

Barack Obama and the Closure of Guantanamo Prison, 2009

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Abstract

As it was the most notorious prison in the world, American president Barack Obama believed that the closure of Guantanamo prison within only one year after taking office would be an easy thing to do. But it was not the case. Obama's attempt to fulfill his promise proved to be impossible, and it was really surprising to the newly elected president that there were many factors that have made it impossible for him to keep his promise; therefore, this article presents an analysis of the main reasons behind Obama's failure to carry out his pledge of closing Guantanamo.

Key words: Guantanamo prison, Barack Obama, detainees, Afghanistan, Congress.

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Résumé

Comme Guantanamo est la prison la plus connue au monde par sa pire réputation, le président américain Barack Obama estimait que sa fermeture, dès la première année à la tête de la Maison Blanche, serait facile à réaliser. Or ce n'était pas le cas. Juste après son élection, Obama avait su que sa promesse était irréalisable vu les nombreux facteurs qui l'avaient surpris et qui empêchaient la fermeture de la prison de Guantanamo; par conséquent, cet article présente une analyse des principales raisons pour lesquelles Obama n'avait pas pu tenir à sa promesse de fermer cette prison.

Mots Clés : prison de Guantanamo, Barack Obama, les détenus, Afghanistan, le Congrès.

ملخص

نظرا لكون غوانتانامو السجن الأسوأ سمعة في العالم، فقد اعتقد الرئيس الأمريكي باراك أوباما أن عملية غلقه في غضون عام واحد فقط من توليه رئاسة الولايات المتحدة أمر سهل تحقيقه. غير أن الأمر لم يكن كذلك. فقد تبين لأوباما أن محاولته الالتزام بوعده أمر مستحيل، كما أنه تفاجأ بأن هناك عوامل عديدة حالت دون ذلك. لذلك، فإن هذا المقال يقدم تحليلا لأهم الأسباب التي وقفت خلف فشل أوباما للوفاء بوعده بغلق سجن غوانتانامو.

الكلمات المفتاحية: سجن غوانتانامو، باراك أوباما، المعتقلون، أفغانستان، الكونغرس.

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Introduction

Seeking to re-establish American credibility in the world, Barack Obama, in his first act as president on 22 January 2009, ordered the closure of Guantanamo prison within a year. He said: “Guantanamo will be closed no later than one year from now... We’re not going to continue with a false choice between [American] safety and [American] ideals.” (1) However, closing Guantanamo could not be made at the whim of even the most powerful president in the world. As Obama’s deadline loomed, it became clear that it was practically impossible to close Guantanamo. There were of course many factors that prevented Obama from fulfilling his promise. These included the ambiguous legal status of many detainees, a fierce public and congressional opposition in the U.S., and the challenge to find countries that would accept to hold the released detainees. This article addresses all these factors and shows how they contributed to Obama’s failure of closing Guantanamo within his first year as president.

1. The Legal Status of Detainees in Guantanamo

One difficult challenge that faced President Barack Obama was the legal status of detainees in Guantanamo. Immediately after 9/11 attacks, the U.S. government moved across Afghanistan interrogating suspected terrorists who were captured during ‘Operation Enduring Freedom.’ Though no Afghans were among the 9/11 hijackers, Bush’s argument was that Afghanistan’s government of Taliban was harboring Al-Qaeda. (2) In the chaotic early days of the war on terror, the Bush administration searched for effective ways to fight offering bounties to everyone who led them to suspected Taliban fighters. (3) Reportedly, hundreds of men were exchanged for millions of dollars. Some turned out to be members of Al-Qaeda, but many were innocent.

American forces held more than 800 hundred men in custody. (4) After months of interrogation, America began sending them to Guantanamo. The latter was preferred by the U.S. administration as a detention facility because of its unique legal standing. The U.S. was granted power to exercise complete jurisdiction and control over the facility while leaving ultimate sovereignty with Cuba. Moreover, the prison camp fell outside the jurisdiction of the U.S. courts which consequently could not challenge the legality of the prisoners’ detention or facilitate permissive interrogate techniques that would otherwise be constrained by U.S. statutes. (5) In other words, the Bush administration intentionally made it impossible for detainees to be tried legally in the U.S. They were all beyond the reach of American law. It is important to mention that only 8% of prisoners in Guantanamo were Al-Qaeda fighters. (6) The others posed no immediate threat to U.S. security. Furthermore, President Bush saw Guantanamo as a necessary part of the west’s defenses against terrorism. He said that “the ones in

Guantanamo bay are killers.” (7) Though President Bush declared that terrorism was a tactic not an ideology, all detainees were all Muslims from many Arab and Islamic countries. Besides, declaring a war on a tactic made absolutely no sense.

