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Closing Guantanamo: Ending 20 Years of Injustice

Testimony of Charles D. Stimson

Mr. Chairman, Mr. Ranking Member, and Members of the Committee,

Thank you for the opportunity to testify today. My name is Charles Stimson. I am a Senior Legal Fellow at The Heritage Foundation. I testify on my own behalf, not on behalf of The Heritage Foundation, the Navy, the Department of Defense, or any other organization. One of the areas of my research and writing is Guantanamo. I will draw on that work, and my time as the Deputy Assistant Secretary of Defense for Detainee Affairs (DASD-DA) during the Bush Administration for my presentation today.

I would like to make five points.

First, the United States remains in a state of armed conflict. As such, we are entitled, under domestic and international law, to detain opposing enemy forces for the duration of hostilities, including the terrorists at Guantanamo.

Second, the terrorist detention facility at U.S. Naval Station Guantanamo Bay, Cuba, is a safe, secure, humane detention facility for law of war detainees, and is and has been in compliance with Common Article 3 to the Geneva Conventions.

Third, the President has wide discretion as commander in chief to decide where to detain opposing enemy forces, how long to detain them, and whether and when to release and transfer them during an ongoing armed conflict.

Fourth, the debate over closing Guantanamo has been overtly political. Guantanamo remains open today because of the lack of political courage to close the facility.

Fifth, to close Guantanamo in a responsible manner, the Administration must focus on the legal, logistical, political, and diplomatic challenges, and then spend the political capital and show courage to get it done.

State of Armed Conflict

The United States remains in a state of armed conflict against al-Qaeda, the Taliban, ISIS, and associated forces.[1] Presidents Bush, Obama, Trump, and Biden have all acknowledged this fact. As I wrote in my testimony before the Senate Armed Service Committee hearing in 2013, the Supreme Court has affirmed our engagement in an armed conflict in, among other decisions, *Hamdi v. Rumsfeld* in 2004.[2] A country in a state of armed conflict may resort to that body of law called the law of armed conflict.

In response to the devastating attacks against our homeland, Congress passed a joint resolution a week after the attack on September 18, 2001. The preamble to the 2001 Authorization for Use of Military Force (AUMF) directs the President "to protect United States citizens both at home and abroad." The operative text authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

This authorization for the use of force has acted, and still acts, as the legal framework for, among other things, targeting and detention operations, including detention operations at Guantanamo Bay, Cuba. Every Administration since then has relied on the 2001 AUMF to engage those actors who were responsible for, aided, or harbored those responsible for 9/11.

After President Biden withdrew all U.S. troops from Afghanistan earlier this year, he said that the United States has "ended 20 years of war in Afghanistan." Our troops may be out of Afghanistan, but the United States remains in a state of armed conflict, as evidenced by the Administration's posture and statements regarding using "over the horizon" and other military capabilities to detect and deter the enemy—actions which are authorized by the 2001 AUMF.

The 2001 AUMF does not include the words "detention." Nonetheless, each of the three branches of the federal government, including the executive branch across four Administrations, has recognized that the AUMF necessarily includes the power to detain those subject to the boundaries of the 2001 AUMF.

In June 2002, the Bush Administration argued in its brief before the Fourth Circuit in the case of *United States v. Hamdi* that the authority to detain Yasser Hamdi flowed from the commander in chief's Article II powers and from the "statutory authorization from Congress…. Furthermore,

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[1]The Bush Administration determined that the 2001 Authorization for the Use of Military Force (AUMF) applied to al-Qaeda, the Taliban, and associated forces. The Obama Administration agreed, but also extended the applicability of the 2001 AUMF to ISIL (otherwise known as ISIS or Islamic State). There are no members of ISIS held at Guantanamo Bay, thus, my presentation is based on the 39 detainees at Guantanamo as of December 14, 2021, each of whom are members of al-Qaeda or the Taliban. See Charles D. Stimson, Why Repealing the 1991 and 2002 Iraq War Authorizations Is Sound Policy, Heritage Foundation *Legal Memorandum* No. 256, January 6, 2020, https://www.heritage.org/sites/default/files/2020-01/LM256.pdf.

[2]Written testimony of Charles D. Stimson, Armed Services Committee, United States Senate, May 13, 2013, https://www.armed-services.senate.gov/imo/media/doc/Stimson_05-16-13.pdf (accessed December 6, 2021).

the President here is acting with the added measure of the express statutory backing of Congress." It cited the 2001 AUMF.

Similarly, in its brief before the Supreme Court in *Hamdi* in 2004, the Bush Administration argued that its detention authority stemmed, in part, from the AUMF, as that authority "comes from the express statutory backing of Congress."

And, as is well known by now, the Supreme Court held in *United States v. Hamdi* that "Congress has in fact authorized Hamdi's detention, through the AUMF."As the Court explained, citing long-standing, consistent executive practice and the law of war, "detention of individuals [who fought against the United States as part of the Taliban], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[3] The Bush, Obama, and Trump Administrations have relied on the AUMF's detention authority. The Biden Administration has also done so, at least to date.

