

Closing Guantanamo

Does the prison hinder the fight against terrorism?

President Obama has tried for years to close the U.S. military-run detention facility at Guantanamo Bay, Cuba, and incarcerate terrorism suspects in the United States. Critics of Guantanamo say it serves as a potent propaganda tool for the Islamic State, which makes the prisoners it captures wear orange jumpsuits nearly identical to those worn by Guantanamo inmates. But Republicans and some Democrats have fought to keep the facility open, contending that transferring detainees to U.S. soil would be dangerous. The prison has drawn the opposition of many U.S. allies, who cite allegations of torture there. Democratic presidential nominee Hillary Clinton wants to close the prison, while Republican nominee Donald Trump vows to expand its use. The Obama administration has stopped sending new prisoners to Guantanamo and is steadily reducing the population — now 61 inmates — by transferring detainees to the custody of U.S. allies. National security analysts say the Guantanamo controversy underscores the need to reform how suspects captured in the terrorism fight are tried in court.



Critics of the Guantanamo Bay detention facility protest at the White House on March 11, 2016. Democratic presidential candidate Hillary Clinton says she will continue President Obama's efforts to close the 14-year-old prison for terrorism suspects; Republican nominee Donald Trump wants to expand its use.

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EXECUTIVE EDITOR: Thomas J. Billitteri
tjb@sagepub.com

ASSISTANT MANAGING EDITORS: Kenneth Fireman, kenneth.fireman@sagepub.com,
Kathy Koch, kathy.koch@sagepub.com,
Chuck McCutcheon,
chuck.mccutcheon@sagepub.com,
Scott Rohrer, scott.rohrer@sagepub.com

SENIOR CONTRIBUTING EDITOR:
Thomas J. Colin
tom.colin@sagepub.com

CONTRIBUTING WRITERS: Marcia Clemmitt,
Sarah Glazer, Kenneth Jost, Reed Karaim,
Peter Katel, Barbara Mantel, Tom Price

SENIOR PROJECT EDITOR: Olu B. Davis

EDITORIAL ASSISTANT: Anika Reed

FACT CHECKERS: Eva P. Dasher,
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Closing Guantanamo

BY PATRICK MARSHALL

THE ISSUES

When the Islamic State (ISIS) executes captives, it forces them to wear orange jumpsuits nearly identical to those worn by suspected terrorists held at the U.S. military prison at Guantanamo Bay, Cuba.¹

Critics of the controversial facility say it is a reviled worldwide symbol of inhumane treatment and a recruiting tool for terrorists. ISIS, they say, uses the orange jumpsuits to invoke Guantanamo and incite its followers.²

The critics have an important ally. President Obama, along with many Democrats and some top military officials, say the prison not only fails to advance national security but also undermines it.

“Guantanamo harms our partnerships with allies and other countries whose cooperation we need against terrorism,” Obama said in February. “When I talk to other world leaders, they bring up the fact that Guantanamo is not resolved.”³

In one of his first acts as president, Obama issued an executive order to close the prison, part of a 45-square-mile naval base at Cuba’s southeastern end.⁴ But almost eight years later, as Obama’s second term winds down, the prison remains open because of a bitter standoff between the White House and the Republican-controlled Congress.

Republicans — and some Democrats — oppose closure, arguing that Guantanamo inmates would pose a security risk if transferred to prisons on U.S. soil or to other countries. Some prominent Republicans also accuse Obama of failing to work with them on finding a workable alternative to the prison.



Military police bring a Taliban prisoner to Camp X-Ray, the first detention facility at Guantanamo Bay, in 2002. The small compound of tents and open-air cages was replaced soon after it opened by Camp Delta, which includes several camps for detainees of varying risks, recreation rooms, a soccer area, a hospital and courtroom facilities.

Getty Images/The LIFE Images Collection/Shane McCoy

The presidential election is unlikely to resolve the stalemate. Democratic nominee Hillary Clinton has vowed to close the Guantanamo prison, while Republican nominee Donald Trump has promised to keep it open and “load it up with some bad dudes.”⁵ Trump also promised earlier this year to use waterboarding and other interrogation methods regarded as torture on terrorism suspects, but later said he would follow international law, which outlaws torture.⁶

With Congress and the White House at loggerheads, the prison remains in limbo. The Obama administration has stopped sending new terrorism suspects

to Guantanamo and is steadily reducing the prison population. Detainees deemed not dangerous by a review panel are being transferred to other countries, with the largest numbers being sent to Afghanistan, Saudi Arabia and Pakistan. (See graphic, p. 797.) In August, the Pentagon announced the largest single transfer during the Obama years: 15 prisoners to the United Arab Emirates (UAE).

Of the roughly 780 people who have been held at the prison since it opened in 2002, 710 have been transferred to other countries, nine detainees have died while in custody and 61 remain.⁷ Of those sent to other countries, 214 are known or suspected to have returned to terrorist or insurgent activities.⁸

Naureen Shah, Amnesty International USA’s director of national security and human rights, said the recent transfers to the UAE were a “powerful sign that President Obama is serious about closing Guantanamo before he leaves office.”⁹ But Rep. Ed

Royce, a California Republican who chairs the House Foreign Affairs Committee, called the transferred detainees “hardened terrorists” who should have remained at Guantanamo.¹⁰

The American public is divided on closing the prison. According to a CNN/ORC International survey conducted at the end of February, 56 percent of respondents opposed Obama’s efforts to close the prison, and 40 percent backed the idea.¹¹ The division is sharply along party lines, with 83 percent of those identifying as Republicans opposed to shutting down the prison compared with 63 percent of Democrats who supported closure.

Guantanamo Base Has 113-Year History

The U.S. military base at Guantanamo Bay sits on 45 square miles of land leased from Cuba in 1903 as a Navy coal-fueling station. The base, which shares a 17-mile border with Cuba, now includes military housing, schools, stores and recreational areas, as well as support facilities for the Department of Homeland Security. Guantanamo's prison facilities have housed suspected terrorists since 2002. President Obama has sought to shut the prison since taking office in 2009, but Republicans and some Democrats have resisted.



Source: Commander, Navy Installations Command, "Naval Station Guantanamo Bay," <http://tinyurl.com/gmq5jul>; "Guantanamo Bay Naval Station Fast Facts," CNN, Aug. 19, 2016, <http://tinyurl.com/pywr4de>

Public opinion has shifted significantly since 2009, when a CNN/ORC poll found that 51 percent of respondents favored closing the prison.¹²

When the detention center opened in January 2002, prisoners were first held in Camp X-Ray, a small compound of tents and open-air cages. By April 2002, Camp Delta — which includes six "camps" to house detainees of varying security risk, as well as recreation rooms, soccer areas, hospital and courtroom facilities — was opened and Camp X-Ray was closed.¹³

Despite the improvements, attorneys for detainees say prisoners have suffered abuse — including cold cells, isolation and sleep deprivation — as

well as the use of torture during interrogations. The government has not acknowledged the extent and duration of torture in interrogations, including waterboarding. But according to a report released by the Senate Select Committee on Intelligence in April 2014, the CIA employed "enhanced interrogation techniques" at a secret detention site at Guantanamo.¹⁴

Critics on the left, as well as a few on the right, say Obama should have moved to close the prison during his first two years in office, when Democrats controlled both chambers of Congress and had more political leverage against Republican opponents.

"They blew it," says Charles "Cully" Stimson, deputy assistant secretary of Defense for detainee affairs in President George W. Bush's administration who is now manager of the national security law program at the conservative Heritage Foundation think tank in Washington. "They blew the opportunity to close it in a responsible way in 2009, and then they lost both the House and Senate."

Since then, with Republicans controlling one or both chambers, "President Obama has been unwilling to stand up to Congress," says J. Wells Dixon, a senior staff attorney at the Center for Constitutional Rights, a Washington-based human rights advocacy group that backs the prison's closure.