Legally, barely a month after the invasion of Afghanistan, Bush issued a military order in November 2001 entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism.” The military order defined those detainees that were captured by American forces as unlawful combatants instead of prisoners of war. (8) However, article 3 of the Geneva Conventions defines soldiers and civilians detained in war time as prisoners of war. (9) The Bush administration strongly defended its legal position arguing that Guantanamo detainees were not prisoners of war under the terms of the Geneva Conventions. Asserting his right as commander in chief yet without consulting Congress, President Bush declared in August 2002 that the detainees were neither civilians nor soldiers. They were unlawful combatants. He stated that “they were not wearing uniforms... they do not apply to the Geneva Conventions.” (10) Stated differently, unlike a uniform soldier, the captured prisoners were not easy to identify or deal with.

The Bush administration stressed its legal position with other logical arguments. One of Donald Rumsfeld’s legal advisers, Ruth Wedgwood, argued that the Geneva Conventions were a contract between nations, yet Taliban was not a nation. (11) The captured fighters then were not fighting for a state and there has never been a recognized right to make war on the part of private groups. Additionally, the U.S. did not want to give the prisoners a legal status because that would also give legitimacy to Al-Qaeda as an organized army. The controversy is that while prisoners captured in Afghanistan were deemed illegal combatants, those captured in Iraq in 2004 were given the status of prisoners of war under international law. (12) But international lawyers did challenge the American denial of the prisoners’ legal position. They claimed that in keeping with the detainees’ status as unlawful combatants, the Bush administration undermined the moral authority of the United States. Yet, Bush’s position never wavered. He said: “International law? I better call my lawyer; he did not bring that up to me.” (13) Bush was not interested whether his foreign policy was in consistent with international law or not.

To try designated detainees, the Bush administration has set up special courts called military commissions. A military commission was run by a military judge with a military jury and military lawyers. (14) Yet, these commissions represented the lowest level of justice among the options. Secret trials were conducted behind the doors, and even concerns about prisoners’ abuse during interrogations were raised as the Bush administration subjected them to physical and psychological tortures. The U.S. has admitted that some suspects were water boarded. Former Vice President Dick Cheney

said: “You’ve heard endlessly about water boarding. It happened to three terrorists.” (15) Consequently, not only the defense lawyers were criticizing the unfairness of the trials, even some of the military prosecutors were. Since 2004, several prosecutors have resigned in protest of indefinite imprisonment and harsh torture. Colonel Morris Davis was the third of the five chief prosecutors at Guantanamo (2005-2007). He resigned because he believed that the techniques used on the prisoners were contrary to American values, and they were a stain on America’s reputation. (16) Out of hundreds of detainees held in Guantanamo since early 2002, the U.S. government has charged only 23 with war crimes as of October 2008. (17) These figures indicated serious flaws in the system created by the Bush administration because so many prisoners remained without adequate legal treatment for years.

Accordingly, Barack Obama, on taking office, issued an executive order that launched a case-by-case review of the detainees, and emphasized civilian courts as the appropriate forum for criminal trials. (18) The executive order inspired hope that illegal detention could be brought to an end. In his attempts to restore confidence in American justice, president Obama also announced that his administration intended to move the military commissions to American soil. In 2009, Attorney General Eric Holder said that “those allegedly responsible for the attacks... [would] be brought to New York to answer for their alleged crimes in a courthouse.” (19) As Obama’s deadline loomed, the Guantanamo population has been reduced to roughly 200. (20) Politics is a strange business because the Bush administration has released more than 500 prisoners, but Obama was portrayed as the champion of human rights, not George W. Bush. However, Obama has agreed that detention without trial was to continue for some dangerous detainees. The decision has caused much anger and contempt among human rights advocates. Anthony Romero, the head of the American Civil Liberties Union said: “President Obama’s action... is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law.” (21) For the union, suspected terrorists should be brought to justice in established courts. To do anything more than that would be to give them more dignity than they deserve. And to do anything less than that would be to strip away the principles that have guided American justice for centuries.

2. Government and Public Opposition to Closing Guantanamo

The other challenge to fulfilling Obama’s promise of closing Guantanamo was the fierce opposition of republicans in the American Congress and the hostility of the victims’ families to his plan. Before the election of Barack Obama in 2008, republicans demonstrated impressive party discipline across the branches of government and houses of Congress. They vigorously joined officials of the Department of Defense in defending the decision of George W. Bush against his critics. For instance, Republican senator John Warner played his supportive role in defending the Bush administration as

he noted that the few cases of misconduct should be viewed against 24,000 interrogations conducted at Guantanamo. (22) Clearly, Republican effort was devoted to blunting the charges of harsh interrogation techniques to refuting them.

