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Getting Back on Track to Close Guantanamo

How to Get to Zero

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Executive summary

The process for closing Guantanamo has not gone as smoothly as the Obama administration had hoped. It was always going to be difficult, but some unforeseen obstacles were thrown in its path, and the new administration made some mistakes that have cost time and sucked energy away from the core mission of closing the prison.

Even with these setbacks, the actual closure of Guantanamo is now within reach, but the Obama administration will have to do the following:

- **Push back the closure deadline to July 2010.** It is extremely unlikely that the administration can meet the one-year timeline without unwanted compromises. Merely allowing the deadline to slip, however, would be a serious mistake. The Obama administration should establish new deadline and, at the same time, announce a comprehensive plan to get the Guantanamo detainee population down to zero
- **Prosecute 9/11 conspirators in federal court and limit military commissions to battlefield crimes.** The prosecution of Khalid Sheik Mohammed and his co-conspirators is the most important of all cases at Guantanamo. U.S. federal criminal courts can handle this prosecution, and it will demonstrate meaningful change, setting the tone for broader U.S. detention policy. It is in the United States' strategic interest to refrain from seeking the death penalty no matter which forum it chooses, thus denying martyrdom to the 9/11 conspirators. Military commissions remain tainted by Bush-era mistakes, and must be limited—if used at all—to battlefield crimes in order to gain a measure of legitimacy.
- **Limit military detention only to enemy fighters captured in combat zones and use criminal law to prosecute detainees captured far from any battlefield.** The Supreme Court has already upheld narrow military detention authority for al Qaeda and Taliban fighters captured in Afghanistan. The Obama administration should return to this kind of traditional military detention. The criminal laws of the United States and our allies and partners are well-suited to prosecute suspected terrorists captured far from the battlefield.

- **Incarcerate detainees convicted in U.S. criminal courts in maximum-security U.S. prisons and transfer those who will remain in military custody to Bagram prison in Afghanistan.** U.S. maximum and supermaximum security prisons currently hold hundreds of convicted terrorists and are perfectly capable of safely imprisoning Guantanamo detainees. Sending Afghan battlefield detainees back to Afghanistan makes logical sense and would eliminate the need to return to Congress for additional funding to close Guantanamo.

The challenges in closing Guantanamo have been significant and the criticism that President Barack Obama has received from many quarters has been as irresponsible as it is unrelenting. This political pressure should not cause the Obama administration to back away from necessary change. Modest reforms, while welcome, are not sufficient if it leaves the Bush administration's detention regime largely intact. Despite all of the sound and fury, however, only one question matters: Can President Obama fulfill his pledge to deliver a paradigm shift in U.S. detention policy?

Where we are now: January to October 2009

President Obama inherited more when he took office than just the 240 detainees who remained imprisoned at the U.S. military base at Guantanamo Bay. He also inherited the legacy of a disastrous detention regime. The Bush administration created a prison camp specifically designed to exist outside the reach of the law. It did so because what it intended to do was transparently illegal: torture, indefinite detention, and show trials that made a mockery of justice. Guantanamo became a symbol of American hypocrisy that did measureable damage to American security. Closing Guantanamo and changing U.S. detention policy is not an elective choice; it is a national security imperative.

President Obama realized the urgent need for change, and in his first official act on January 22, 2009, he signed Executive Orders establishing a one-year timeline to close Guantanamo, end torture and other abusive interrogation, and stop the practice of extraordinary rendition.¹ He also secured a 120-day suspension of the military commission trials at Guantanamo.² The administration created two inter-agency task forces to shepherd the closing of Guantanamo and report back in a six-month period.³ The first task force was to examine each individual detainee's case and make a recommendation on disposition, and the other task force was to craft a new policy for both Guantanamo detainees and detention operations going forward. Guantanamo was only one of a number of urgent crises facing the new administration immediately upon taking office, and once the Executive Orders were issued, senior administration officials moved on to those other priorities and allowed the task forces to take control of policy development.

The task forces struggled right out of the gate. The detainee disposition task force, which was made up of federal prosecutors, expected to find the evidence and other information in the U.S. government's possession on each detainee stored in an ordered case file system. The reality proved far different, with information on detainees "scattered throughout the executive branch" literally in a desk drawer here or a foot locker there.⁴ Pulling together this information dramatically slowed the process of reviewing detainee cases and is only now nearing completion.

The detention policy task force fared little better at the outset. It is unreasonable to expect a new administration to operate at peak performance in its first days. Transitions are notoriously slow, and even though the Obama administration moved quickly to fill key posts, many were not yet in their jobs during the detention task force's early work as Sarah Mendelson of the Center for Strategic and International Studies recently noted in *Foreign*

*Policy.*⁵ The first public material reflected this tension and was more a tinkering around the edges than a paradigm shift from the Bush policies.