Obama himself has expressed reservations about not acting sooner. When a seventh-grade student in Cleveland asked him last March what advice he would give himself if he could start his presidency over, Obama replied, "I think I would have closed Guantanamo on the first day." As the issue became a political hot potato in Congress, he said, "the path of least resistance was just to leave it open."¹⁵

After winning control of the House in the 2010 midterm elections, Republicans banned using federal funds to transfer Guantanamo detainees to the United States for any reason. An additional provision barred the Pentagon from using federal funds to build or modify any facility for Guantanamo detainees anywhere but at Guantanamo.¹⁶

Supporters of the provisions, which remain in force, generally cite security as their primary concern. "President Obama's determination to move some of the world's most dangerous terrorists to U.S. soil is inexplicable and unacceptable," House Intelligence Committee Chairman Devin Nunes, R-Calif., said after Obama asked Congress to remove the provisions last February.¹⁷

But it is not just Republicans who oppose housing Guantanamo detainees on the mainland. Some Democrats do too, even when they support closing

the prison. Sen. Michael Bennet, D-Colo., approves bringing the detainees to the states but opposes an administration proposal to convert a high security prison in Colorado into a detention facility for Guantanamo detainees. “I’ve voted to close the prison, but I believe military detainees should be held in military prisons,” Bennet said. “Colorado does not have that type of facility. This plan [of Obama’s] has done nothing to change my mind.”¹⁸

At the same time, however, some experts note that many high-level terrorists have long been imprisoned on U.S. soil without incident. As of April 2016, 443 convicted terrorists were in federal prisons in the continental United States, far more than the 61 detainees at Guantanamo.¹⁹

One implication of Congress’ ban on bringing detainees to U.S. soil is that they cannot be tried in federal courts. Instead, they must face Guantanamo-based military commissions — tribunals of military officers used to prosecute detainees captured in the fight against terrorism.²⁰ However, Thomas Pickering, a former U.S. ambassador to the United Nations, says those commissions have proven “woefully inadequate” because of questions about fairness and the slowness of deliberations. Only eight prisoners have been convicted by military commissions, and four of those convictions were overturned on appeal. In contrast, hundreds of terrorists have been convicted in federal courts.²¹

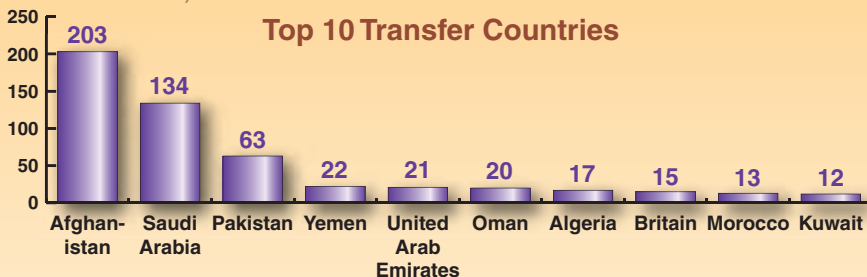
With political gridlock over Guantanamo continuing, Obama has pushed for changes in the military commissions that would speed up deliberations. But that idea has drawn heavy criticism from congressional Republicans, as well as some human rights groups, because of fears it would compromise the quality of the proceedings.

As experts and policy makers consider closing Guantanamo prison, here are some of the questions they are asking:

Afghanistan Takes the Most Detainees

The United States has transferred about 710 Guantanamo Bay detainees to 59 countries since the prison opened in 2002. The largest number of prisoners transferred — about a third of the total — has gone to Afghanistan and Saudi Arabia. Sixty-one inmates remain at Guantanamo.

(No. of Guantanamo Inmates Transferred)



Source: “The Guantánamo Docket: Transfer Countries,” The New York Times, <http://tinyurl.com/jgw765m>

Is keeping Guantanamo open helping to fuel global terrorism?

Obama is not alone in arguing that the detention facility at Guantanamo incites terrorists abroad.

“Guantanamo continues to be a potent symbol of American injustice worldwide,” says Alberto Mora, former general counsel of the Navy and a senior fellow at Harvard University’s Carr Center for Human Rights. He says the history of human rights violations at Guantanamo is a “strategic gift that has been provided to our adversaries in terms of messaging and recruiting.”

Rep. Jackie Speier, D-Calif., a member of the House Armed Services Committee, called the prison “an injurious symbol” that to many people represents “a manifestation of lawless abuse” and “fuels twisted ideological propaganda.”²²

That abuse, critics of the prison say, refers to the treatment inmates received in the facility’s early years and to the imprisoning of detainees without charges. For example, only seven of the 61 remaining detainees at Guantanamo Bay have been charged with a crime, leaving the others in legal limbo. Such treatment contributes to Guantanamo’s bad reputation and in-

flames radical elements in the Mideast and elsewhere, Speier and others say.

Other experts and politicians, however, say the prison has little or no impact on the activities of terrorists.

Rep. Vicky Hartzler, R-Mo., another House Armed Services member, said the same terrorist groups were targeting Americans before the Guantanamo prison was opened. The Taliban, for example, had established its regime in Afghanistan in 1996 and al Qaeda had bombed the *USS Cole* in 2000 as well as carried out the Sept. 11 attacks on New York City and Washington a year later, she noted.

“Indeed, it was because of the death and destruction caused by these terrorists that [Guantanamo] came into being,” Hartzler said.²³

David B. Rivkin Jr., a senior fellow at the Foundation for Defense of Democracies, a Washington, think tank focusing on national security, argues Guantanamo does not motivate terrorist groups. “The notion that the existence of Guantanamo is somehow radicalizing people and causing them to engage in attacks is just ridiculous,” says Rivkin.

Sen. Tom Cotton, R-Ark., an Iraq War veteran who is hawkish on national security matters, went even further. The

CLOSING GUANTANAMO

prison should be kept open, he said, and those who want to close it on the grounds that it is inciting terrorists are playing politics.

"They don't attack us for what we do [at Guantanamo]; they attack us for who we are" as a nation, Cotton said of terrorists. "To say that [closing the facility] is a security decision based on propaganda value that our enemies get from it is a pretext to justify a political decision."²⁴

No one believes closing Guantanamo would lead terrorists to renounce their ideology. Nevertheless, says Mora, such a move would give terrorist groups one less recruiting tool. He pointed

as a symbol appears to be fairly constant," Mora says. "If we moved out of Guantanamo, I think it's going to be less useful as a new, hottest symbol; it would have less relevancy."

Other experts say that while closure of Guantanamo's detention facilities might not have a direct impact on terrorist groups, it likely would improve relations with allies in the fight against those groups.

"Until the facility is closed, it will continue to be seen by the world as our attempt to avoid the rule of law," Rep. Adam Smith of Washington state, the House Armed Services Committee's top Democrat, said at a 2013 Senate

notes democracy in the Americas.²⁸ The pope, in a 2014 speech, criticized countries that use torture and imprison suspects without trial.²⁹ The Vatican later offered to help the United States find a way to close the Guantanamo prison.³⁰

Is a new international convention needed on the detention and trial of terrorism suspects?

Some experts say Guantanamo has become contentious in large part because the detention and trials of some detainees fall in gray areas of federal and international law.

The U.S. government classifies Guantanamo detainees as "unlawful enemy combatants." The International Committee of the Red Cross, which promotes adherence to the Geneva Conventions governing treatment of prisoners of war, said that while those conventions do not contain the term "unlawful combatant," they still cover the concept. Specifically, "if civilians directly engage in hostilities, they are considered 'unlawful' or 'unprivileged' combatants or belligerents," according to a 2011 Red Cross policy document, and may be prosecuted under the domestic laws of the government that detains them.³¹

Indeed, when the George W. Bush administration launched operations against al Qaeda and the Taliban in Afghanistan in 2001, it took the legal position that captured members of those groups were not entitled to prisoner-of-war status under the Geneva Conventions. In the case of al Qaeda, this determination was made because the organization was not a state party to the Geneva Conventions.

The Taliban's situation was more complicated: It was a functioning government in 2001 and thus was covered under the Geneva Conventions, according to the Bush administration, but it said captured Taliban combatants were disqualified for POW (prisoner of war) status on other grounds.³² Bush administration press secretary Ari Fleischer declined to specify those grounds but



Getty Images/Chip Somodevilla

President Obama pledges on Feb. 23, 2016, to continue his efforts to relocate the terrorism suspects being held at Guantanamo Bay and close the controversial facility. Republicans, and some Democrats, have opposed closing the prison. Flanking Obama are Vice President Joe Biden, left, and Defense Secretary Ashton Carter.

to Abu Ghraib prison in Iraq, formerly run by the U.S. military, where photos of tortured inmates sparked a worldwide uproar — and led to the prison's closure — after they were published in 2004.²⁵ The United States transferred control of the prison in 2006 back to Iraq's government, which closed it eight years later.²⁶

Terrorists' use of Abu Ghraib as a symbol "has declined markedly since the United States stopped using it, while the use of Guantanamo by them

Judiciary Committee hearing. "In addition, it undermines our national security because our allies are less likely to share valuable intelligence with us and hesitate to send their detainees to the United States without a guarantee they won't be sent to Guantanamo Bay."²⁷

The State Department's special envoy for Guantanamo closure, Lee S. Wolosky, echoed that view. He noted that critics of Guantanamo have ranged from Pope Francis to the Organization of American States, an international group that pro-

said the Geneva Conventions, adopted in 1949, do “not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today.”³³

Bush promised in 2002 that even though the United States was not classifying Guantanamo detainees as POWs, it would treat them humanely and “in a manner consistent with the principles” of the Geneva Conventions, but only “to the extent appropriate and consistent with military necessity.”³⁴

However, it soon became clear, according to some experts, that the government did not want to subject many of the detainees to domestic U.S. law, as would be expected under the general practices of international law.

