

# The Detainee Dilemma

The U.S. Debate about the Release of Prisoners from Guantanamo Bay

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Ever since President Obama announced that the detention camp at Guantanamo Bay would be closed by 22 January 2010, there has been controversy in the U.S. about what to do with the remaining 229 detainees. Because the President announced the decision to close the camp by executive order without giving any details about its implementation, Congress has been increasingly questioning his plan. The Republicans are using the issue to accuse Obama of weakness in the fight against terrorism. But even the Democrats have conditioned their support of the new policy on Obama's providing a comprehensive strategy for how to deal with the prisoners. This has created a situation in which the plan to close the prison and deal with the detainees in accordance with the rule of law also depends on Obama's obtaining international support for the placement of the detainees.

On his second day in office, Obama issued an executive order to close the detention camp on the U.S. Naval Base at Guantanamo Bay, Cuba, within a year. Consistent with prohibiting the use of aggressive interrogation techniques, Obama demonstrated his determination to end his predecessor's arbitrary practice with respect to the treatment of terror suspects (see SWP Comments 2005/C 12). On 21 May 2009, the President explained his motives in a speech on national security. He criticized the initial idea of establishing a detention center outside the territory of the United States so that it would be beyond the reach of U.S. law, and emphasized that any solution to the Guantanamo problem had to comply with the rule of law and due process.

However, Obama's comments about the fate of the detainees remained rather vague. He said that one group of detainees would face American justice. In cases that concern criminal charges, detainees could be brought to the U.S. to be tried in the federal courts. If the cases involved violations of the laws of war or where the protection of sensitive sources was an issue, prisoners trials could be carried out by military commissions. Another group of detainees could not be prosecuted because the evidence against them is insufficient to press charges or inadmissible because it was obtained through coercion. For this group, Obama reserved the possibility of a regime of preventive detention on the basis of clear legal standards and with periodic judicial review.

The third group of detainees consists of those who have been cleared of terrorist charges, either by a court ruling or because the U.S. government has determined that they do not pose a danger. In his speech, Obama avoided any specifics about what will happen with this group of detainees.

The issue of what to do with these detainees remains unsolved. Most of them would be threatened by arrest, torture, or execution, if they were turned over to their home countries. Thus, humanitarian and international legal concerns are an obstacle to their return.

### **The Debate in the Public and Congress**

Obama's commitment to a specific date for the closure without a plan for its implementation has received some significant opposition within the United States. Shaken by crisis, the Republican Party has seized the issue of Guantanamo to accuse the President of being weak and naïve in the fight against terrorism. They were backed up by former Vice-President Cheney. On 21 May 2009 Cheney gave a speech, defending the policies of the Bush administration, including the establishment of the prison in Cuba and the secret program of enhanced interrogation techniques. Cheney used strong words to charge Obama with undermining the policies that have kept America safe, an unprecedented move for a member of the previous administration. In a number of media appearances, other members of the Bush administration and conservative commentators, such as Karl Rove, William Kristol and Charles Krauthammer, adopted Cheney's reasoning and argued against the closure of Guantanamo.

The political right does not share the view that Guantanamo is harmful to America's security interests. Conservative senators, such as Jon Kyl, believe that the argument that Guantanamo fosters anti-Americanism and serves as a recruitment tool for terrorist is evidence of a "blame America first" mentality among liberals.

The public perception in the United States is influenced by the Bush administration's repeated claim that the population of Guantanamo inmates consisted only of the "worst of the worst". However, even over the course of Bush's second term, a large number of detainees were transferred to their countries of origin, reducing the number of detainees from more than 700 to fewer than 300. Still, according to a *U.S.A. Today/Gallup* from the end of March 2009, two-thirds of Americans are now opposed to the closure of Guantanamo and the transfer of detainees to American prisons.

A number of bills intended to prevent detainees from being transferred have been introduced in Congress. By using its budget power or passing specific laws, the legislative branch can restrict the Obama administration's range of policy choices. More than 20 Republicans, including minority leader John Boehner, have introduced a bill that would require the approval of the relevant State governor and legislature before a transfer of detainees from Guantanamo Bay to the United States. A clear bipartisan majority in both houses has voted to refuse an USD 80 million budget request by the administration for the closure of Guantanamo as part of the supplemental defense appropriations bill. The amendment to strip the funding from the emergency budget was adopted with 90 votes in favor, and only six Democrats voting to support the President's request. Both the Republican minority leader Mitch McConnell and the Democratic majority leader Harry Reid conditioned any funding on a comprehensive strategy for closing Guantanamo. Senator Reid emphasized that the Democrats would not permit the release of terrorists into the United States under any circumstances. Democrats have also opposed the release of a group of Uighurs, who cannot be turned over to their native China because of the risk that they would be executed. Even though an American court has already ordered their release, the majority – apart from four former inmates that have been accepted by

the Pacific island of Palau – remain detained since no country willing to accept them has been found. The Democrat Jim Webb, member of both the Senate Foreign Relations and the Armed Services Committees has explicitly opposed the release of the Uighurs into the United States. Another obstacle is posed by the “Real ID Act” of 2005, which prohibits anyone affiliated with terrorist activity from entering and living in the United States. In particular, the Uighurs would be affected under a section of the law, which excludes anyone who has received military-type training from a terrorist organization.