The Obama administration announced in May that it would revive the Bush administration's military commissions as an option for prosecuting some Guantanamo detainees, albeit with modifications.⁶ The commissions were first established by a Bush military order and then modified by Congress in 2006 after the tribunals were struck down by the Supreme Court as unconstitutional.⁷

Reviving the military commissions was a significant error and justifiably caused many to question the Obama administration's commitment to delivering a genuinely new detention system. Military justice may be appropriate for some Guantanamo detainees, but a perfectly good and respected system already exists: the Uniform Code of Military Justice. The Bush military commissions are inextricably linked with the worst excesses of the previous administration and the symbol of Guantanamo.

Military commissions at Guantanamo had a terrible track record. The Bush-era Defense Department General Counsel William Haynes infamously said of the commissions, "there will be no acquittals."⁸ There were only three convictions in seven years; two of those defendants have already been released from custody, and the third boycotted his own trial.⁹ It is remarkable that the Bush administration got such a measly return from a system that was widely believed to be organized with the specific purpose of convicting detainees instead of reaching a legitimate verdict.

The Obama administration's return to military commissions upset many who supported plans to close Guantanamo, but the administration's biggest mistake was an \$80 million request in early April for funds to support closure in the Fiscal Year 2009 Supplemental Appropriations bill. No Guantanamo line item appears in either the 2008 war supplemental or in the regular Defense Department 2009 appropriation, so it is puzzling why the administration chose to insert it in this request.¹⁰ Asking Congress for money for Guantanamo opened the door for conservatives on Capitol Hill, and the Obama administration was caught completely off guard when they began aggressively pushing back against the funding.

The main line of attack was that "President Obama wants to bring terrorists into your neighborhoods."¹¹ It is ridiculous to claim that locking up al Qaeda terrorists in U.S. maximum security prisons is somehow reckless and dangerous. If that is the case, we are in the midst of a great national security emergency because 216 international terrorists currently reside in U.S. prisons apparently just waiting for the right moment to launch a massive attack.¹² Of course, conservatives do not actually believe that terrorists in U.S. prisons are a serious threat. They simply took advantage of an opportunity to win a political fight with President Obama, and unfortunately, they won.

The White House failed to support its allies in Congress that were willing to push back against the fear mongering.¹³ And the die was cast by the time President Obama got in the

game in late May with a strong speech at the National Archives justifying his decision to close Guantanamo. The lack of early backing from the administration sealed the defeat. The result was a blowout, with Congress overwhelmingly voting to bar the release of any Guantanamo detainees into the United States and placing severe restrictions on any other kinds of transfers.¹⁴

The most significant consequence of this legislative failure was abandoning the plan to resettle in the United States a small number of Chinese Uighur detainees that never should have been at Guantanamo in the first place. Many Guantanamo detainees are to be released from detention but need to be resettled in third countries because international law prohibits their return to their native lands. Many American allies are willing to help the United States and accept detainees, but quite reasonably expected the United States to share in the responsibility. It is a hard sell for America's allies to tell their citizens that they are accepting Guantanamo detainees even though the U. S. Congress feels that they are too dangerous for release in America.

Congressional action has not completely stopped transfers, but it has caused significant delays in the process. American allies still are willing to take detainees—to their great credit and as a testament to Guantanamo envoy Dan Fried's hard work—16 countries either having already accepted some or pledged to do so, including deals with Palau and Bermuda to accept most of the Uighurs.¹⁵ But instead of moving detainees in large chunks, it's only going in ones and twos. Other stages are moving at a snails pace; only one detainee, Ahmed Ghailani, has been brought to New York to stand trial, and the military commissions have yet to resume.

These struggles forced the Obama administration to delay the reports from the inter-agency task forces. The review of detainee case files has been granted several more months, and the detention policy task force has been granted a full year to complete its work, which will run through January 2010.¹⁶

Despite all these problems, the Obama administration appears to have found its footing, and momentum is building toward closing Guantanamo. Congress passed amendments to the Military Commissions Act sought by the administration.¹⁷ Congress backed off on some of the most severe restrictions on Guantanamo detainee transfers and approved bringing detainees into the United States during legal proceedings.¹⁸ And Attorney General Eric Holder has stated that the detainee case review will be completed by November 16.¹⁹

Even with this recent push, progress has been much slower than expected or needed to meet the one-year timeline. The task forces got off to a slow start and missed their reporting deadlines. Congress has been remarkably unhelpful, even by its own low standards, and has complicated the difficult task of resettling detainees ready for release but unable to return to their native countries. As a result, we are more than nine months into a 12-month timeline, and 90 percent of the 240 detainees at Guantanamo on January 20, 2009 are still there.