The incidents of physical and mental torture were thus reduced to merely minor departure from humane interrogation procedures. Prisoners were not intentionally subjected to programmed assaults on their physical and mental health. Similarly, senior military officers testifying before congressional committees denied any misconduct on the part of the military personnel about their treatment of prisoners. For example, Air Force lieutenant general Randall Schmidt testified before the Senate Armed Services Committee discrediting claims of abuse at Guantanamo, stating that he found only a small number on instances in which interrogations had violated Department of Defense guidelines and that the misconduct was not severe enough to constitute inhumane treatment. (23) Moreover, the Department of Defense also elicited positive assessments from Republican committee members who visited Guantanamo and made supportive remarks about the conditions of prisoners there. Republican Joel Hefley, a member of the House Armed Services Committee and one of seventy-seven members of the House to have toured Guantanamo, gave his favorable remarks of the prisoners' condition. He said: "nobody wants to be in prison, but if you're going to be in prison, this is the one to be in." (24)

For Obama, righting the wrongs that happened in Guantanamo was a key aim. The prison had a bad reputation internationally, and it was used as propaganda against the United States. He said:

The record is clear: rather than keeping us safer, the prison at Guantanamo had weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the cost of keeping it open far exceeds the complications involved in closing it. (25)

Probably, President Obama was sincere in his intentions to close Guantanamo, yet the Department of Defense was not in a hurry to implement his agenda. Adding to the pressure on the president, the department invited relatives of some of the victims of 9/11 to attend a military commission at Guantanamo on 17 July 2009. Many of the families were hostile to Obama's plans and were frustrated by the slow progress towards obtaining justice. After their day in court, they talked in a press conference and called on Obama to keep Guantanamo prison open. (26) There was no doubting the anguish of these families. They wanted Guantanamo to stay open, and they feared that the trials of prisoners might even let them go free. However, it is difficult to avoid the suspicion that the families were used to undermine Obama's Executive Order to close Guantanamo.

In Congress, former Bush administration officials were anxious to protect their historical legacy of Guantanamo. Hence, they continued to challenge Obama's decision to close the prison camp. Republicans were strongly determined to frustrate everything Obama dreamed of. On May 20th, 2009, representing public anxiety, the Senate, though had a majority of democrats, voted by 90 to 6 to forbid the relocation of any Guantanamo prisoners for release in the United States. In addition, Congress would not let president Obama to put those detainees in American prisons. (27) Jubilant Republicans were able to block Obama's plan in the Senate. This was a political disaster and an unmistakable verdict on how badly Obama was doing. The consequence was that detainees were stuck in Guantanamo.

Congress also refused to authorize 80 million dollars of funding that President Obama had requested to close Guantanamo. (28) The degree to which the majority of Congressmen refused to work with him was unprecedented. Republicans, in particular, did everything to prove that Obama failed. For the latter, things were going in the wrong direction. Losing Congress fundamentally changed what he could do as president. Thus even for Obama, saying something did not mean that it would happen. As the deadline for closing Guantanamo loomed, the Obama administration announced that it intended to move the military commissions to American soil. (29) Those accused of planning 9/11 would be tried in a Federal Criminal Court. The decision left the victims' families deeply disappointed.

3. Finding Countries to Hold Detainees

Obama's pledge of closing Guantanamo threw up a much bigger issue which was what to do with the remaining detainees held there. Is there any country in the planet that would take them? Can they be simply set free? If America could not find countries to hold the detainees, Guantanamo could not close. Obama's argument was that the continued imprisonment of detainees threatened to undermine the security and foreign objectives that the closure of the prison would otherwise achieve. (30) Yet, only a few months into his administration, Obama was facing a growing opposition because his decision of closing Guantanamo ignited fierce criticism.

