



Guantanamo's Last Year

By Ken Gude January 26, 2016

With one year left in his administration, President Barack Obama remains committed to closing the prison at Guantanamo Bay during his time in office. Congress has prohibited, at least for now, one aspect of the president's preferred pathway to close the prison—transferring some detainees into the United States for trial or continued law of war detention.¹ Much of this debate has focused on the question of whether President Obama will use executive action to override the congressional transfer ban.² Doing so would be impractical and extremely unwise. The Obama administration should state publicly that it will not use executive action to bring large numbers of Guantanamo detainees into the United States in defiance of congressional statute. A better strategy would be to pursue alternative options for closing Guantanamo that, even given current statutory constraints, remain entirely in the control of the executive branch.

Amid disappointment at the failure to close Guantanamo, it is easy to forget that President Obama originally believed it was feasible to identify, categorize, prosecute, and transfer all 242 detainees in just one year—the same amount of time he has left for the remaining 91 detainees.³ While congressional resistance is a new obstacle not present at the time of President Obama's original pledge, moving the majority of detainees out of Guantanamo is now mostly about the implementation of policies and decisions already made, a much more manageable challenge than the one that Obama faced in 2009. If that goal is to be achieved, however, President Obama must command a greater level of urgency throughout his administration and especially at the Pentagon. The risk is not simply a failure that becomes a stain on the president's legacy; rather, the much more serious risk is that the next administration could resume sending detainees to Guantanamo, which is on the wish list of many conservatives.

The latter would do irreparable harm to American national security—and be a colossal waste of money. Holding a detainee at Guantanamo now costs \$4 million per year per detainee, compared with less than \$100,000 per inmate in the highest security prison in the United States.⁴ And while it is fair to say that the salience of Guantanamo as a recruiting tool for terrorist groups has faded during the Obama administration's efforts to close it, it is not gone. Hostages held by the Islamic State of Iraq and al-Sham, or ISIS, are not dressed in Guantanamo-like orange jumpsuits by accident. And if new detainees were to be sent to Guantanamo by the next administration, the prison would roar back to prominence in terrorist propaganda and be an enormous self-inflicted wound on the country.

We cannot afford to risk this possibility. Guantanamo must be closed during the Obama administration. This can be achieved by completing the following steps:

- Hold Periodic Review Board hearings for all eligible detainees by July 1, 2016.
- Accelerate transfers of those detainees designated for transfer or release.
- Order the Department of Justice to review detainee cases for prosecution and potential plea bargain in federal court.
- Pursue agreements with countries to prosecute under their laws any Guantanamo detainees accused of serious crimes.
- Engage the Afghan government to seek an agreement to transfer back to Afghan custody any remaining law of war detainees captured in connection with the war in Afghanistan.

Some of these options may not represent the best or preferred method for the Obama administration to close Guantanamo, but this is a feasible and realistic path to close the prison in one year. Some of these choices will be difficult, but when measured against the possibility that Guantanamo could be back in the business of accepting new detainees in 2017, those difficulties should not be disqualifying. A reinvigorated effort from the Obama administration is urgently needed to make 2016 Guantanamo's last year.

Current Guantanamo detainee population

Guantanamo held 242 detainees when President Obama took office on January 20, 2009. The interagency task force that he set up as part of the process to close the prison specifically reviewed each detainee's case in 2009. That task force categorized the Guantanamo detainee population into three broad categories. First were the detainees who could be transferred out of Guantanamo and out of U.S. custody—those who had been cleared by the Bush administration but were awaiting arrangements with receiving countries. Next were detainees who were slated for prosecution in either federal criminal court or in a military commission. And third were detainees who were to be held in accordance with the law of war but not prosecuted.⁵

As of now, there are 91 detainees remaining at Guantanamo. Of those 91, 33 have been cleared for transfer; 22 are slated for prosecution but no charges have yet been filed; seven are currently facing trial by military commission; 26 are being held in law of war detention with no public plans for prosecution; and three, who were convicted by a military commission, are being held pursuant to their sentences.⁶

Hold Periodic Review Board hearings

President Obama established the Periodic Review Boards, or PRBs, by executive order in March 2011.⁷ The PRBs were tasked with making an ongoing assessment of the necessity of continued detention for those Guantanamo detainees who were in the law of war or prosecution categories but had not been charged. These reviews only examine whether

continued detention under the law of war is warranted for a particular detainee and are not designed to make recommendations about the potential viability of prosecution either in federal courts or military commissions. The executive order called for each detainee to have a PRB case review within one year and then at least one subsequent review every three years thereafter. As originally contemplated, each Guantanamo detainee would have had their case reviewed for possible recategorization and clearance for transfer at least twice by now. But only 19 cases have been completed, and seven more are pending.⁸

