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Why Gitmo Will Never Close

President Obama wants to shut down the controversial prison but not the policies it has come to represent.

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Barack Obama had been President for only one full day when, on Jan. 22, 2009, he acted on a central campaign promise. Arguing that the Founding Fathers would agree that America must “observe the core standards of conduct not just when it’s easy but also when it’s hard,” Obama signed an Executive Order to close the notorious military prison camp at Guantánamo Bay, where the Bush Administration had detained hundreds of men captured in combat and counterterrorism operations since 2001.

With dozens of men imprisoned for years without charges brought against them, and in many cases having actually been cleared for release, Obama said closing Guantánamo would return America to the “moral high ground” it had yielded in its ruthless pursuit of al-Qaeda during the Bush years. “I

can tell you that the wrong answer is to pretend like this problem will go away,” Obama said in May 2009. “I refuse to pass it on to somebody else. It is my responsibility to solve the problem.”

Four years later, with Guantánamo still open—and the site of widespread hunger strikes and other acts of disobedience by many of its 166 inmates—Obama is again trying to fulfill that responsibility. In a May 23 address about a range of his counter-[terrorism](#) policies, including drone strikes, Obama declared the start of a new push against the political obstacles that thwarted his first attempt to close the most infamous symbol of the U.S.’s post-9/11 war on terrorism. “[History] will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it,” Obama said.

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But Obama will be hard-pressed to live up to his grand rhetoric. Opposition still runs high to the idea of releasing or bringing into U.S. [prisons](#) dozens of men widely considered dangerous terrorists even if many are not. Asked to gauge the probability that Obama can close Guantánamo before he leaves office, David Remes, a lawyer who represents 18 Guantánamo inmates replies, “Zero.” And even if Obama can shut down the site known colloquially as Gitmo, he hasn’t promised to end the practice of long-term incarceration without trial that along with interrogation techniques like waterboarding blighted the U.S.’s track record for treating prisoners in the so-called global war on terrorism. The prison camp on Cuba’s southern tip may or may not be shuttered during Obama’s watch, but Gitmo, in the metaphorical sense, may never really close.

Nor is America’s long war on terrorism about to end. Obama’s speech revealed a man “haunted” by the deaths of innocents in drone strikes and wrestling with the balance between national security and the Constitution’s integrity. But while he announced tighter standards for ordering drone strikes abroad (including an unspoken plan to partly shift the program from the CIA to the theoretically more accountable Pentagon) and spoke of a day when the war might be declared over, Obama is retaining broad powers to detain or kill suspected terrorists, to conduct aggressive surveillance and to use military force in foreign nations. “To do nothing in the face of terrorist networks would invite far more civilian casualties,” Obama said. “We must finish the work of defeating al-Qaeda and its associated forces.”

Hungry for Clarity

At last count, military medical personnel at Gitmo were force-feeding 35 of the more than 100 inmates who refuse to eat. Twice a day, those men are strapped into restraining chairs as tubes that run up their noses and down their throats fill their stomachs with a compound called Ensure, a supplement used by everyone from athletes to dieters. The U.N. High Commissioner for Human Rights has called force-feeding a violation of international law, and the World Medical Association, of which the U.S. is a member, declared in 1991 that the practice is “never ethically acceptable” unless a prisoner consents or is unable to make a rational choice. (The WMA calls it “ethical to allow a determined hunger striker to die.”)

Although Remes says he suspects the inmates at Gitmo are aware of the President’s speech and that some may even have watched it on television, he doubts that the hunger strikes will end anytime soon. “Obama has no credibility with the detainees,” he says. “I bet they didn’t even look up from their chessboards.” Then, recalling that after recent scuffles with their guards, inmates were barred from congregating, he adds, “No, they’re not playing chess. They’re not even allowed to be together.”

A lack of faith in Obama is one reason for the hunger strikes (although detainees have also alleged improper treatment by guards, including charges of mishandling Korans, that the military denies). Among the hunger strikers are 86 who have been declared safe for release—some of them by two different administrations—and who were crushed when Obama failed to deliver on his 2009 promise to close Gitmo.

Should They Stay or Should They Go?

Understanding why Gitmo hasn’t closed requires understanding who exactly is there. The camp holds three types of inmates, each posing different challenges. The first group consists of those 86 detainees deemed safe to release to their home countries or third nations, so long as they can be monitored and accounted for to ensure they don’t take up arms against the U.S. The second group consists of suspected terrorists whom the Administration is prosecuting or plans to charge with specific crimes. The third group consists of prisoners too dangerous to simply release—for reasons that could include a suspected organizational role in al-Qaeda, explosives training or in some cases an openly stated desire to kill Americans—but also impossible to put on trial, maybe because of

evidence rendered inadmissible by torture; because the troops who captured them didn't collect evidence; or because they supported al-Qaeda before the U.S. made that a crime for foreigners overseas.