Before Obama took office, the Bush administration worked steadily to reduce the number of detainees by returning them to their home countries. For instance, twenty two men in Guantanamo were Muslim Uyghurs from Western China. They were arrested after 9/11 in Afghanistan and Pakistan. They claimed that they were feeling persecution by China. But like many others at Guantanamo, they got caught up in the fear of Islam that took hold after 9/11. (31) The prisoners said that they were tortured in China and also at Guantanamo. The comparison between China and America was very uncomfortable for Americans. In 2003, the U.S. decided they were no threat to the West and cleared them for release. (32) For those detainees, return to Communist China would equate physical torture and false confessions extorted by threats. From the perspective of Chinese foreign policy makers, the detainees were potential terrorists

fighting in the cause of Islamist Uyghur separatism. Consequently, America could not send them home to China because from the perspective of American foreign policy makers, those detainees were potential victims of Chinese human rights violations. The irony is that the Uyghur detainees also suffered persecution for being Muslims at Guantanamo. As the Uyghurs did not want to return to China, five were eventually sent to Australia while several others were sent to Palau and Bermuda. (33)

At the State Department, Daniel Fried was the man who had been given the task of relocating detainees. Despite the array of inducements that could be open to a superpower like America, finding countries to take cleared detainees proved really hard. Actually, there have been few takers. America worked hard to convince Europeans to accept some numbers of detainees for settlement. According, the European Union members issued a joint statement with the United States in June 2009 setting for a framework for the transfer of detainees cleared for release to European allies willing to help the U.S. “turn the page... in a manner that [would] comport with the rule of law.” (34) Only six European governments agreed to receive detainees. (35) They were insistent upon generous remuneration from the United States.

Germany, Ireland, Latvia, and Spain agreed to accept small numbers of prisoners. Human Rights Watch attorney Andrea Prasow pointed up the reason that releasing the remaining detainees other countries was likely to fail: “with a congressionally- enacted ban on any releases into the U.S., the U.S. government finds itself begging other countries to help resettle detainees who can’t be returned to their home countries while refusing to take any itself.” (36) Stated differently, European nations accepted only a few numbers of detainees because the U.S. needed to set an example by taking in some numbers of detainees itself. Moreover, accepting those detainees was intended to symbolize the improvement in relations between the NATO allies that had soured during the Bush administration but improved with the Obama presidency.

Similarly, it was not easy for the Obama administration to persuade third world countries to accept prisoners from Guantanamo. The task was made even more difficult by the mounting political instability in the Middle East. Nearly half of the remaining detainees were from Yemen. (37) Yet, this country was in the brink of civil war. As Al-Qaeda was strong in Yemen, the Obama administration was nervously reluctant about sending Yemeni prisoners home. Moreover, the image of Guantanamo in the Middle East helped recruit extremists. There was no guarantee then that the released detainees would not turn to threaten American security or jeopardize its interests in the region. For instance, one of the released detainees was the Saudi Said Ali Al-Shihri. He was released to a Saudi rehabilitation program. However, he became Al-Qaeda leader in Yemen. (38) Guantanamo gave American enemies the opportunity to recruit soldiers

who would fight against America. Others would argue that there was no Guantanamo when American interests were attacked in the 1990s and 2001.

Another reason that the U.S. has returned to few Yemeni detainees for trial or release was because of the perceived failings of the Yemen's judicial system. The U.S. feared that either prisoners would be set free without trial or abused. Neither would be good for America's reputation. Similarly, the Obama administration forcibly repatriated Algerian Naji Abdul- Aziz, after spending eight years of his life in Guantanamo. Abdul-Naji expressed fear that he would be tortured or killed after repatriation. (39) On both national security and human rights grounds then, it was difficult to return even low value detainees to their home countries.

By late November 2009, the number of detainees in U.S. custody has dropped from 240 to 215. (40) Many detainees had never been tried inside or outside the United States. Their imprisonment in Guantanamo immensely contributed to their difficulties reintegrating into their societies. Some of them returned home with compromised physical and mental health. No detainees have been compensated for the harm suffered as a result of their imprisonment.

Conclusion

By electing Barrack Obama in late 2008, the United States of America wanted to test whether it could set its foreign policy in harmony with human rights. Obama, himself, did not want to repeat the same mistakes of his predecessor George W. Bush. To demonstrate that his administration was completely different from the previous one, Obama promised in 2009 that Guantanamo prison would be closed within his first year in office. However, promising something, even by the American president, did not mean that it would happen. The ambiguous legal status of many detainees made the progress of releasing them agonizingly slow. Domestic opposition and political necessity also led Congress to prevent the Obama administration from claiming the achievement of closing Guantanamo. Congress did not even agree to take the untried detainees on to American soil. Consequently, Obama failed to meet his deadline, and Guantanamo prison stayed open. The world was probably disappointed, yet only few countries did accept to bear the burden by holding some of the released detainees. There was no prospect of closing Guantanamo prison anytime soon. Obama's promise of closing it was easier said than done.

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