As a U.S. military base on another country’s soil, “Guantanamo was specifically chosen by the Bush administration because it was thought to be entirely outside the law, domestic and international law,” says Dixon of the Center for Constitutional Rights. “The core purpose of Guantanamo was to avoid any legal constraints on the Bush administration in its treatment of detainees.”

Shortly after the first detainees arrived at Guantanamo, Dixon’s organization sued the Bush administration, challenging the idea that Guantanamo was beyond the reach of federal laws. In 2004, the Supreme Court determined that U.S. federal courts have jurisdiction over Guantanamo detention facilities.³⁵

According to Boston University law professor Susan M. Akram, the Supreme Court repeatedly has held that both U.S. and international laws apply to the Guantanamo detainees; that they cannot be held indefinitely without trial; that constitutional habeas corpus protections allowing people to report their unlawful detention before a court apply to the detainees; and that the U.S. government tribunals to determine their status were unconstitutional and violated the Geneva Conventions.³⁶

“Yet Congress and the executive branch have, through policy and leg-

islation, strenuously avoided implementation of these decisions,” Akram told an interviewer. She noted that other countries and the United Nations repeatedly have criticized the United States over its interpretation of the laws of war as they apply to the detainees.

“There has been deep and perhaps irreparable damage done to the bedrock norms of international humanitarian law and international human rights law, not just by Guantanamo, but the entire paradigm of the U.S. engagement of its so-called war on terror,” Akram said.³⁷

Pickering, the former U.N. ambassador, acknowledges that it is unclear how international law applies to organizations such as al Qaeda and the Islamic State. It might make sense, he says, to treat them as prisoners of war when they are captured. “But treating them as non-prisoners of war — that is, as armed civilian combatants — because it allows us to do more seriously nasty things to them doesn’t seem to me to be easy to reconcile with this gray area,” he says.

As a result, some experts have called for developing a new international consensus for dealing with so-called non-state combatants.

Peter Mansoor, a retired Army colonel and a professor of military history at Ohio State University, says doing so might require writing an entirely new set of Geneva Conventions. Because fighting nonstate combatants instead of other nations’ armies is “becoming the norm,” says Mansoor, “we’re going to have to create international laws to deal with those kinds of groups.”

Others argue that current international law, including but not limited to the Geneva Conventions, is adequate for dealing with the Islamic State and al Qaeda.

Rivkin, of the Foundation for the Defense of Democracies, notes that modern international law long has dealt with conflicts involving nonstate combatants, including pirates and mercenaries. “The rules are perfectly sound and valid,” he says.

Dixon contends that the absence of precedent or a clear body of law is not what has created confusion. Instead, he says, the U.S. government has chosen to “cherry pick” from the rules of war, denying detainees prisoner-of-war status but not applying domestic laws.

“The [Obama] administration’s only borrowing those rules selectively and always to the detriment of the detainees,” Dixon says. “The administration wants to have its cake and eat it too” by saying it wants to close the prison while continuing Bush administration policies.

Should the United States continue sending Guantanamo detainees to other countries?

So far this year, the Obama administration has transferred 46 detainees to their home country or to another nation willing to accept them, bringing the total during the president’s two terms to 185.³⁸

Even more detainees were transferred during the presidency of George W. Bush. Between 2002 and Jan. 22, 2009, the Bush administration transferred 532 of the approximately 780 Guantanamo detainees to other countries, according to the Office of the Director of National Intelligence.³⁹

Critics in Congress, however, worry that some of the transferees have returned to the fight and killed Americans. News outlets reported in June that at least 12 transferred detainees had been involved in attacks against allied forces in Afghanistan that resulted in the deaths of about six Americans.⁴⁰

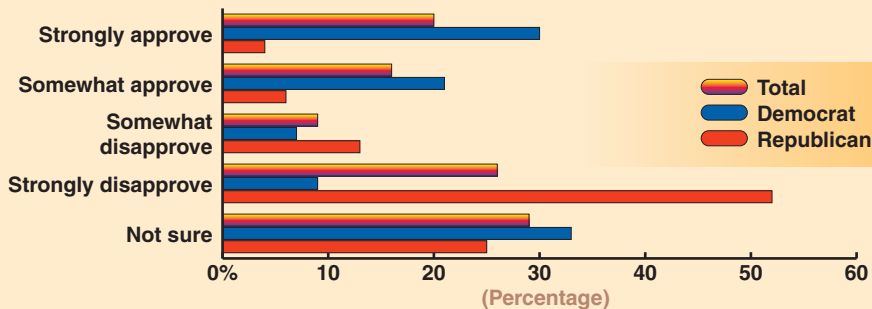
According to American officials who spoke to a *Washington Post* reporter on condition of anonymity, a former Guantanamo detainee who was transferred to Libya in 2007 — only to be released by that country the following year — was likely involved in the Sept. 11, 2012, attack on the American embassy compound in Benghazi that killed U.S. Ambassador J. Christopher Stevens and three other Americans.⁴¹

“The administration is releasing dangerous terrorists to countries that can’t

Americans Divided on Guantanamo Transfers

Americans were divided largely along party lines on the transfers of 15 Guantanamo Bay prisoners to the United Arab Emirates in mid-August — the largest single detainee release during the Obama presidency. Republicans overwhelmingly disapproved of the transfers, while a slim majority of Democrats approved. A significant minority from both parties said they were unsure how they felt about the transfers.

Approval Rating of Guantanamo Transfers



Note: Independent, Other and Not Sure of political affiliation not shown.

Source: "Guantanamo Bay results," YouGov, Aug. 16, 2016, <http://tinyurl.com/hnqfgph>

control them," said Royce, the House Foreign Affairs chairman. "The president should halt detainee transfers immediately and be honest with the American people."⁴²

Royce also said "many countries just aren't up to the job" of detaining or keeping tabs on ex-Guantanamo inmates. A diplomatic agreement with the United States for such purposes "isn't worth the paper it is written on if a country doesn't have the resources or training to keep committed terrorists from returning to the battlefield," he added.⁴³

Obama administration officials, however, say the most problematic detainees were transferred to Afghanistan, Saudi Arabia and elsewhere during the Bush administration. According to the Office of the Director of National Intelligence, 185 detainees, or nearly 35 percent of the total that the Bush administration transferred, are confirmed or suspected of having returned to the fight. Meanwhile, 19 — or 13 percent of the total — of those the Obama administration transferred are con-

firmed or suspected of renewing terrorist or insurgent activity.⁴⁴

That lower figure is "testament to the rigorous, interagency approach the [Obama] administration has taken to both approving detainees for transfer and to negotiating and vetting . . . detainee transfer frameworks," said the State Department's Wolosky in July.⁴⁵

But others say Obama's transferees are more recent than those transferred by the Bush administration and could still return to the fight. "Only time will tell how many of the prisoners Obama released will eventually return to the business of terror and jihad," wrote Arthur Herman, a senior fellow at the Hudson Institute, a conservative think tank in Washington.⁴⁶

Stimson, the former Bush official now at the Heritage Foundation, contends that the number of detainees released by the Obama administration who have returned to combat is "creeping up" compared with the Bush era. "It takes between two to four years to pop up on that list once you've been transferred," he says. "You don't know

when they're back to their old ways until they get caught again."

Many of the procedures for screening inmates for potential transfer and ensuring that other countries could guarantee transferees would not affect security was in response to legislation that Congress passed shortly after Obama took office.

Beginning in 2010, with each year's National Defense Authorization Act, which establishes the annual budget and goals for the Defense Department, Congress has set the conditions for transferring detainees. The 2011 law said that for a transfer to occur, the secretary of Defense has to certify to Congress that the destination country or entity:

- Must not be a state sponsor of terror or a terrorist organization.
- Must maintain control over the facility where the detainee will be transferred.
- Must not face security threats likely to affect its ability to control the detainee.

- Must agree to take steps to ensure the detainee doesn't pose a future threat.
- Must agree to share information about the detainee with the United States.⁴⁷

Obama expressed disapproval of the restrictions, calling them an infringement on executive power because they interfere with the president's ability to make foreign policy and national security determinations about whether and under what circumstances transfers should occur.⁴⁸ Since then, however, the White House has not challenged Congress' authority in setting those restrictions.

Some in Congress are pressing for even tighter restrictions. In June, the House approved an amendment to the defense policy bill that would prevent the transfer of Guantanamo detainees to any country.

Democrats objected to the proposal as unconstitutional. "What it says is, even if you find that an individual is innocent, even if you factually find out he's guilty of no terrorism, he didn't fight against us, he's not a prisoner of

war, he's guilty of nothing, he must stay in jail forever," Rep. Jerry Nadler, D-N.Y., said.⁴⁹

As of September, the legislation was languishing in the Senate, and the White House had already recommended that the president veto the bill because it, among other things, places restrictions on planning for the transfer of detainees to U.S. prisons. ■

BACKGROUND

Early Military Tribunals

The question of how to treat illegal combatants — including rebels, terrorists, spies, saboteurs and mercenaries — has been answered in different ways throughout U.S. history. But from the beginning, if the military captured an individual, it generally detained and — in some but not all cases — tried the suspected offender.