The slow pace of the PRB process has been among the most inexplicable aspects of the Obama administration's efforts to close Guantanamo. The PRB process is entirely within the control of the executive branch. The process is run by the Department of Defense and consists of a review panel comprised of representatives of the departments of Defense, Justice, Homeland Security, and State; the Office of the Director of National Intelligence; and the Joint Chiefs of Staff. And it has produced results: 13 of the 19 hearings held to date resulted in approval to transfer, and three of the six applications that were initially rejected were approved on a subsequent review. In all, 16 of the 19 decided cases determined that the detainee could be safely transferred out of Guantanamo.⁹

President Obama should direct the secretary of defense to make necessary provisions to ensure that all eligible Guantanamo detainees have a PRB hearing by July 1, 2016. It is necessary to allow approximately six months before the end of the Obama administration in order to have enough time before President Obama leaves office to reach a resolution in these cases and arrange transfers for any detainees cleared by the PRBs. Of the remaining 91 detainees, 33 have already been cleared for transfer and do not require a PRB. Ten detainees who have either already been convicted in or are facing military commission trials should not be prioritized for PRBs. Of the remaining 48, 7 detainees are awaiting the final decision in their PRBs and 3 have already had a PRB hearing that resulted in recommended continued law of war detention.¹⁰

That leaves 38 detainees. Conducting a PRB for each of them by the July 1 deadline clearly would be a massive increase in the rate of hearings to date, but it should not be an insurmountable task for an administration that insists that it is committed to closing Guantanamo during President Obama's term in office "or die trying."¹¹ As of now, only four more PRBs are scheduled—and only one is scheduled in the entire month of February.

Accelerate foreign transfers

The overriding concern going into the most recent congressional debate about Guantanamo provisions in the 2016 National Defense Authorization Act, or NDAA, was that the now Republican-controlled Congress would enact more severe transfer restrictions than it had in 2014. This would have made it impossible to move detainees out of Guantanamo. Several Republican senators introduced legislation early in 2015 that was intended to do just that.¹² And early versions of the fiscal year 2016 NDAA did include language that would have required the secretary of defense to "ensure that" any country

receiving a Guantanamo detainee prevent that detainee from threatening the United States or engaging in terrorist activity.¹³ That standard was deemed virtually impossible to meet when it was in effect between 2011 and 2014 and was the primary cause of the virtual shutdown of transfers during that period.¹⁴

In the final 2016 NDAA enacted in December, however, the foreign transfer provisions were modified to require only certification that receiving countries “substantially mitigate” any threat posed by Guantanamo detainees.¹⁵ Thus, the FY 2016 bill basically preserved the FY 2015 status quo on conditions on transfers—although it added absolute transfer bans for a few specific countries. The Obama administration has already transferred 16 detainees under these new requirements.

Those transfers will be welcome, but there would still be 33 detainees already cleared for transfer who were still in detention and many more likely added to that category through the PRB process. We have seen bursts of transfer activity in the past, such as the 27 detainees moved out of Guantanamo in 10 weeks from November 2014 through January 2015.¹⁶ But only 13 more transfers followed that spike in the next 11 months of 2015.¹⁷ If there is any hope of closing Guantanamo before President Obama leaves office, the pace of transfers expected this month must continue throughout the year.

Instruct the Department of Justice to review potential criminal charges against the uncleared detainees as soon as possible

The congressional ban on transfers of Guantanamo detainees to the United States has cut off the most effective venue to prosecute suspected terrorists. Foreign terrorist suspects captured overseas have been brought to the United States for trial with relative frequency throughout the Obama administration with none of the controversy associated with Guantanamo detainees. Two recent high-profile examples are the conviction of Osama bin Laden’s son-in-law in New York and the ongoing prosecution in Virginia of the alleged ringleader of the Benghazi attack.¹⁸

The one former Guantanamo detainee brought to trial in a federal court, Ahmed Ghailani, was convicted and is now serving a life sentence in a U.S. prison for his role in the 1998 East African Embassy bombings.¹⁹ But no other detainees have been brought to trial since the 2010 congressional ban. The Obama administration should instruct the Department of Justice to immediately review any potential criminal charges which could be brought against Guantanamo detainees not currently designated for transfer either by the 2010 task force determination or a PRB.

Bringing such charges in federal court is a much better path to potentially overcome the U.S. transfer ban than doing so by unilateral executive action. Once charges are filed, the government could ask the judge to order the defendant to be brought into the United States to face the charges against him. The indicted Guantanamo detainee would be entitled to agree or object to such a transfer. The federal judge would have to decide on the

lawfulness of the transfer ban in a specific case where the government wants to prosecute a defendant in U.S. custody, who could otherwise not be prosecuted and would have to be released at the end of the conflict consistent with the law of war.