Closing Guantanamo

Despite all the bumps in the road, the Obama administration has never wavered on its decision to close Guantanamo. And President Obama will close Guantanamo. Some of President Obama's ideological opponents have sought to portray the new administration's difficulties closing the prison as evidence of failure and broader progressive naïveté, but no serious analyst ever believed the process for closing Guantanamo would be easy. It is important to remember when hearing these charges that the reason it is so hard is almost exclusively a result of the Bush administration's staggering incompetence.

Four key decisions remain in the process for getting the detainee population at Guantanamo down to zero: 1) whether to meet or push back the one-year deadline; 2) what forum to use to prosecute detainees selected to stand trial; 3) the scope of military detention authority; and 4) the location of detention for detainees that remain in U.S. custody. Addressing these four issues will put the Obama administration on track to close the prison.

Push back deadline to July 2010

The calendar is ticking ever closer to January 2010, and there has been a lot of sound and fury in recent weeks about the one-year deadline for closing Guantanamo. With less than three months to go, 221 of the 240 detainees remain in Cuba, and it seems unlikely—and at this point unwise—that they will all be moved out of the prison in time. Yet President Obama was exactly right to establish a deadline for closing Guantanamo; it has been the source of significant positives for the administration and has not been the cause of any of the problems it has had in closing the prison.

Closing Guantanamo is a complex and challenging task, as has been painfully evident during the past nine months. It takes time to create and implement a policy for closing the prison, time that the American people and the international community would not likely have given the new administration. If 221 detainees were still at Guantanamo absent the president's commitment to close the prison in a year, pressure on the Obama administration would be unrelenting. Many would seriously question Obama's commitment to changing U.S. detention policy, and it is likely that Congress and the bureaucracy would throw up even more roadblocks in the path of closure.

President Obama started off on exactly the right foot with America's allies and partners hungry for a new approach to foreign policy by distancing himself from his predecessor so early in his tenure. Progress on transferring Guantanamo detainees to allied countries has been slow, but that has everything to do with Congress blocking the Uighurs from coming to the United States. In fact, without the deadline, there probably would not have been any transfers after Congress got in the way. The E.U.-U.S. joint statement pledging cooperation on closing Guantanamo issued in June 2009 was predicated in large measure on the establishment of a deadline.²⁰

The Obama administration's approach to Guantanamo also put al Qaeda at a strong disadvantage. Jettisoning the phrase "war on terror," stopping torture, and closing Guantanamo have undermined Al Qaeda's message about the United States. President Obama can reach out to Muslims around the world, whether at a speech in Cairo or a town hall in Turkey, in part because of the decisions taken on January 22. A repeat of President George W. Bush's declared intention to close Guantanamo without offering a timeline and plan for completion would not have had the same effect.

That is why it is so surprising that some of the criticism of the deadline seems to be coming from within the administration. One unnamed administration official recently told *The Washington Post* that the deadline "seemed like a bold move at the time, to lay out a time frame that to us seemed sufficient to meet the goal. In retrospect, it invited a fight with the Hill and left us constantly looking at the clock."²¹ This is completely wrong and is more likely an attempt to lay blame at someone else's feet rather than provide genuine analysis. What invited the fight with the Hill was the \$80 million request for funding to close Guantanamo in the supplemental the administration had no intention of backing up. Looking at the clock is a necessary push for the sluggish government bureaucracy.

It is important to keep things moving, but the deadline should not be the deciding factor and can become counterproductive if rigid adherence leads to ill-considered outcomes. The Obama administration must be careful not to allow the arbitrary one-year deadline to drive decision-making on its detention policy with so much work to be done and relatively little time left. The Obama administration has sent mixed signals on whether it intends to stand by the deadline. Defense Secretary Robert Gates said in late September that "it's going to be tough" to meet the deadline and it may take "a little longer."²² But just a week later, National Security Adviser James Jones said "I still hope that we'll be able to meet that deadline."²³

It is possible to close Guantanamo by January 22, and the current Guantanamo commander, Navy Rear Adm. Tom Copeman, has said it would take just 10 days to move all the prisoners off the base.²⁴ Practicality aside, this can only be accomplished if large numbers of detainees are moved to a temporary, make-shift detention center. Such a move would be a mistake. It is hard enough to construct a permanent solution to Guantanamo without also having to craft a temporary one. It would also be a logistical nightmare to shift the detainees and attendant personnel more than once.