The Continental Congress in 1775 adopted Articles of War based on Britain's military code that included provisions for courts-martial. The code, however, did not mention illegal combatants. And in the only section that referred to civilians, the code said non-soldiers who served with the army "are to be subject to the articles, rules, and regulations of the continental army."⁵⁰

In 1778, a board of officers investigated whether Thomas Shanks, a former American soldier, had spied for the British. It voted for his conviction and execution, and Shanks was hanged the following day.⁵¹

During the War of 1812, Gen. Andrew Jackson put New Orleans under martial law as the city awaited a British attack and continued it even after he had defeated the enemy in the Battle of New Orleans in January 1815. When Louis Louallier, a private citizen, published a newspaper article arguing that

civilians accused of a crime should be heard before a civil judge, not military tribunals, Jackson arrested him. The general accused Louallier of inciting mutiny and "disaffection" in the army. Louallier eventually was acquitted at his court-martial, in part because his civilian status gave the military court no jurisdiction.⁵²

Jackson again convened a military tribunal in 1818 to try two British citizens, Alexander Arbuthnot and Robert Christy Ambrister, who were charged with encouraging Creek Indians to wage war against the United States. Arbuthnot also was charged with being a spy. Both were convicted, though Arbuthnot was found not guilty on the spying charge, and executed. The House Committee on Military Affairs later criticized Jackson, saying it found no law authorizing a military trial for the allegations made against the two men.⁵³ It said the lone exception was the spying charge on which Arbuthnot was found not guilty.

During the Mexican-American War (1846-48), Gen. Winfield Scott issued an order creating two types of military tribunals. One was "military commissions" trying both soldiers and civilians for acts not covered by courts-martial, including murder, robbery, theft and vandalism. The other tribunal was for violations of the laws of war.⁵⁴

Scott sought congressional approval, but Congress did not respond and those rules remained in effect.⁵⁵

During the Civil War, military commissions were used more frequently. As early as April 1861, President Abraham Lincoln issued a proclamation suspending writs of habeas corpus — petitions incarcerated people under arrest can file to force the government to justify before a judge their jailing. In 1862, Gen. Henry Halleck, commander of the Union army in Missouri, convened commissions to try civilians for crimes that were not covered by the laws of war. And in 1863, Lincoln issued what became known as the Lieber Code,

making military commissions the appropriate forum for trying cases that the Articles of War did not cover.⁵⁶ The military commissions were used to try thousands of people, especially in border states where the Union sought to exercise its authority.

After the Civil War, the only significant use of military tribunals to try civilians until World War II was during the U.S. occupation of the Philippines from 1899 to 1902.

During World War II, two military tribunals attracted widespread public attention. In 1942, a military commission was convened to try eight German civilians who surreptitiously entered the United States on U-boats and planned sabotage. Two of the group's leaders tipped off the FBI to the plot, and the bureau planned to charge the Germans in federal court.

But President Franklin D. Roosevelt's administration did not want it publicly revealed that one suspect had turned himself in and fingered the others. It also did not want to broadcast the ease with which U-boats had reached the U.S. mainland undetected.⁵⁷

Roosevelt also wanted to use a military commission because it could impose harsher penalties; the maximum sentence for sabotage in civilian courts was 30 years in prison.⁵⁸ After the military commission completed its work, all of the Germans were executed except for the two leaders.

Another high-profile use of a military commission was the International Military Tribunal held by Allied forces in Nuremberg, Germany, at the end of World War II. In addition to trying high-level Nazi officials for war crimes, the tribunal prosecuted civilians for domestic crimes.⁵⁹

First Detainees Arrive

One week after the Sept. 11 attacks on the World Trade Center in New York and the Pentagon in Virginia,

CLOSING GUANTANAMO

Congress passed a joint resolution authorizing the president to use “all necessary and appropriate force” against terrorists.⁶⁰ This Authorization for Use of Military Force (AUMF) gave the president the power to imprison suspects

it was beyond U.S. courts’ jurisdiction, wrote Allan A. Ryan, an attorney who teaches the law of war at the Boston College Law School and Harvard University. “This was a critical concern to those in the president’s

“the worst of the worst.” He also said that without a place to hold detainees, “the only other option is to kill them, and we don’t operate that way.”⁶³

Ryan, however, disputed that the “worst of the worst” were sent to Guantanamo. Instead, Ryan wrote, they were sent to CIA-operated “black sites” in secret locations in Europe and Asia and subjected to years of “enhanced interrogations” that critics said amounted to torture. “Those sent to Guantanamo were for show,” Ryan said.⁶⁴

New Yorker reporter Connie Bruck found that most detainees were not terrorist leaders but lower-level foot soldiers. Local warlords turned over many of them to the U.S. military for a bounty of as much as \$25,000 per prisoner.⁶⁵

Some of the Bush administration’s critics also disputed its reasons for using military commissions for the relatively few Guantanamo detainees who were actually charged with crimes. An analyst for the Congressional Research Service, Congress’ research arm, noted that federal courts were used in the past to try suspected terrorists for war-related offenses, including suspected Palestinian Liberation Organization members accused in the 1985 hijacking of an ocean liner; a group accused in the 1993 bombing of the World Trade Center; the suspects in the bombings of two U.S. embassies in Africa in 1998; and al Qaeda’s attack on the *USS Cole* in 2000.⁶⁶

“There is historical precedent for using federal courts to try those accused of terrorism or war related offenses, including some that might under some circumstances be characterized as ‘violations of the law or war,’ ” wrote legislative attorney Jennifer K. Elsea in a report to Congress.⁶⁷

In fact, when Bush’s attorney general, John Ashcroft, learned that the president planned to employ military commissions he was enraged, according to Karen J. Greenberg, director of the Center on National Se-

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AFP/Getty Images/Fadel Senna

Younis Abdurrahman Chekkouri was sent back to Morocco, his home country, in 2015, after being held at Guantanamo for more than 13 years. Of the roughly 780 people who have been held at the facility since it opened, 710 have been transferred to other countries and nine have died; 61 detainees remain. Of the prisoners transferred out of Guantanamo, some 214 are known or suspected to have returned to terrorist or insurgent activities.

at Guantanamo and, in some cases, have them tried. (See sidebar, p. 806.)

Two months after the attacks, President Bush issued a military order creating military commissions to try non-U.S. citizens who were past or current Qaeda members. Bush said applying the normal principles of civilian law was impractical.⁶¹

The first detainees arrived at the Guantanamo facility in January 2002. Because Guantanamo is in Cuba — on land perpetually leased from that country under a 1903 agreement —

inner circle, because they had no intention of creating a conventional prisoner-of-war camp, operated in accordance with international law under the constraints of humane treatment imposed by the Geneva Conventions and monitored by the International Committee of the Red Cross,” Ryan wrote.⁶²

The Bush administration justified the Guantanamo prison on security grounds. In 2009, Dick Cheney — who had been Bush’s vice president — said the prisoners left at Guantanamo were

Chronology

1815-1959 *Military commissions come into use. U.S. takes possession of Guantanamo Bay, Cuba.*

1815-1818

Gen. Andrew Jackson employs military commissions to try British and U.S. civilians during and after the War of 1812.

1846-1848

Gen. Winfield Scott orders the creation of two types of military tribunals during the Mexican-American War.

1903

U.S. leases Guantanamo Bay site from Cuba.

1934

Future Cuban president Fulgencio Batista co-signs a provision stipulating that the lease can't be ended without mutual consent.

1942

President Roosevelt uses a military commission to try eight German civilians accused of planning sabotage.

1945

The Allied Powers convene the International Military Tribunal at Nuremberg to try both soldiers and civilians for war crimes as well as certain domestic crimes not covered by the laws of war.

1959

Communist revolutionary Fidel Castro overthrows Batista. The Castro government subsequently demands return of the Guantanamo base.

2001-2002 *Bush administration brings terrorism suspects to Guantanamo.*

2001

Congress authorizes the president to use "all necessary and appropriate force" against those responsible for the Sept. 11 terrorist attacks and those who aid terrorists. . . . President George W. Bush signs executive order creating military tribunals for the trials of those captured in the war against al Qaeda and the Taliban.

2002

First 20 detainees arrive at the newly opened Guantanamo detention facility. For the first few months they are housed in cages that leave them exposed to the elements.

2004-2008 *Military commission trials proceed amid legal fights.*

2004

Supreme Court rules in *Rasul v. Bush* that federal courts have jurisdiction over Guantanamo and that detainees can challenge their detention in federal court.

