprudence behind them, their verdicts are far more certain to withstand appeal. Putting an end to the prohibition on transfers to the US – as is provided for in the Senate Armed Services Committee version of the NDAA – is an important step towards closing Guantanamo.

Guantanamo can and should be closed. There is a role for both the president and Congress to play in its closure. The president has the authority to begin transferring cleared detainees, and he should do so immediately. But Congress also has a role to play, and should allow the president more leeway in implementing the assessment of the intelligence agencies and the military.

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<sup>8</sup> Laura Pitter, "Listening In," *Foreign Policy*, February 21, 2013, (accessed July 23, 2013), <http://www.hrw.org/news/2013/02/21/listening>

<sup>9</sup> Jane Sutton, "Vanishing files delay Guantanamo hearings in 9/11 case," Reuters, April 17, 2013, (accessed July 23, 2013), <http://www.reuters.com/article/2013/04/17/us-usa-guantanamo-delay-idUSBRE93GoYT20130417>.

As Obama himself said, Guantanamo "hurts us in terms of our international standing" and "lessens cooperation with our allies on counterterrorism efforts." It is incumbent on both the president and Congress to close Guantanamo, and put an end to indefinite detention without trial.