Logistical problems are not the only impediment, as it now appears likely that a plan to send many of the 97 Yemeni Guantanamo detainees to Saudi Arabia for rehabilitation may not be concluded in time. The Yemeni problem has long been among the most vexing at Guantanamo, with American officials in both the Bush and Obama administrations reluctant to send detainees to Yemen because of justifiable concerns that the Yemeni government does not have adequate control over its prison system.²⁵

One possible solution would be to send the Yemenis to neighboring Saudi Arabia and into its rehabilitation program that facilitated the release of more than 100 Saudis from Guantanamo.²⁶ But Saudi officials are reluctant to accept all of the Yemenis, fearing their impact on Saudi Arabia's own counterterrorism efforts. U.S. officials still hope that an agreement can be worked out, and it may start with the approximately 20 Guantanamo Yemenis that have Saudi family ties.²⁷ Needless to say, the makeup of the detainee population will look decidedly different if it does not include the nearly 100 Yemenis, and the best course of action is to hold off on determining a final detention location until that issue is resolved.

The reality is that we are going to miss the deadline, which is unquestionably a setback for the administration. But it would be far worse to allow the deadline to slip without imposing another fixed date for closing the prison. The Obama administration should announce that it is pushing back its deadline for closing Guantanamo by six months to July 22, 2010. The new deadline should only be part of the announcement. President Obama should take advantage of this moment to put forward his comprehensive plan to close Guantanamo with a specific plan outlining how all of the detainees will be transferred off of the base.

This extension matches the six-month delay in the detention policy task force and strikes the right balance, giving the Obama administration ample time to work through the remaining cases while maintaining a sense of urgency to close Guantanamo as quickly as possible. A new deadline and a complete plan for closing Guantanamo that includes a prosecution forum selection criteria, the legal basis for continuing detention, location for that detention, and a strategy to win approval from Congress, is precisely what is necessary to get this over the finish line.

Forum for prosecuting Guantanamo detainees: Federal courts or military commissions?

The Obama administration has indicated a strong preference for using federal criminal courts for the prosecution of Guantanamo detainees, but it has preserved the option of using military commissions. Serious questions persist about even the modified commissions' fairness and they are broadly viewed as an illegitimate forum for trial by the international community. The Obama administration will face a heavy burden to convince the courts, the American people, and the world that these commissions are a fair and legitimate system of justice.

The Obama administration's rule changes to the military commissions improve the procedures of the commissions, for example, strengthening the prohibition on using evidence obtained through torture and coercive interrogations. But it also needed to make statutory changes, and here again it ran into difficulty in Congress.

One of the most significant problems with the military commissions as constructed by both the Bush administration and Congress is that they include the option to prosecute offenses that are not traditionally viewed as violations of the laws of war. Conspiracy and material support for terrorism may be violations of U.S. criminal law, but they have never been defined as war crimes before these military commissions.²⁸

This crossover between criminal law and the law of war has contributed to the perception that military commissions are used to prosecute regular crimes because it is easier to secure a conviction. There is also serious concern within the Obama administration that convictions for these offenses in military commissions would not stand up on appeal. Assistant Attorney General David Kris testified to Congress that the Obama administration believes, "that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law-of-war offense."²⁹ Salim Hamdan was convicted in a military commission on the sole charge of material support for terrorism; he is set to appeal to the D.C. Circuit Court of Appeals and stands a very good chance of winning. A verdict that throws out a conviction in a military commission would be another blow to their perceived legitimacy.

The Obama administration sought to remedy this problem by amending the Military Commissions Act to remove conspiracy and material support as offenses that could be prosecuted in military commissions. Yet Congress once again demonstrated its inability to understand complex national security law issues and kept both charges as offenses triable by military commissions.

Now that Congress has failed to accept these required amendments, the Obama administration should reconsider its decision to revive military commissions. Should it still decide to pursue cases in military commissions, the administration should establish strict criteria for which forum it uses to try the approximately 60 detainees that have been referred for prosecution.

The most significant challenge the administration faces on military commissions is the widespread perception that the military commissions are second-class justice and that particular forum is chosen because it is easier to secure a conviction. The Obama administration has at least in part contributed to this view by voicing a preference for prosecution in federal court "where feasible."³⁰ This understandably leaves the impression that the quality of the case against a particular detainee is the determining factor in the selection of trial forum. The Obama administration can overcome this perception by recognizing legal constraints on subjecting certain detainees to military jurisdiction.

When it is appropriate to prosecute a detainee in either forum, that forum should be selected based on the nature of the offense and the most appropriate venue to secure a legitimate verdict for those offenses.

The detention policy task force contemplated the need to create a mechanism to make forum determinations when it submitted its interim report in July. But it repeats the “where feasible” language, and although it emphasizes the need to consider the nature of the offense in selecting the forum, it also identifies numerous other factors to consider, such as efficiency and evidentiary problems.³¹ It may be true—as the report claims—that these criteria are “forum-selecting factors traditionally used by federal prosecutors,” but the nature of the legitimacy deficit confronting the military commissions demands procedures that go beyond simple tradition.

