

Signing Away Guantanamo Bay: The Practical Difficulties

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Kenneth Damien argues Guantanamo Bay has come to personify a disregard for the very rule of law its detainees are accused of threatening.

Just two days after taking office, President Obama signed an executive order closing Guantanamo Bay. The detention camp which has been used since January 2002 for the operations that made it infamous will be closed within the year. The U.S. will be able to regain some of its credibility lost by the Bush administration's approach to this issue. However, anyone assuming closing Guantanamo truly concludes the chapter on this saga in U.S. history will be sorely disappointed. In theory, closing the facility is a procedure that merits quick and efficient execution. However, in reality, closing Guantanamo Bay is likely to create a legal and political quagmire. As Vijay Padmanabhan remarks, 'after the signature that's when you face difficulties'.¹

Old Dog; New Tricks

Of all the painful comparisons that have been pinned on the facility perhaps the most uncomfortable is the notion of recurrence. Guantanamo inmates, much like the predicament of over 100,000 Japanese in America during the Second World War, are interned at a secure facility without any explanation or access to a courtroom. There are, however, some discrepancies. During World War Two, those detained were deemed 'enemy combatants' and detained under a pretence of combat, rather than 'terrorists'. Moreover, of the Japanese interned, 62% were US citizens.² Nonetheless, in both cases, 'national security' took precedence over 'personal freedoms'.

This becomes even more apparent when brought under the harsh judicial light of the infamous case of *Korematsu v. United States*. The internment of Fred Korematsu, a U.S. born Japanese American, in a camp along the West Coast was held to be constitutional.³ Although it remained controversial the case was never officially overturned and in some ways Guantanamo indicates a recurrence of *Korematsu*. Indeed, in 2004 Fred Korematsu filed an *amicus curiae* brief in the case of *Rasul v. Bush*⁴ stating 'The extreme nature of the government's position in these cases is reminiscent of past episodes, in which the United States too quickly sacrificed civil liberties in the rush to accommodate overbroad claims of military necessity'.⁵ In attempting to reverse the predicament of Guantanamo and signalling a shift away from such institutional attitudes, the new administration will face host of new challenges.

¹ Time Magazine, Thursday, Jan. 22, 2009: Bobby Ghosh, Obama Orders Gitmo Closed - Now the Hard Part. Vijay Padmanabhan is former counsel on detainee issues to the State Department.

² Semiannual Report of the War Relocation Authority, for the period January 1 to June 30, 1946

³ 323 U.S. 214 (1944)

⁴ 542 U.S. 466 (2004)

⁵ 'Brief of Amicus Curiae Fred Korematsu in Support of Petitioners', p.2 Oct term 2003, Nos. 03-334 & 03-343



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Guantanamo Bay: The 'detainees'

Broadly speaking, the 250 inmates still held (from a peak of some 700) can be split into three categories. The first of these are those whom sufficient evidence cannot be brought to press war-crime charges. The 60-70 that fall within this group are likely to face military tribunals, if not their trial will be suspended to another date fixed by the President. Then there are those, numbering approximately 50-60, who have been cleared of all charges but cannot be sent home for a myriad of different reasons. In some cases it is a fear that, ironically, they will be mistreated in their home states. For others, it is a simple trust issue: the U.S. fears the detainees may (re)join extremist groups or they will be repatriated to countries whose governments cannot be expected to monitor them. The final group of more than 100 detainees are considered simply too risky to release but against whom there is no evidence to prosecute.⁶

Reading this, it becomes apparent that only a minority of detainees have a legitimate reason to be there. Furthermore, Guantanamo would have collapsed long ago had there not been a 'legal black hole'. In many ways Guantanamo represented a blunt solution in dealing with a complex range of different groups. It is true the facility houses people like Khalid Sheikh Mohammed, a key player in 9/11 attacks. However, its inmates also include 17 Uighur dissidents from China, who even the Pentagon has admitted present little threat to the U.S.⁷

Review, Trial and Relocation

The closure of the facility is not without its critics. Dick Cheney stated that 'closing Guantanamo makes terror attacks more likely' but we are more concerned here with the pragmatic issues. According to Peter Hoekstra a high ranking Republican in the House Intelligence Committee, the decision to close Guantanamo "places hope ahead of reality — it sets an objective without a plan to get there." This has left some asking whether the plan should come before the action. However, any delay in favour of a concrete 'plan' to close the facility seems likely to be caught in the net of political wrangling, leaving the issue in legal limbo. Nonetheless, as Robert Guest of the Economist stated: 'loading prisoners on a plane will be one thing. Figuring out what to do with them next will be anything but.'⁸ The U.S. will have to relocate those that cannot be charged as well as figure out how and where to try those they can. Neither of these will be easy.

Reviewing the cases of all remaining detainees will be the first step in a three month plan. Eric Holder, the U.S. attorney General and Robert Gates, The Secretary of Defence; will spearhead the task force to review cases for federal court prosecutions, perform individualised risk assessments and separate those who will be tried and those who will be resettled. However, each group has its own set of problems.

Plans have been made to send a number of detainees to other countries that have been swayed by the international goodwill generated by President Obama's election campaign. Spain and Canada, for example, have evinced a willingness to take on a 'limited number' of inmates. However, this cannot be depended upon indefinitely. Obama will have to diplomatically acute in negotiating with other states to take on detainees. Resettling some of them in the U.S. seems likely – 'not least

⁶ Figures from 'Human Rights First: How to Close Guantanamo, Nov 2008.' ; 'Robert Guest, Goodbye Guantanamo - The Economist : The World in 2009' and

⁷ Time Magazine, Thursday, Jan. 22, 2009: Bobby Ghosh, Obama Orders Gitmo Closed - Now the Hard Part.

⁸ 'Robert Guest, Goodbye Guantanamo - The Economist : The World in 2009'

because it would encourage other countries to do the same'. However, there has been considerable domestic resistance after Fort Leavenworth was suggested as a possible relocation point. The solution is likely to centre on a combination of US relocation and a foreign diplomatic stratagem fostering international cooperation.

Such issues are likely to overlap with the trial of many detainees. It is likely that large number will not be tried in the U.S. due to the manner of their treatment and arrest not meeting the standards of a federal court. There will also be important legal issues at stake. What of those who confessed under torture? It is possible with such evidence being inadmissible that certain individuals would only be tried on lesser charges. Although this is likely to draw strong criticism, it will be a necessary political sacrifice if the Obama administration is serious about revoking the institutional attitude of the previous administration, to an issue as serious as torture. However, for the spectre of Guantanamo to be extinguished, detainees deemed by the Attorney General should be brought before a federal court. Human Rights First in a report on closing Guantanamo has reiterated that detainees who can be tried in their home countries should be, even 'if they cannot be properly tried for crimes against the United States.'⁹

Piece of the Puzzle: Guantanamo and the Wider War on Terror

It is evident there is a need to shift away from symbolism to pragmatism. Guantanamo has in many ways come to personify the previous administration failed strategy on the complex problem of terrorism. The resulting Global War on Terror has been 'strategically unfocused, promises much more than it can deliver and threatens to dissipate ...scarce means over many ends'.¹⁰ In a similar fashion, Guantanamo Bay was intended as a symbolic deterrence and efficient solution. Instead, it has become the personification of a disregard for the very rule of law the detainees themselves were accused of threatening. The closure of Guantanamo, just like its existence, is no more than a symbol. It is precisely for this reason that the when should follow the how rather than vice versa, despite the complexities of the latter.

⁹ 'Human Rights First : How to Close Guantanamo, Nov 2008.' p.2

¹⁰ Record, Bounding the Global War on Terror(2003)