Pursue agreement with affected countries for other prosecutions

Seeking judicial action to bring Guantanamo detainees into the United States to stand trial might not succeed. In preparation for that possibility, the Obama administration should also immediately begin negotiations on the possibility of transferring some Guantanamo detainees to stand trial in other countries. The most likely candidate would be Riduan Isamuddin, better known as Hambali. He is an Indonesian associated with both Jamaat Islamiyya and Al Qaeda and is believed to be responsible for a series of deadly bombings in Southeast Asia, including the 2002 Bali bombing that killed more than 200 people, including 9 Americans.²⁰

It would be preferable, of course, for American justice to be rendered on the murder of nine Americans. But the U.S. transfer ban may prevent a trial in a U.S. court, and the Guantanamo military commissions are so hopelessly bogged down in the cases they are already handling that expecting another trial in that forum may be foolish.

But if Congress prevents a U.S. trial, justice for the victims of these attacks need not be denied forever. There are at least two possible countries that might prosecute Hambali—Indonesia or Australia. Indonesia is his country of nationality and Bali the location of the deadliest of his alleged attacks. And 88 Australians were killed in that attack, more than any other nationality.²¹

Two other associates of Hambali are also held at Guantanamo. They were captured in Thailand in 2003 by Thai authorities and then transferred into U.S. custody.²² It is possible that these two also could be prosecuted for their actions in countries with jurisdiction over their alleged crimes. There are a handful of other detainees captured far from the battlefields in Afghanistan that also could be candidates for third country prosecution.

Transfer Afghan War detainees to Afghan custody

Even if all of the options outlined above are successful over the course of the year, it is virtually certain that at least some detainees will remain in law of war detention. These detainees will not be candidates for prosecution in any forum nor for resettlement in other countries through the traditional transfer process. If the prohibition on transfer to the United States remains in effect, the Obama administration should begin negotiations with the Afghan government to transfer to its custody those Guantanamo detainees captured in connection with the Afghanistan War. Doing so would be consistent with current U.S. policy in Afghanistan regarding detention.

While this option has not been publicly discussed, it is only the peculiarity of Guantanamo itself that makes it seem unusual. If the Bush administration had not chosen to remove these detainees from the “Af-Pak” theater in which they were captured when Guantanamo was created, mostly in 2002 and 2003, then these detainees never would have left at all. Transfers to Guantanamo slowed markedly in the mid-2000s, and most individuals detained by U.S. forces in the Af-Pak theater were in fact kept in detention there.

In 2012, the United States entered into a memorandum of understanding with the government of Afghanistan to transfer control of all U.S. detention facilities and custody of all U.S.-held detainees in Afghanistan.²³ Non-Afghan detainees held in Afghanistan by the United States, so-called third country nationals, became a sticking point in the negotiations over the transfers of facilities and custody.²⁴ This was ultimately resolved with an additional agreement negotiated in 2014 as part of the U.S.-Afghanistan Bilateral Security Agreement.²⁵ In that agreement, Afghanistan committed to a process to review periodically the cases of those detainees held in law of war detention and make its detention regime consistent with international humanitarian law and all of Afghanistan’s international obligations “with respect to humane treatment and applicable due process.”

Pursuant to that agreement, all Afghan and third country national detainees held by the United States in Afghanistan were transferred to Afghan custody by December 2014. In essence, transferring detainees to the Afghan government who were captured in connection with the war in Afghanistan but held in Guantanamo, and who will not be prosecuted, would complete the policy process begun with the 2012 memorandum of understanding.²⁶

The Obama administration may have considered this option in the past and rejected it given the often fraught relationship with the previous Afghan president, Hamid Karzai, particularly around the issue of detention. The United States enjoys a much stronger working relationship with new Afghan President Ashraf Ghani. And the Obama administration has increased leverage with its Afghan counterparts after delaying the draw-down of U.S. troops in Afghanistan in 2015 after a direct appeal from President Ghani.

Transferring third country nationals back to Afghanistan likely would generate criticism. It is vital that any such transfers be consistent with all obligations under international law. They could not proceed unless it is absolutely clear that the detainees will not be mistreated in Afghan custody. But any other concerns must be weighed against the real prospect that if President Obama fails to close Guantanamo, these detainees will be stuck in Guantanamo for years to come, and there may very well be new detainees sent there as well. At this juncture, the pathway for resolving the cases of law of war detainees transferred to Afghanistan is clearer than it is for any who might be left at Guantanamo.

Conclusion

It is easy to be pessimistic about the prospects for closing Guantanamo during the Obama administration. Positions have hardened on all sides, seemingly insurmountable obstacles are in the path of closure, and the debate has gone stale. What is needed now is fresh thinking and new energy behind the goal of closing Guantanamo. One year is still a long time. Alternatives to the current standoff do exist. Guantanamo's 15th year can be its last.

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Endnotes

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