Military commissions should be available only to prosecute offenses that are traditional violations of the laws of war and relate to actions taken during armed conflict. Congress has preserved material support for terrorism as a triable offense, but the Obama administration controls prosecutorial decisions in the military commissions and should instruct its prosecutors to refrain from pursuing a case in the commissions against material support for terrorism.

All violations of criminal law should be prosecuted in federal criminal court, but the reverse does not hold for law of war violations or other crimes that occur in a combat zone. The War Crimes Act explicitly provides federal criminal courts with jurisdiction to try violations of the laws of war.³² Prosecutors should have the option to bring these charges in a federal court even if they occurred in a combat zone if that forum would render a more legitimate verdict.

The most significant trials will be for the five detainees who are accused of planning and organizing the 9/11 attacks. The resolution of these cases has the potential to define public perception of the Obama administration’s detention policy. There is little genuine doubt among people of open minds around the world that Khalid Sheik Mohammed and his co-conspirators in 9/11 were complicit in the attacks. The only remaining judgment to render is whether the United States can give even these most reprehensible of mass murderers a trial in a universally recognized fair and legitimate forum.

Military commissions—even as improved by the Obama administration—fail to provide such a forum. There is nothing inherently illegitimate or unfair about military commissions or military justice. On the contrary, the existing system of military justice in the United States, the Uniform Code of Military Justice, is widely regarded as among the fairest systems of justice in the world. And the Obama administration could design a military commissions system that would likely be regarded as fair and legitimate if it was starting from scratch.

But they are not starting from scratch, and any military commission will be tainted by their association with the worst elements of the Bush administration's detention policy. Justly or unjustly, questions about its fairness and impartiality would burden any military commission trial of Khalid Sheik Mohammed, drawing attention away from his grievous crimes. That is an unacceptable risk to take during the trial of the most serious crime ever prosecuted in a U.S. court.

Mohammed and his co-conspirators should be indicted on nearly 3,000 counts of murder and brought to stand trial in a federal courtroom in Manhattan. It is a near certainty that Mohammed will plead guilty—to do otherwise would require him to publicly claim that he had no involvement in the 9/11 attacks when he has taken every previous opportunity to publicly assert that he masterminded the entire plot. But even in the unlikely event that there is a trial, the federal court system has proven perfectly capable of handling complex terrorism cases, and this trial would be no different.

The Obama administration should refrain from seeking the death penalty regardless of which forum it chooses to prosecute the 9/11 conspirators. The decision not to seek the death penalty in this case has nothing to do with any moral debate surrounding capital punishment. It is in the strategic interests of the United States to deny these most heinous Al Qaeda terrorists what they want most: martyrdom. Al Qaeda will exploit an execution by the U.S. government as a significant propaganda victory, no matter how fair and legitimate the trial. Life imprisonment, however, would cause Khalid Sheik Mohammed and his co-conspirators to be forgotten like Ramzi Yousef and other terrorists currently rotting in obscurity in U.S. jails.

Prosecuting the 9/11 conspirators in federal court will create an opening to re-establish the legitimacy of military commission justice. But it is a window of opportunity that could close quickly if the Obama administration fails to implement major changes to the applications of the military commissions procedures.

A comprehensive review of all the military commissions proceedings by Judge Patricia M. Wald, formerly Chief Judge of the U.S. Court of Appeals for the District of Columbia and Judge on the International Criminal Tribunal for the Former Yugoslavia, uncovered an “almost hopeless lopsidedness” in the process with “a distinctly Kafkaesque quality to the proceedings.”³³ For example, the government resisted making witnesses available to the defense—even other detainees at Guantanamo—and withheld critical exculpatory information. Judge Wald found the approach of the military commissions judges “varied widely,” and they often failed to provide even minimal explanation for their rulings beyond passing references to the controversial commission procedures.³⁴

It is an enormous undertaking to reverse both the past practice and the perception of the commissions. The Obama administration must take a number of significant steps to ensure a fair trial over and above the amendments to the law approved by Congress

to overcome what has transpired in previous military commissions trials. There can be no withholding of information from the defense, military judges must be experienced and impartial, and the proceedings must be as transparent as possible. Only then can the Obama administration hope to secure a modicum of legitimacy for the verdicts obtained in these new military commissions.

Scope of military detention: Who can we keep in custody?

At his National Archives speech, President Obama grouped the remaining Guantanamo detainees into five categories: those who will be prosecuted in federal court, those who will be prosecuted in military commissions, those who will be transferred to and released in their native countries, those who will be released in allied countries willing to accept them, and “detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people.”³⁵ Obama emphasized later in the speech that he would work with Congress on issues related to closing Guantanamo.

The president’s fifth category and apparent intent to work with Congress sparked serious anxiety among supporters of the decision to close Guantanamo, who were fearful of what would emerge from a Congress with a poor recent track record on these issues and dominated by intense partisanship and wild scare tactics.