2005

Bush signs Detainee Treatment Act, which aims to restrict the access of detainees to federal courts.

2006

Supreme Court rules in *Hamdan v. Rumsfeld* that the military commissions to try detainees in place of the federal courts violate the Geneva Conventions governing the treatment of prisoners of war. . . . Congress passes Military Commission Act, authorizing trials by military commissions.

2008

Supreme Court rules in *Boumediene v. Bush* that the right to habeas corpus is rooted in the Constitution, and Congress cannot restrict it.

2009-Present

Obama and Congress battle over closing Guantanamo.

2009

On his first day in office, President Obama suspends the Guantanamo military commissions for 120 days, and two days later issues an executive order to close the detention facility within a year. Four months later, he announces resumption of the commissions with expanded legal protections. . . . Congress restricts president's ability to transfer detainees to other countries.

2011

Congress further restricts transfer of Guantanamo detainees, requiring the Defense secretary to certify to Congress that a receiving country is not a designated state sponsor of terrorism and not facing a threat likely to affect its ability to maintain control over a transferred detainee. . . . Obama issues executive order creating review boards to assess whether detainees should be transferred to other countries.

2015

Congress includes provisions in the annual defense bill putting restrictions on transfers of any of the 112 remaining detainees to the United States, making it impossible for detainees to be tried in federal court.

2016

Pentagon announces largest-ever transfer of detainees — 15 prisoners sent to the United Arab Emirates. House Republicans respond by passing a bill that would temporarily block detainee transfers to other countries until stricter requirements are fashioned. The bill's future in the Senate is uncertain. . . . Additional transfers reduce Guantanamo inmate count to 61.

Conditions at Guantanamo Still Mostly a Mystery

Officials cite improvements, but government blocks outside access.

When the first 20 suspected al Qaeda and Taliban members arrived at Guantanamo Bay in January 2002, they were kept in open-air steel-and-wire pens, described by some journalists as “dog cages,” while guard dogs were housed in air-conditioned kennels. Each detainee was given one bucket for water and another as a toilet. Some detainees complained of torture, including Mehdi Ghezali, a Swedish citizen and the son of an Algerian-born immigrant, and six British nationals who later sought compensation from the British government for the treatment they received while in American custody in Afghanistan and at Guantanamo Bay.¹

While the Department of Defense hurried to expand and improve the jail space at the military outpost, then Secretary of Defense Donald H. Rumsfeld defended the choice of Guantanamo Bay as “the least worst place we could have selected.”²

Conditions at the prison have improved significantly since those early days, according to retired Gen. John Kelly, who ran the prison from 2012 to January 2016. There are now air-conditioned cell blocks and even recreational facilities, and the prison population has fallen from nearly 700 in 2002 to 61 in September. “The facilities they live in today are pretty good,” he said. “Again, I wouldn’t want to be a detainee, but if you got to be a detainee somewhere, Gitmo is the place to be.”³

Karen J. Greenberg, director of the Center on National Security at Fordham University Law School, said in 2013 that conditions had improved markedly, especially since President Obama took office in 2009. “As recently as this past fall,” she wrote in 2013, “as many as 130 Guantánamo detainees were living in communal areas, many with access to Skype, television and a football pitch [soccer field]. This more relaxed policy was based on the premise that creature comforts could compensate for the lack of hope and due process afforded to the

detainees.”⁴ Charges have yet to be filed against most of the prisoners.

Greenberg also noted, however, that many of these comforts were temporarily taken away after detainees began a wave of hunger strikes in February 2013. “The recent turn toward feeding tubes, individual cells and violence between detainees and guards has made Guantanamo more like a dungeon, its inmates tormented by lives without resolution or release,” Greenberg wrote.

According to some reports, more than half of the 166 detainees at Guantanamo in 2013 were on hunger strikes.⁵ After guards discovered homemade weapons, detainees were assigned to individual cells with heavy steel doors.⁶

By 2015, military officials said the majority of detainees were once again living in communal areas and had extensive opportunities to read, exercise and watch TV.⁷

Still, a clampdown on information about the detention facility imposed by the Defense Department in 2013 means that the public remains largely in the dark about current conditions at Guantanamo, analysts and legal experts say. Indeed, in December 2013, the Pentagon announced that it no longer would inform the media about prisoners’ hunger strikes. “The release of this information serves no operational purpose and detracts from the more important issues, which are the welfare of detainees and the safety and security of our troops,” said Navy Cmdr. John Filostrat, a spokesman for the military’s Joint Task Force Guantanamo.⁸

The Obama administration also has continued to refuse to let the United Nations special rapporteur for torture speak with detainees, a policy initiated in 2004 by the George W. Bush administration.

David B. Rivkin, senior fellow at the Foundation for Defense of Democracies, a think tank in Washington that focuses on national security issues, echoes Kelly about current conditions. “I can tell you that, objectively speaking, the Guantanamo detention

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at Fordham University. “The attorney general immediately went to the White House to argue that the federal courts for the appropriate venue for trials of foreign terrorists,” she wrote. “Ashcroft had precedent on his side.”⁶⁸

In a series of rulings between 2002 and 2008, however, the Supreme Court made it clear that Guantanamo was not beyond the reach of U.S. laws. In 2004, the court held in *Rasul v. Bush* that federal courts have jurisdiction over Guantanamo and that the detainees could challenge their detention

in federal court.⁶⁹ Congress responded in 2005 by passing the Detainee Treatment Act, which aimed to restrict detainees’ access to federal courts for habeas corpus appeals.⁷⁰

The next year, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the military commissions to try detainees in place of the federal courts were procedurally flawed and violated the Geneva Conventions.⁷¹ Congress responded by passing the Military Commissions Act of 2006, which authorized military commission trials.⁷²

According to Dixon of the Center for Constitutional Rights, Congress

was essentially using the Military Commission Act to say, “No, we really mean it. We’re taking away jurisdiction of the federal courts over Guantanamo.”

The Supreme Court again disagreed. In 2008, it ruled in *Boumediene v. Bush* that Congress could not restrict individuals’ right to habeas corpus appeals.⁷³ The key part of the *Boumediene* decision, says Dixon, is that the right to habeas corpus “is a right that is rooted in and guaranteed by the Constitution, which means that Congress cannot take away that right. So that settled that issue.”

facility is the best-run prison facility I've ever seen, and I have visited a number of federal and state penitentiaries," Rivkin says. "If I were unfortunate enough to be detained, I'd rather be detained in Guantanamo than just about anywhere else."

Still, some experts say it remains impossible to verify those assertions. Joseph Hickman, a former Army National Guardsman who worked at the detention facility, told reporters in 2015 that Guantanamo no longer was the "cruel place" he saw when he arrived in 2006. He added, however, that the limited access provided to the media and others made it hard to tell that story. "If [the military] would be more transparent with what they're doing, it would make things a lot easier," he said.⁹

At a March meeting of the U.N. Human Rights Council, U.S. Ambassador to the U.N. Keith Harper was peppered with questions about the U.S. refusal to let the U.N. torture investigator onto the base. His response: "We are continuing to have a dialogue with the special rapporteur. It is the hope that we will have an agreement on terms."¹⁰

The administration's stance puzzles Alberto Mora, a former general counsel of the U.S. Navy. "I don't understand what the rationale [for denial] is," says Mora. "Why one would wish to erode the capability of United Nations in that respect is something that puzzles me."

The United Nations and the Organization for Security and Co-operation in Europe, in an open letter in January 2016, urged the United States to promptly close the detention facility and that failure to do so could encourage other countries to engage in similar behaviors. "The United States must clean up its own house — impunity only generates more abuses as States do not feel compelled to stop engaging in illegal practices," the letter said.¹¹

— Patrick Marshall



U.S. Navy/MCS 2nd Class Kegan E. Kay

The Guantanamo Bay naval base includes a detention facility that now holds 61 terrorism suspects.

¹ "Swede says he was tortured in Guantanamo," *The Irish Times*, July 14, 2004, <http://tinyurl.com/hj9wlgp>; Fran Yeoman, "Blair knew of Guantanamo torture in 2002, lawyers claim," *The Independent*, Sept. 28, 2010.

² Katharine Q. Seelye, "U.S. to Hold Taliban Detainees in 'the Least Worst Place,'" *The New York Times*, Dec. 28, 2001, <http://tinyurl.com/z8qllose>.

³ "The Case for Closing — And Keeping Open — Guantanamo," Weekend Edition Sunday, NPR, March 6, 2016, <http://tinyurl.com/h6lufum>; "Gitmo upgrades as prison enters 5th year," NBC News, Jan. 11, 2006, <http://tinyurl.com/hpjinl3>.

⁴ Karen J. Greenberg, "Five Myths about Guantanamo Bay," *The Guardian*, May 7, 2013, <http://tinyurl.com/gwk24an>.