The first group is the easiest to deal with. Obama has the freedom to send the 86 men home on his own. Fifty-six of them are from Yemen—all of whom could be there by now had al-Qaeda's Yemeni affiliate, whose leaders included an ex-Gitmo detainee, not tried to bomb a Northwest Airlines flight on Christmas Day 2009, leading Obama to halt detainee transfers back to the country. Obama now says improvements in the Yemeni government's ability to monitor repatriated detainees allows him to lift his self-imposed moratorium on returning detainees there. He can likewise dispatch the rest of the cleared inmates to other countries unilaterally. Republicans warn that even some of those detainees deemed safe for release will inevitably join forces with Islamic radicals—as did Saeed al-Shihri months after his 2007 release from Gitmo, eventually rising to the No. 2 spot in al-Qaeda's Yemeni branch before being killed by a drone strike earlier this year. “I don't trust the government” in Yemen, Republican Representative Peter King told ABC's *This Week* on May 26. But they can't prevent Obama from proceeding. How fast he'll move is another question: Obama said each of the Yemenis must first undergo yet another review.

The second and third groups are considerably tougher cases. Obama would like to move the trials by military commissions now under way at Guantánamo to a location in the U.S. and bring any new cases against prosecutable suspects on American soil, either in military or civilian courts. He also presumably intends to move to highly secure sites in the U.S. the roughly 46 who can be neither released nor tried, until some solution can be found for them. But right now Obama can't move any detainees into the U.S. without Congress's help. In 2009 he tried to resettle some low-risk prisoners in the U.S. and also proposed trying alleged 9/11 mastermind Khalid Sheikh Mohammed and four other Gitmo inmates in federal court. A furious backlash from conservatives and even many Democrats who feared the soft-on-terrorists label prompted Congress to block inmate transfers into the U.S. for any reason.

And while Obama's May 23 speech may have stirred the hearts of some liberal supporters, it doesn't seem to have moved the Republicans whose support he'll need to move detainees into the U.S., particularly in the GOP-controlled House of Representatives. “I don't get the sense that this

pressure is having an impact” on House Republicans, says Representative Adam Smith, the top-ranking Democrat on the House Armed Services Committee. Many Republicans argue that the risk of detainees’ committing future acts of terrorism outweighs the damage Guantánamo does to the U.S.’s image. And they have little interest in Obama’s appetite for moving more terrorism cases into civilian courts.

Lately Obama has tried speaking the language Republicans best understand—spending—by pointing out that each inmate at Gitmo costs \$800,000 per year to house, for a total of about \$150 million per year in operations. But when it comes to closing Gitmo, Smith says, many of the Republicans whose support Obama would need to approve transfers to U.S. prisons have boxed themselves in politically. House Speaker John Boehner, for instance, has called the prison a “world-class facility” and in 2010 said he wouldn’t vote to close it “if you put a gun to my head.”

The broader themes of Obama’s speech may not have helped the Guantánamo cause either. Far from agreeing with the President’s talk of a severely weakened al-Qaeda and his aspiration to wind down the war on terrorism, some Republicans accused him of complacency and retreat. Newt Gingrich called Obama’s vision “breathtakingly, stunningly naive.” Such talk is hardly the groundwork for a new spirit of cooperation.

Some Problems Have No Solution

Even assuming that the president can close Gitmo by resettling some detainees in other countries and bringing the rest to trials and prisons in the U.S., a major problem will remain: What to do with the 48 detainees who can’t be tried or released for fear that they will return to the “battlefield” of the war on terrorism? After all, holding prisoners without charges would seem to violate the Constitution’s fundamental habeas corpus guarantee. Obama doesn’t claim to have a clear answer, and his speech punted the question. He said only that “once we commit to a process of closing [Guantánamo], I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.”

For now, Obama deals with this legal equivalent of radioactive waste by treating those inmates as prisoners of war. In March 2009, Obama’s lawyers filed a legal brief justifying detention of Gitmo detainees under the laws of war—in this case the war on al-Qaeda, made official by Congress’s September 2001 Authorization for the Use of Military Force (AUMF), which

allowed for the invasion of Afghanistan and other counterterrorism efforts. Ironically, “while it decries Guantánamo as contrary to American values, the Obama Administration has convinced courts of its legal validity,” says Matthew Waxman, a former Bush detainee policy official now at Columbia Law School.

Rather than see Obama stretch that validity in new directions, one prominent human rights lawyer has actually argued for keeping Gitmo open. Closing it now “would do more harm than good,” human rights lawyer and Georgetown law professor Jennifer Daskal wrote in a January New York *Times* op-ed, because it would mean simply opening up a similar camp in the U.S., thereby “setting a precedent and creating a facility readily available to future Presidents wanting to rid themselves of a range of potentially dangerous actors.”

According to this vision, Gitmo would close when the war on terrorism is finally considered over. Lawyers for detainees might argue that should happen once the U.S.’s lead combat role in Afghanistan ends in late 2014, for instance. Obama also says he’d like Congress to revisit the AUMF, perhaps to narrow its scope or even to declare the war over. “Usually if you’re holding prisoners of war, you release them at the end of hostilities,” says C. Dixon Osburn of Human Rights First.

But at a recent Senate hearing on the AUMF, a top Pentagon official testified that the war on al-Qaeda could last 10 to 20 more years. Some Republicans, including Senator John McCain, have suggested that the law should be broadened, not narrowed or repealed.

Rhetoric about the founders aside, it’s hard to imagine Obama’s releasing trained al-Qaeda members who have not renounced terrorism into the wild, as it were. “The Administration’s view seems to be that so long as it’s only a small number of very dangerous al-Qaeda terrorists, it is legitimate to hold them without trial,” Waxman says. Obama would prefer not to hold them in the prison that stains America’s international reputation. But he may find the moral high ground he seeks is simply out of his reach