Congressional performance on complex national security law issues is notoriously poor, sparking fears that the result would be a disaster. The prime example is the Military Commissions Act, passed in the wake of a Supreme Court ruling declaring the Bush administration’s tribunals unconstitutional. Rather than make significant improvements, Congress perpetuated many of the same flaws the Supreme Court identified and even this latest effort to reform the commissions has still left some serious problems.

Congress has a constitutional responsibility in some areas at issue in reforming U.S. detention policy, but the embarrassing antics that marked the debate surround holding Guantanamo detainees in U.S. maximum security prisons clearly shows that many in both chambers are not taking it seriously. It is far more important for President Obama’s opponents to score political points or undermine support for his plans than it is to find the most appropriate means of protecting the American people.³⁶ It is understandable in this climate why many were gravely concerned that Congress would end up making things worse, not better.

Part of the problem stemmed from the way President Obama described this fifth category—linking continued detention to the danger posed by a particular detainee rather than the source of legal authority. The notion of holding an individual who cannot be prosecuted certainly raised the specter of preventive detention. But criminal prosecution is not the only source of legal authority available to maintain detention for many Guantanamo detainees.

Detainees captured in an active combat zone or fleeing from the combat zone—which encompasses a very high percentage of the remaining Guantanamo detainees—could be eligible to be held as military detainees until the end of American military involvement in the conflict in Afghanistan.

The Authorization to Use Military Force—passed by Congress in 2001 in response to the 9/11 attacks—gives the federal government this detention authority. The Supreme Court sustained military detention in the narrow circumstances of al Qaeda or Taliban combatants captured in Afghanistan in its 2004 *Hamdi v Rumsfeld* decision.³⁷ And the habeas corpus cases for more than 200 Guantanamo detainees currently working through the courts are being decided on precisely this detention authority.

The Obama administration revealed in September that it would not seek any new legislative detention authority, removing the worst case scenario for many supporters of closing Guantanamo.³⁸ That decision focuses the debate about the continued detention of Guantanamo detainees onto the Obama administration’s interpretation of the scope of detention authority granted by the AUMF.

The Bush administration had a very expansive interpretation of military detention. It claimed the power to hold in indefinite military detention individuals captured anywhere in the world who were suspected of mere association with terrorism, even if they had never taken part in any military engagement. It also held that the president’s inherent authority as Commander-in-Chief from Article II of the Constitution allows this type of military detention even absent congressional authorization.³⁹

The ongoing habeas cases forced the Obama administration to deliver its first interpretation in March—far earlier than it wanted and while its policy review was still in its infancy. The biggest shift was a rejection of inherent Article II authority, rather than relying on Congress’ 2001 authorization. It also slightly narrowed the category of individuals detainable under this authority, specifying that an individual must have given “substantial support” to Al Qaeda or affiliated groups in order to justify detention, but applying no limitation that an individual must be captured in a combat zone.⁴⁰ The Obama administration also filed a separate declaration from Attorney General Eric Holder that indicated it could further amend its interpretation once the Detention Policy Task Force completes its work.⁴¹

The March filing was an improvement on the Bush administration’s interpretation. Some subsequent district court rulings have narrowed the Obama administration’s interpretation, but they have still left largely intact a broad scope of military detention that goes far beyond what the Supreme Court has previously upheld.⁴² When examining the specific cases of Guantanamo detainees, there is no meaningful security advantage to this broad system of military detention. The Obama administration should return to the traditional interpretation of military detention authority and restrict it to enemy fighters captured in a zone of active combat or those fleeing from it.

The overwhelming majority of Guantanamo detainees were captured in Afghanistan, or along the Afghanistan-Pakistan border, or just into Pakistan as they fled the battlefield. The Obama administration would have to succeed on the merits of each individual habeas case to show that a particular detainee is an enemy fighter, but this type of traditional military detention has long been recognized as lawful during armed conflicts. Detainees who lose their habeas cases under this standard could be lawfully held by the military until the end of U.S. combat operations in Afghanistan. Military detention does not preclude prosecution of any detainee for violations of the laws of war or U.S. domestic law; it is simply another source of lawful detention authority.

Establishing a detention system that recognizes the option of lawful military detention but restricts its application to combatants captured in or fleeing from a combat zone would resolve the supposed dilemma raised by the president's "fifth category" and return U.S. detention policy to sound legal footing.

Detention location for those remaining in U.S. custody: Where should we hold detainees?