⁵ Chris Lawrence and Matt Smith, "Daily life at Guantanamo: Hunger strikes, sprays of filth," CNN, May 17, 2013, <http://tinyurl.com/h3ramsw>.

⁶ *Ibid.*

⁷ Tyler Pager and Paige Leskin, "Military: Gitmo detainees not treated like in early days," *USA Today*, March 16, 2015, <http://tinyurl.com/zjan64r>; Pager and Leskin, *op. cit.*

⁸ "Guantanamo detainees' hunger strikes will no longer be disclosed by U.S. military," *The Associated Press*, *The Washington Post*, Dec. 4, 2013, <http://tinyurl.com/jlvm554>.

⁹ Pager and Leskin, *op. cit.*

¹⁰ Stephanie Nebehay, "U.N. torture envoy appeals again for visits to U.S. prisons," Reuters, March 8, 2016, <http://tinyurl.com/zw57hbb>.

¹¹ "Guantanamo Bay, 14 years on — Rights experts urge the US to end impunity and close the detention facility," Office of the United Nations High Commissioner for Human Rights, Jan. 11, 2016, <http://tinyurl.com/hhdkxtb>.

Obama versus Congress

Upon taking office in 2009, Obama instructed military prosecutors to suspend proceedings in the Guantanamo Bay military commission for 120 days.⁷⁴ Two days later, he issued an executive order to close the Guantanamo detention facility within a year.

Four months later, however, Obama announced that the military commissions would resume with expanded legal protections. Obama administration officials said the decision to proceed with military commissions resulted partly from con-

cerns that some federal prosecutions might fail because the interrogation techniques used at Guantanamo tainted the evidence against the detainees.⁷⁵

Among the expanded protections, Obama directed that the secondhand recounting of a conversation, or "hearsay," and information obtained through cruel interrogation methods, such as waterboarding, no longer would be admitted as evidence.⁷⁶

The decision to resume military commissions infuriated civil rights groups, who accused Obama of going back on his word to close Guantanamo. "These military commissions are inherently ille-

gitimate, unconstitutional and incapable of delivering outcomes we can trust," said Anthony D. Romero, executive director of the American Civil Liberties Union.⁷⁷

Beginning in 2009, Congress began imposing restrictions on Obama's ability to transfer detainees to other countries even though the Bush administration had been doing the same thing. A bill that year to fund the military and other agencies required the president to notify Congress 15 days before a transfer. Congress also instructed Obama to include a classified report that contains an analysis of the risk the transfer may present to U.S. security, as well as the terms

Lawmakers Spar Over Military Force

Some argue new measures are needed to detain ISIS fighters.

One week after hijackers crashed jetliners into the World Trade Center and the Pentagon, Congress authorized the use of military force against “nations, organizations or persons” responsible for the Sept. 11, 2001, attacks.¹ This Authorization for Use of Military Force (AUMF) also permitted action against those who had helped the attackers.²

Congress in the past has passed formal authorizations for the use of military force — which are generally more limited in scope than a declaration of war — at least 10 times since 1798. But experts continue to debate whether presidents need to secure such authorizations before sending troops into combat. Earlier presidents, including George W. Bush, have taken the position that getting congressional approval is beneficial because it strengthens their hand, but is not required.³

Related questions on executive power deal with the use of Guantanamo Bay as a prison and the current fight against the Islamic State (also known as ISIS and ISIL). Many legal experts agree that the 2001 AUMF does permit the detention of the 61 prisoners remaining at Guantanamo. But some say it’s unclear whether current U.S. military operations — most notably against ISIS — fall under that authority because the AUMF only authorized actions against those responsible for the 9/11 attacks and those who harbored them. ISIS did not exist in 2001.

Among the critics is Democratic vice presidential candidate Tim Kaine, who said in April that the current law “does not provide a legal justification” for fighting the Islamic State.

Kaine, a U.S. senator from Virginia, also said the law gives the executive branch too much power to wage hostilities because only Congress can formally declare war.

Kaine charged that the Obama administration and Congress have “basically come up with a war doctrine that says ‘wherever and whenever,’ as long as the president feels it’s a good idea — without Congress even needing to do anything about it.”⁴

But Charles Stimson, deputy assistant secretary of Defense for detainee affairs under Bush, dismisses the view that the AUMF doesn’t cover ISIS and other enemies. The Islamic State is “a natural inheritor of al Qaeda, it grew out of al Qaeda,” Stimson says, and a new authorization-of-force is unnecessary.

At the same time, though, Stimson says he’s unsure whether the 2001 authorization would cover the potential detention of Islamic State prisoners at Guantanamo. (None are there now.) He says the president and Congress should cooperate to pass a law dealing with ISIS.

“The further you get away from the 9/11 attacks, and the further you get away from the narrow class of individuals who fell under the 2001 AUMF, the more tenuous the connection is as a legal matter,” he says.

President Obama maintains that he has the authority to fight ISIS under existing laws. Nevertheless, in February 2015, he urged Congress to pass legislation authorizing the use of military force against the terrorist group. Obama submitted a draft for a new AUMF that was more limited than the 2001 version and included, among other restrictions, a three-year limit on the use of ground forces.⁵

Congressional Republicans declined to move forward with Obama’s draft or any other legislation in that area. House Speaker Paul Ryan, R-Wis., said the president “has the authority right now” to fight the Islamic State under the existing authorization.⁶

of agreement with the receiving country, including any financial assistance.⁷⁸

In 2011, in the National Defense Appropriations Act, Congress placed even more restrictions on transfers in the annual military spending bill.⁷⁹

Obama issued an executive order in 2011 that created a process to periodically review the executive branch’s use of its detention authority.⁸⁰ Critics saw the move as the administration’s abandonment of its plans to close the detention facility.

“It is virtually impossible to imagine how one closes Guantanamo in light of this executive order,” said the ACLU’s Romero. “In a little over two years, the Obama administration has done a complete about-face.”⁸¹

Romero and other critics were further upset when Obama signed the National Defense Authorization Act of 2012, which allowed the government to detain any individuals suspected of involvement with the Sept. 11 attacks “until the end of the hostilities.”⁸²

Obama had threatened to veto the bill over those provisions but ended up signing it into law because of the legislation’s overall merits.

“By signing this defense spending bill, President Obama will go down in history as the president who enshrined indefinite detention without trial in U.S. law,” Kenneth Roth, executive director of Human Rights Watch, said in a statement.⁸³

In late 2015, Obama again reluctantly signed that year’s defense authorization bill, despite provisions he considered objectionable, that restricted transfers of any of the 112 remaining detainees to the United States or a foreign country.

Despite these restrictions, the Obama administration submitted a nine-page plan to Congress for closing the detention facility at Guantanamo that included transferring some detainees to the United States for potential trial.⁸⁴

But congressional Republicans declared the proposal dead on arrival. Sen. Pat Roberts, R-Kan., posted a video on Twitter showing him crumpling the proposal and throwing it in the trash.

Sen. Robert Menendez, D-N.J., said Republicans oppose an authorization that is more narrowly defined than the earlier version.

"The big debate here is between a universe, mostly Republicans, that wants to basically say, 'Here you go [Mr. President], you have the wherewithal to do anything you need' — you know, an open-ended authorization — and Democrats who don't want to see another Iraq or another Afghanistan in terms of an open-ended military [engagement]; they want to tailor it more," said Menendez, a former chairman of the influential Senate Foreign Relations Committee.⁷

Actually, it seems those Republicans are saying just what Menendez says. They're not against a new authorization but they don't want it to be more limiting than the current one.

Some legal experts say policymakers should refrain from legislating special authorizations. Jennifer Daskal and Stephen I. Vladeck, professors at the American University Washington School of Law, said such measures "perpetuate war at a time when we should be seeking to end it."

Daskal and Vladeck argued that the government already has numerous counterterrorism tools at its disposal, including law enforcement and intelligence gathering. They said those tools "provide a much more strategically sound (and legally justifiable) means of addressing the terrorist threat."⁸

— Patrick Marshall

¹ "Public Law 107-40-Authorization for Use of Military Force," U.S. Government Printing Office, 2001, <http://tinyurl.com/ha8kvlv>.

² *Ibid.*



Getty Images/Chris Madaioni

Democratic vice presidential candidate Tim Kaine said in April that the Authorization for Use of Military Force "does not provide a legal justification" for fighting the Islamic State.

³ David M. Ackerman and Richard F. Grimmett, "Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications," Congressional Research Service, updated Jan. 14, 2003, <http://tinyurl.com/jjwbfnk>.

⁴ Susan Jones, "Sen. Tim Kaine: 'We Have Made a Complete Hash of the . . . Doctrines of War,'" CNSNews.com, April 29, 2016, <http://tinyurl.com/hgrdosc>.