Obama continues to advocate the transfer of detainees to American prisons. However, in light of the legal obstacles and faced with Congressional opposition, he has all but abandoned his initial plan to set free in the United States detainees who have been cleared of terrorist charges.

### **The Role of the Europeans**

As long as Obama is left without the option of releasing detainees into the United States, his administration is dependent on the support of its allies. Therefore, Obama has appointed Daniel Fried, an experienced diplomat, to convince other countries to admit freed inmates. The search for countries willing to accept detainees is global, but Washington hopes for support from its European allies in particular. On 15 June 2009, the United States and the European Union issued a “Joint Statement on [the] Closure of Guantanamo Bay and Future Counterterrorism Cooperation”. The statement emphasizes that the primary responsibility for finding residences for the former detainees rests with the United States. At the same time, however, European nations have expressed their readiness to assist Washington in its effort to close the prison camp in compliance with the rule of law and international legal obligations. Specific decisions regarding the acceptance of detainees are the responsibility of the receiving country and will be made on a case-by-

case basis, coordinating with other members of the Schengen group.

So far the willingness of Europeans to accept detainees has been limited. The German government has assured the U.S. administration of its general support, most recently on 26 June when Chancellor Merkel visited Washington. However, specific requests have so far been rejected, citing a concern that the information about the detainees provided by the U.S. has been insufficient.

### **A Problem of American Credibility**

The reluctance by European states is understandable, given the risks and costs of accepting detainees. There are security concerns, since there is no guarantee against future terrorist activity, even if detainees have been cleared of terrorist charges. In addition, social welfare, medical and psychological assistance and possible surveillance by security agencies will come with a price. While the joint statement mentions Washington’s willingness to consider contributing to the costs related to the reception of detainees, it is difficult to assess the long-term burden.

However, the bigger problem is the fact that the U.S. itself is unwilling to receive released detainees while it expects its allies to do so. This presents the American negotiators with a credibility problem. The U.S. did not consult its European allies before establishing the prison camp at Guantanamo and ignored warnings about the negative consequences of creating a legal vacuum. Therefore, the dilemma of where to place released detainees is primarily a U.S. problem. It is difficult for the U.S. to explain or justify a policy which passes the burden of closing Guantanamo on to its allies. According to media reports, Europe is only willing to accept larger numbers of detainees if the U.S. shares in this commitment.

## Negative Consequences of Stalling

The Obama administration is faced with a difficult predicament. Congress is demanding a comprehensive plan for the placement of detainees. Yet at the same time, some members of Congress are blocking the release of detainees into the United States, ostensibly a key component of any comprehensive plan. This in turn, forces the President to explore options which transfer the burden of hosting detainees to America's allies. Their willingness to accept detainees, however, depends on America's own willingness to do the same.

If Obama does not find a way out of this dilemma, one of two scenarios seems likely. It is possible that his ambitious agenda for closing Guantanamo within a year of taking office cannot be realized. His early announcement, which was intended as a clear signal of a paradigm shift in American foreign policy, could backfire. The failure to close Guantanamo would cause America's image in the world, which has already suffered greatly under the Bush administration, to further deteriorate and reaffirm those who had criticized Obama's idealist goals to return to the rule of law as naive. Even under Democratic leadership, Congress seems to be willing to accept such a development.

The other likely scenario is that the U.S. government will increasingly rely on diplomatic guarantees of "safety" to transfer detainees to countries with problematic human rights records. The transfer of persons to countries where they are at risk of being tortured would not only be a violation of the United Nations Convention against Torture, it could also lead to a situation, in which Guantanamo appeared as the lesser evil.

Obama's clear break with the detainee treatment policies of the previous eight years and his commitment to human rights and the rule of law have been welcomed in Europe. European governments would be well-advised to consider what effect their different policy options will have on American strategy in dealing with Guantanamo.

When faced with American requests to accept detainees, stalling may be legitimate and understandable given the costs and risks involved. But it would undermine the political forces in the U.S., whose political preferences are in line with the declared goals of the European Union.

The question of whether or not to accept detainees is not just about the fate of the remaining prisoners. At stake is Obama's agenda of a clear break from the Bush administration's policies of mistreating detainees, of which the prison camp in Cuba was only the most visible symbol. A refusal to accept detainees might have the unintended consequence of discouraging policy-makers from steering the U.S. towards policies that comport with the norms of international law.

Given Obama's difficulty finding a solution to the detainee dilemma, there are three general arguments for a stronger European commitment to accepting detainees (regardless of the specific decision in individual cases):

- ▶ A constructive contribution to closing Guantanamo would be in accordance with a foreign policy based on human rights.
- ▶ A commitment to burden-sharing would enhance Europe's position as a serious partner in the fight against terrorism.
- ▶ By supporting those in the American debate with a clear commitment to human rights, Europe contributes to a stronger transatlantic relationship on the basis of common values.

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