The question of where to put the Guantanamo detainees that will remain in U.S. custody has dominated the debate surrounding closing the prison. The Obama administration clearly underestimated the force of "not in my backyard" complaints from members of Congress in both parties. Most local communities with large prisons are accustomed to dealing with dangerous prisoners and tend to view the potential arrival of Guantanamo detainees as less of a problem. Elected officials, however, are often more sensitive to the loudest voices and worry that accepting Guantanamo detainees exposes them to heated criticism from some quarters, no matter how silly the attacks. It is inevitable that there will be opposition from local elected officials in the chosen location, wherever it is.

The Obama administration has put forward several options as possible detention locations in the United States for those detainees that will remain in U.S. custody. The U.S. Disciplinary Barracks at Ft. Leavenworth in Kansas is the only maximum security facility in the U.S. military detention system.⁴³ It could have handled at least some detainees, but it was ruled out after Kansas' two Republican Senators—Sam Brownback and Pat Roberts—refused to allow a confirmation vote appointing Republican John McHugh to be Secretary of the Army until the Obama administration pledged not to send detainees there.⁴⁴

Homeland Security and Defense Department officials toured a maximum security state prison in Standish, Michigan in August as a possible location for all detainees that will remain in U.S. custody.⁴⁵ The prison is slated to close unless it gets new prisoners; it is the region's largest employer, and many local residents would welcome the transfer of Guantanamo detainees if it would keep the prison open. Rep. Pete Hoekstra is cam-

paignig for governor of the state, however, and has railed against bringing Guantanamo detainees to Standish. The prison has officially closed and it looks less likely now that any Guantanamo detainees will end up there.⁴⁶

Other location options under consideration are the supermax facility in Florence, Colorado; the U.S. Penitentiary in Marion, Illinois; the brig at Charleston Naval Base in South Carolina, or other unspecified military bases in the United States.⁴⁷ None of these options would be able to accommodate all of the Guantanamo detainees slated to remain in U.S. custody, but these facilities or others like them could be appropriate destinations for some of the detainees.

Multiple facilities are being considered because there are at least three different categories of detainees at Guantanamo. The first are those that have been cleared for release and are awaiting transfer either to their native country or to a third country. No further detention is contemplated for these detainees once the rather slow process of resettlement is completed. Those Guantanamo detainees who will face trial in federal criminal court are the second category. And the last group of detainees consists of those who will remain in military custody, whether they are prosecuted in military commissions or held as combatants.

The best way to identify the most appropriate detention location for Guantanamo detainees is to segment the population into these categories, not try and replicate Guantanamo's single detention center model.

The Obama administration recently provided the first indication of the size of the first category by identifying 75 detainees that the Detainee Disposition Task Force has cleared for release or the courts have ordered released.⁴⁸ That number may still grow as the courts resolve more habeas cases or the task force clears more detainees. Even 75 detainees seems like a daunting number to transfer and release when considering the rather slow progress of transfers so far, but it is achievable if the deadline is pushed back until July 2010. There is a good chance that a large portion of these transfers will go in big chunks, since Yemenis and Uighurs alone make up 33 of this group.⁴⁹ These detainees should remain at Guantanamo while they await transfer and should not be brought into the United States. This would eliminate the need to find space at any facilities for at least 75 detainees.

Removing from the equation detainees that will be transferred and released allows efforts to focus on finding appropriate detention facilities for detainees in the remaining two categories: those detainees prosecuted federal criminal court, and those that remain in military custody.

Detainees in federal criminal court

Those detainees that will be prosecuted in federal criminal court should be treated like other high-security detainees already in the custody of the Bureau of Prisons. Existing facilities are well-equipped to handle detainees from this group. The one Guantanamo detainee already transferred to the United States to stand trial, Ahmed Ghailani, is being held in pre-trial detention at the Metropolitan Correctional Center in Manhattan.⁵⁰ The MCC, or other pre-trial detention centers such as the one in Alexandria, Virginia, that held Zacarias Moussaoui during his trial, have dealt with dangerous defendants before and are perfectly capable of handling these detainees.⁵¹

Once these detainees are convicted in federal court, they would enter the Bureau of Prisons system and likely be placed at one of the supermax facilities. If they end up in Florence, Colorado, they would join already incarcerated international terrorists Moussaoui, Ramzi Yousef, Richard Reid, Sheik Omar Abdel-Rahman, and Wadi El-Hage.⁵² No one has ever escaped from a supermax prison.⁵³ Prisoners are isolated in 23-hour lock down so claims about terrorists' ability to radicalize the prison population do not withstand close scrutiny.⁵⁴ This group reportedly could include up to 60 detainees.⁵⁵ It is not likely that all 60 of these detainees would be incarcerated at Florence, but it is also not necessary since other supermax or high-security facilities could hold those who cannot be sent to Florence.