⁵ "Authorization for the Use of United States Armed Forces in connection with the Islamic State of Iraq and the Levant," Letter from the President to the Congress of the United States, Feb. 11, 2015, <http://tinyurl.com/qz8227v>.

⁶ Rebecca Nelson and Sarah Mimms, "Why the White House Wants an AUMF, and Why It's Not Going to Happen," *The Atlantic*, Dec. 8, 2015, <http://tinyurl.com/zbckg7n>.

⁷ *Ibid.*

⁸ Jennifer Daskal and Stephen I. Vladeck, "After the AUMF," *Harvard National Security Journal*, Jan. 22, 2014, <http://tinyurl.com/hwmn2wb>.

"This is what I think of the president's plan to send terrorists to the United States," he said.⁸⁵

CURRENT SITUATION

Civilian or Military Courts?

In April, the Obama administration proposed a series of changes to the military commissions aimed at speeding

up deliberations while lowering costs. Its proposals included allowing judges to conduct pretrial hearings by video-conference; permitting civilian government lawyers to represent defendants; and allowing the primary judge to appoint a secondary judge to hear some motions, a provision aimed at reducing delays, particularly given the distances judges must travel to Cuba.⁸⁶

Brig. Gen. John Baker, the chief defense lawyer in the military commissions system, criticized the proposed overhaul, calling it an "unfair and unconstitutional" attempt to change the rules "in the middle of the game" because the changes would "deny these individuals the right to be present in the courtroom."⁸⁷

Dixon, of the Center for Constitutional Rights and an advocate for detainees, agrees. "Why would the administration try to change the rules of the game in order to favor the prosecution instead of bringing these men into the United States to face criminal trials in federal court?" Dixon asks. "It makes no sense from a legal perspective, and it makes no sense from a policy perspective."

Cmdr. Gary Ross, a Pentagon spokesman, disagrees with such criticisms, saying the proposals were "narrowly tailored to allow for better management, flexibility and accountability." For example, he said, videoconferencing reduces the need for all necessary participants to travel to Cuba every time

an issue is discussed, while allowing civilian government lawyers to represent detainees helps solve the problem of turnover caused by periodic redeployments of military personnel.⁸⁸

Another ongoing — and hotly debated — issue is whether military commissions or federal courts are the better forums for trying detainees.

While the Obama administration now reluctantly favors military commissions over the federal courts — both because of concerns that federal courts may disallow evidence gathered through the interrogation techniques employed at Guantanamo and by the congressional ban on bringing detainees to the mainland — civil rights groups argue that the federal courts are more efficient and more just than the military commissions.

“The military commissions are by and large an abject failure,” Dixon says. “More detainees have died at Guantanamo than have been convicted by a military commission.”

One of the problems with the commissions, some critics say, is that they have tried to adjudicate crimes that are not considered violations of the international law of war.*

“In 2016 we’re still litigating the question of what charges can be brought in a military commission,” Dixon says.

In 2012, a federal appeals court overturned the conviction of a Guantanamo detainee — Salim Ahmed Hamdan, a former driver and bodyguard for Osama bin Laden, the Qaeda leader who was killed by U.S. Special Forces in 2011. Hamdan had been accused of providing “material support” for terrorism, but the court said there was no such crime under the international law of war.⁸⁹

Prosecutors and defenders alike are awaiting a crucial ruling by the U.S. Court of Appeals for the D.C. Circuit, which is considering whether conspiracy charges are appropriate for the military commissions to hear. In June 2015, in a 2-1 opinion, the court overturned the 2008 conviction on conspiracy charges of a Guantanamo detainee, Ali Hamza al-Bahlul, on the grounds that while conspiracy is a domestic crime, it is not recognized as a crime under the international law of war.⁹⁰

Standards of Evidence

Civil rights groups have also criticized the military commissions for employing inadequate standards for evidence and allowing hearsay and evidence gathered through coercion.

“Although statements obtained through torture or cruel, inhuman, or degrading treatment are technically inadmissible in the military commissions, there’s a significant loophole, because the commissions employ looser evidentiary standards than federal courts,” says Ashley Gorski, a staff attorney with the American Civil Liberties Union’s National Security Project. “These looser standards permit the introduction of evidence that was obtained through coercion, and government secrecy limits the ability of defense attorneys to show that a statement should be excluded.”

Gorski says that even when interrogators stop torturing a detainee, later statements are suspect. “There are grave concerns about the extent to which an individual who has been tortured can then subsequently make statements to interrogators that are voluntary,” she says.

But Pentagon spokeswoman Valerie Henderson says “slight procedural differences make military commissions the better forum for certain cases.”

For example, Henderson says, using federal courts can be inappropriate in some cases because of rules regarding

Miranda warnings and hearsay evidence. The Miranda warnings stem from the controversial but now largely accepted 1966 decision in *Miranda v. Arizona* that required police to advise suspects of their rights, including the right to remain silent, before any custodial interrogation — that is, any interrogation during which the suspect is not free to leave.⁹¹

“Requiring soldiers to give Miranda warnings to enemy forces they have captured is impractical and dangerous,” she says. “Similarly, strict hearsay rules — which were not part of the trial of war criminals at Nuremberg and are unknown to many respected justice systems — may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from genuine zones of armed conflict.”

Some experts argue that both federal courts and military commissions are needed to accommodate the variety of prosecutions and that the former works more swiftly than the latter. The Heritage Foundation’s Stimson says if the cases still pending in the military commissions — totaling seven as of September — had been in federal courts, “the trials would be over” because the federal system is able to dispose of cases more swiftly than military commissions.

Federal courts are the best place to deal with terrorism, and they “have done a good job” in that area, says Peter Margulies, a law professor at Rhode Island’s Roger Williams University who specializes in national security law. “Would I want to see everyone tried in military commissions? God forbid,” he says. “But is there a role in a small number of cases? Yes,” such as cases requiring secrecy.

But some civil libertarians disagree. “The military commissions have continued to exist in large measure to prevent public disclosures about the CIA torture program,” says Dixon.

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* The international law of war, a set of rules that seeks to limit the effects of armed conflict, is drawn from three sources: treaties, custom and generally accepted principles. The Geneva Conventions are in the first category.

At Issue:

Should the Guantanamo detention facility be closed?



ALBERTO J. MORA
SENIOR FELLOW, CARR CENTER FOR HUMAN RIGHTS POLICY, HARVARD UNIVERSITY

EXCERPTED FROM TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON NATIONAL SECURITY, MAY 24, 2016

the national security interests of the United States would be advanced by permanently closing the Guantanamo detention facility and transferring the detainees there either to a detention facility or facilities in the United States or, if appropriate, to third countries.

While one can understand the reasons why Guantanamo was initially chosen as a detention facility for high-level detainees captured in the war on terror, those reasons no longer apply, circumstances have changed, better alternatives have emerged, and the high costs of Guantanamo are now fully visible and should be regarded as untenable. To keep the Guantanamo detention facility open today would be contrary to our nation's financial, administrative, military, foreign policy and national security interests. Other than for reasons of inertia, there is no need to keep the facility open — but there are pressing reasons to close it. . . .

I believe it should be closed for five reasons. . . . First, Guantanamo is no longer outside the jurisdiction of U.S. federal courts and thus there is no significant legal advantage to holding detainees in Guantanamo vis-à-vis federal detention facilities in the United States. . . .

Second, the financial costs and personnel burdens of maintaining detainees at Guantanamo are extravagantly wasteful in comparison with other alternatives. Guantanamo is incredibly costly from both a financial and personnel perspective — and unnecessarily so. Financially, Guantanamo costs the U.S. taxpayer \$445 million a year, or about \$5.56 million per detainee annually. The cost to house prisoners in maximum-security prisons, by contrast, is about \$78,000 per prisoner. . . .

Third, given the availability of U.S.-based civilian alternatives, by closing Guantanamo the military personnel now serving as guards there could be reassigned to higher-priority duties. . . .

Fourth, because the federal prison system has demonstrated that it can successfully and safely hold terrorists as dangerous as any of those at Guantanamo, closing Guantanamo and transferring the detainees to the United States would not appreciably add to the current level of risk. . . .

Fifth, and most importantly, the foreign policy and national security costs of maintaining Guantanamo as a detention facility are too high and outweigh any benefit it provides. Guantanamo has damaged us with our friends and has constituted a strategic gift to our enemies. It is not an overstatement to say that the Guantanamo has seriously undermined our national security and contributed to a loss of American lives overseas.



RETIRED NAVY CMDR. KIRK S. LIPPOLD
FORMER COMMANDER, USS COLE

EXCERPTED FROM TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON NATIONAL SECURITY, MAY 24, 2016

the utility that was envisioned for Guantanamo Bay as an intelligence facility has been cast aside for political expediency. The failure to use Guantanamo Bay has made the U.S. less safe and more vulnerable, since we no longer have a facility with its unique capabilities to leverage the intelligence advantage that our nation could possess with its use.