Military custody

The category of detainees that will remain in military custody can be separated into two groups: those that will be prosecuted in military commissions and those that will be held as combatants. Whatever criteria the Obama administration adopts for determining the forum, the number of military commissions trials is likely to be substantially less than criminal prosecutions, leaving approximately 20 detainees in this group. That is a manageable size and existing military detention facilities could accommodate those prisoners, such as the Charleston brig that held Jose Padilla, Yasir Hamdi, and Ali al-Marri.

That would leave as many as 68 detainees that would be held as combatants, should they meet the criteria for military detention. That number is entirely speculative because the Obama administration has repeatedly stated that it has not yet placed any Guantanamo detainees in this category. It is possible that the administration can build a facility to house these detainees at a military base in the United States, but one other option exists for this group that has not received much attention: the main U.S.-run detention center for the Afghan conflict at Bagram air base.

If the prison at Guantanamo had never existed, the detainees captured during the Afghan conflict would almost certainly be at Bagram. Other detainees captured in exactly the

same circumstances are currently being held at Bagram. It makes sense to return the Guantanamo detainees held in connection with the Afghan conflict to the detention center that holds similar detainees.

An additional factor supporting using Bagram is that it would eliminate the need to return to Congress and seek further appropriations to close Guantanamo. The recently-passed language from the Homeland Security Appropriations Act lifting some of the restrictions on transferring Guantanamo prisoners was widely reported to only allow transfers into the United States for prosecution.⁵⁶ But the specific language affords greater flexibility; allowing transfers of Guantanamo detainees to the United States for “the purposes of prosecuting such individual, or *detaining such individual during legal proceedings.*”⁵⁷ (Emphasis added).

Legal proceedings—though undefined in the legislation—would certainly include the ongoing habeas cases in the federal district court in Washington, D.C. The Obama administration could bring Guantanamo detainees it does not intend to prosecute in either federal court or military commissions into the United States while their habeas cases are pending. If a detainee wins his habeas case, he would then be returned to his native country or a suitable third country. If he loses, however, the Obama administration could send him to Bagram.

Waiting to send a Guantanamo detainee to Bagram until after his habeas case is resolved would forestall at least two concerns about sending them there: detainee access to counsel and the differing legal rights afforded detainees held at the two prisons. Sending Guantanamo detainees to Bagram while their cases are still pending would increase an already difficult burden on lawyers’ access to their clients. Bringing them to the Washington, D.C. area would actually be a measurable improvement on the current situation. Even if a detainee loses his habeas case and is sent to Bagram, he would still be represented by counsel and possess the right to file a new habeas claim at a later date, but he would not need the kind of regular access to his attorney that is required now.

Guantanamo detainees possess the right to contest their detention through habeas corpus, and no decision to transfer those detainees could remove that right. Bagram detainees do not have habeas rights, however, and the Obama administration is fighting a U.S. district court decision that would extend habeas to those Bagram detainees that were brought to Afghanistan after being captured in other countries.⁵⁸ Having no pending habeas cases for any Guantanamo detainees would be easier to manage from a practical perspective and simpler from a legal one.

Concerns that Bagram would be perceived as the “new Guantanamo” are legitimate, but this danger is outweighed by the benefits in this context. The administration could take other steps to mitigate the possibility a negative reaction to U.S. detention operations in Afghanistan, and in fact, transferring some Guantanamo detainees to Bagram could serve

as a catalyst for such action. It has long been necessary to adopt a transparent and binding agreement with the Afghan government that formalizes U.S. detention authority and links the system to Afghan law. Doing so in conjunction with closing Guantanamo and moving some of the Afghan battlefield detainees to Bagram would be a net positive for the U.S. mission in Afghanistan.

The best way to solve the issues involved in finding a detention location for those detainees slated to remain in U.S. custody is to break the detainees down into separate groups based on how their cases will be disposed, then identify the detention locations most appropriate for each specific type of detainee. Existing federal pre-trial and maximum security prisons and detention facilities on military bases can accommodate most of the detainees. The Obama administration should also consider the additional option of sending those held as Afghan war combatants to Bagram air base.

Conclusion

No one ever believed that closing Guantanamo would be easy. Some of the obstacles thrown up in the path of the Obama administration were expected, others unforeseen, and still more were self-inflicted. How long it takes to close Guantanamo has never been the most important issue. There is genuine urgency to resolve many of the cases of detainees who have languished in the prison for close to a decade now. But it is by far more important to get it done correctly rather than quickly.

The early momentum to make major changes to U.S. detention policy was lost and has been only recently recaptured. What has transpired in the interim has damaged the Obama administration, but it should not induce it to waver on its core objective. There are worrying signs that the administration will adopt important, but modest, reforms while keeping the overall structure of the Bush administration's detention policy largely intact. President Obama himself promised a paradigm shift on U.S. detention policy and the only meaningful measurement of his administration's efforts to close Guantanamo is if it lives up to that pledge.

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