In fact, the United States has given up a critical strategic advantage in surrendering to the political expediency to close Guantanamo Bay while failing to give due consideration to how we can replace it with a facility under U.S. control that can be guaranteed to remain operational for the duration of the ongoing conflict. For this reason and more, keeping Guantanamo Bay open is more important now than ever before in the war effort. . . .

Guantanamo Bay has the facilities and capabilities necessary to be the crown jewel in the intelligence effort to defeat transnational terrorist groups like al Qaeda and the Islamic State. Several years ago, the Department of Defense spent over \$325 million to build a state-of-the-art headquarters and intelligence fusion center on Guantanamo Bay. It was specifically designed to take the real-time intelligence gleaned from interrogation of detainees, then integrate and construct a robust and capable intelligence picture of their worldwide tactics, techniques and procedures.

Every intelligence agency in the U.S. government could use the facility to protect and defend the United States against attack. Unfortunately, this facility goes virtually unused because of the political decision to attempt to close the detention facility.

Guantanamo Bay is not used as a recruiting tool for terrorist organizations. While Guantanamo Bay is occasionally cited in terrorist propaganda, over the past few years the intelligence community assessed its impact as almost negligible. While many who want Guantanamo Bay closed use the pictures of orange jumpsuits and pictures of detainees from Guantanamo Bay as proof that it is a recruiting tool, the facts do not support this contention. . . .

Keeping the detention facility at Guantanamo Bay open is in the best interest of the United States and the American people. The threat of ongoing terrorist operations against the United States militates that as a nation we should continue using the facilities that have already been built there and expand their use to ensure that another terrorist attack is not carried out against the United States.

CLOSING GUANTANAMO

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Mora, the former Navy general counsel, says the perception surrounding commissions is that they are less interested in judging the defendants' guilt or innocence and more about how much weight to give allegations of torture. "It is pretty clear that they have failed," he says.

aimed at preventing us from closing this facility."⁹²

Some civil rights groups, however, say that while Congress bears much of the responsibility, the president ultimately is responsible for the intractable situation.

"Congress is never going to work with the president on closing Guan-

a law to work with the administration, nor has the administration worked much with Congress, despite repeated promises to do so, to draft a workable long-term detainment policy," he says. Referring to the "Peanuts" comic strip, he says, "It has been this sort of Charlie Brown with Lucy and the football scenario. Sometimes the Republicans are Lucy, sometimes the Democrats are Lucy, but Gitmo is the football. It's just a political hot potato, to mix metaphors."

Other conservatives say the United States should be sending even more prisoners to Guantanamo. "In my opinion, the only problem of Guantanamo Bay is there are too many empty beds and cells there right now," said Cotton, the senator from Arkansas. "We should be sending more terrorists there for further interrogation to keep this country safe. As far as I'm concerned, every last one of them can rot in hell, but as long as they don't do that, then they can rot in Guantanamo Bay!"⁹⁴

Sen. Ted Cruz, R-Texas, agrees. "Don't shut down Gitmo — expand it, and let's have some new terrorists there," he said in February.⁹⁵

While the debate continues, experts advocating a tough approach to national security warn that current policies are hamstringing U.S. forces and hurting their efforts to gather intelligence.

Stimson says that when U.S. troops encounter people in battle zones who could be of use in the terrorism fight, they are turning them over to other nations instead of interrogating them. "What is happening is that when our Special Forces . . . come upon a high-value target who we would like to chat with for a long time in a lawful way, we're not doing that," he says. "We're turning them over to surrogates, and

* The Periodic Review Board consists of senior officials from the departments of Defense, Homeland Security, Justice and State; the Joint Staff; and the Office of the Director of National Intelligence. It reviews whether continued detention of a detainee remains necessary.



Getty Images/Chip Somodevilla

Republican Sen. John McCain of Arizona, center, chairman of the Armed Services Committee, and Sens. Kelly Ayotte R-N.H., and Lindsey Graham, R-S.C., hold a news conference on Feb. 24, 2016, to criticize President Obama's latest plan to close the military prison at Guantanamo Bay, calling it "jibberish." Obama has blamed his inability to shut down the prison on Congress, saying it has "repeatedly imposed restrictions aimed at preventing us from closing this facility."

Blame Game

The stare-down between the White House and Congress over the Guantanamo prison's future continues. Obama, in introducing his latest plan to close the detention facility in February, put the blame squarely on Congress for the failure to do so. Noting that after he was elected in 2008 "the public was scared into thinking that, well, if we close it, somehow we'll be less safe," he added that since that time, "Congress has repeatedly imposed restrictions

tanamo, so I blame President Obama," says Dixon of the Center for Constitutional Rights. "There are number of things that the president could be doing, that he should be doing, but that he has been unwilling to do."

For example, Dixon notes that the Supreme Court has ruled that federal courts could order transfers. That means, Dixon says, Obama could simply ask a judge to order the transfers of detainees who have already been cleared by the Periodic Review Board — 20 currently are eligible.*⁹³

Stimson, however, blames both sides. "Congress has done nothing to pass

that has all sorts of . . . potential negative consequences.”

Rivkin of the Foundation for Defense of Democracies points to a related problem. “We’re not detaining anybody, so we are relying on third parties — Saudis or Egyptians or whatever — to detain people,” he says. “So there are a bunch of people with the blood of American troops on their hands walking around today because we had no place to bring them. That’s a crazy way to fight a war.” ■

OUTLOOK

Finding an End Game

As with many other issues, the fate of the Guantanamo Bay detention facility will likely depend on the general election in November. “As with all things, a new administration, new members of Congress, I think an overall resetting of some key relationships could matter,” says Kathleen Hicks, director of the International Security Program at the Center for Strategic and International Studies, a Washington think tank.

“If you get a Democratic president and a Democratic Congress, I think we can begin to think more seriously about completely closing Gitmo,” says Margulies of Roger Williams University.

Any other outcome than a Democratic sweep, however, is likely to have uncertain consequences for Guantanamo detainees.

“If Trump is the president, it’s anybody’s guess,” says the Heritage Foundation’s Stimson. “I have no way of predicting what he is going to do or say next.”

Trump said in February that he would make more, not less, use of Guantanamo Bay’s detention facilities. “We’re going to load it up with some

bad dudes, believe me — we’re going to load it up,” he said at a rally.⁹⁶

Trump went even further in August when he told a reporter that he was “fine” with prosecuting U.S. citizens at Guantanamo, an act that would be illegal under current law.⁹⁷

Clinton has come out strongly in favor of closing the detention facilities. In a statement issued in February, she said she wanted to “finally close the door on this chapter of our history.” Noting that she had also supported the prison’s closure as a senator and as secretary of State, she said that “closing Guantanamo would be a sign of strength and resolve.”⁹⁸

With respect to the military commissions, “I don’t see any political will for addressing the issues at the military commissions,” says James G. Connell III, a defense attorney at the Military Commissions Defense Organization, a unit of the Defense Department’s Office of Military Commissions. “I believe the military commissions experiment will continue until a political leader has the strength and insight to declare it a failure.”

Regardless of the election outcome, experts are doubtful about the potential for reaching an international consensus on how to deal with captured nonstate combatants.

“I don’t think there’s consensus, and forging that takes quite a bit of time,” says Dru Brenner-Beck, president of the National Institute for Military Justice, a Washington-based advocacy group focused on military justice. “I don’t think you’re going to see any agreed-upon ‘go back to the drawing board’ again on the Geneva Conventions.”

But Dixon, of the Center for Constitutional Rights, says a general international consensus exists — it’s just that the United States disagrees with it.

“When it comes to the laws of war, the United States is now an outlier, and not just in the detention context, but also when it comes to targeted

killings, drones and the use of force,” he says. “That has dangerous repercussions, not only for the United States but for also for the development of international humanitarian law.”

As a practical matter, some experts warn that, regardless of legal considerations, continuing to hold detainees at Guantanamo may not be a wise move.

Noting that the current conflicts may have no formal end, Mora said that continuing to hold prisoners “creates a position in which we’re caught uncomfortably holding people indefinitely without any possibility of release,” he says. “That should make Americans uncomfortable.”

Former diplomat Pickering agrees. “There’s nothing that says you have to detain prisoners of war until the end of the war,” he says. ■

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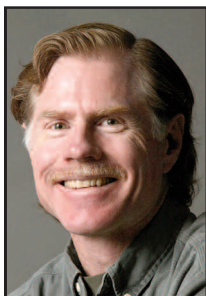
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About the Author

Patrick Marshall, a freelance policy and technology writer in Seattle, is a technology columnist for *The Seattle Times* and *Government Computer News*. He has a bachelor's degree in anthropology from the University of California, Santa Cruz, and a master's degree in international studies from the Fletcher School of Law and Diplomacy at Tufts University.

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