Thus, despite what some critics of Guantanamo have asserted over the years, the United States—under the law of armed conflict and the 2001 AUMF—has the legal authority to detain members of al-Qaeda and the Taliban and associated forces, including at Guantanamo Bay, Cuba. And that detention authority lasts until the end of hostilities, or until the President decides to transfer or release the detainees, as a matter of executive grace.[4]

The 39 detainees that remain at Guantanamo Bay are members of either al-Qaeda or the Taliban. Although candidate Donald Trump promised to "load Gitmo up with bad dudes," including members of ISIS, when he was President, Trump never brought any detainees to Guantanamo. Had ISIS detainees been brought to Guantanamo Bay, there is, as I have written elsewhere, a substantial litigation risk that their habeas corpus cases could have been successful, thereby threatening the applicability of the 2001 AUMF to other combatant activity.[5]

Conditions of Detention at Gitmo Comply with the Geneva Conventions

Not only does the United States have the legal right to hold terrorist detainees during this armed conflict, including at Guantanamo, the conditions of their detention at Guantanamo comply with the Geneva Conventions.

After the Supreme Court issued its ruling in *Hamdan v. Rumsfeld*,[6] holding that Common Article 3 to the Geneva Conventions applied to those detainees held by the United States since the terrorist attacks of 9/11, the Department of Defense required an immediate review of whether all places of military detention complied with Common Article 3.

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[3]Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).
[4]See Charles D. Stimson and Hugh Danilack, The Case Law Concerning the 2001 Authorization for the Use of Military Force and Its Application to ISIS, Heritage Foundation *Legal Memorandum* No. 203, April 17, 2017 https://www.heritage.org/sites/default/files/2017-04/LM-203_1.pdf.
[5]Ibid.
[6]548 U.S. 557 (2006).

We conducted a thorough review of the conditions of detention at Guantanamo Bay shortly after the *Hamdan* decision to make sure we were in compliance with, or exceeded, the conditions as stated in Common Article 3.

As I have written elsewhere, Common Article 3 has somewhat ambiguous, aspirational, and capacious language.[7] And because the United States had vast experience detaining prisoners of war throughout our history, we had developed a professional, humane set of requirements for the treatment and housing of prisoners of war well before 9/11, most of which we applied to captured al-Qaeda and Taliban detainees well before 2006.

Our review of the conditions of detention at Guantanamo Bay, Cuba, demonstrated that we exceeded the standards required by Common Article 3. This was not surprising as we had improved the living conditions and professionalized the guard force there years beforehand. Detainees' living quarters were virtually identical to prisons in the United States. They received medical care by military doctors. Their food was fresh, Halal-based, and blessed by an imam. They were visited regularly by the International Committee of the Red Cross (ICRC), who worked with us routinely and confidentially on everything from conditions of detention to other related topics. Detainees were allowed to practice their faith daily. They were allowed to exercise daily. For detainees in Camp 4, there was a volleyball court and soccer field. They were allowed to send and receive mail and meet with their attorneys as needed to prepare their habeas corpus cases against the government.

I took dozens of people to visit the detention facility at Guantanamo during my tenure as DASD-DA, including Members of this body, and Members of the U.S. House of Representatives, nongovernmental organizations, the press, and the first three international bodies, including the U.K. Foreign Affairs Committee,[8] the Organization for Co-operation in Europe (OSCE), and European Parliamentarians.

As the U.K. Foreign Affairs Committee noted in their post-visit report, the "facilities at Guantanamo are broadly comparable with those at the United Kingdom's only maximum-security detention facility, but the conditions are not. Guantánamo scores highly on diet and on health provision; but it fails to achieve minimum United Kingdom standards on access to exercise and recreation, to lawyers, and to the outside world through educational facilities and the media."[9]

I recall that many Members of Congress who visited the facility on trips where I escorted them were favorably impressed with the conditions of detention. Some lawmakers thought we spoiled detainees by providing them ice cream, television, soccer fields, and freshly made bread. Others, who were against the very existence of Guantanamo, were surprised when they visited, as the

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[7]See Charles Stimson, David Rivkin, Jr., and Lee Casey, "Common Article 3 to the Geneva Conventions and Detainee Policy," Heritage Foundation *WebMemo* No. 2303, February 19, 2009, https://www.heritage.org/report/common-article-3-the-geneva-conventions-and-us-detainee-policy.
[8]See House of Commons Foreign Affairs Committee, "Visit to Guantanamo Bay, Second Report of Session 2006-2007," January 10, 2007, https://publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf.
[9]Ibid. at p. 14.

facilities were similar to those found in their home states, the guard force was professional, and the food, medical care, and services were not what they had expected to find.

As a candidate for President, then-Senator Obama promised that if elected, he would close the detention facility at Guantanamo Bay. After he was elected, in his first week in office, President Obama issued a series of Executive Orders related to closing Guantanamo Bay.

That was his prerogative as President.

Executive Order 13492 of January 22, 2009, Section 6, required the Secretary of Defense to "immediately undertake a review of the conditions of detention at Guantanamo to ensure full compliance" with Common Article 3 of the Geneva Conventions.[10] Secretary of Defense Robert Gates tasked the Vice Chief of Naval Operations, Admiral Patrick Walsh, to conduct the review.

Admiral Walsh and his team found, after a thorough investigation, that the conditions of detention met the standards of humane treatment required under Common Article 3 of the Geneva Conventions.[11] Critics of Guantanamo Bay ridiculed the report, but the Obama Administration did not refute the Admiral's findings.[12]

The iconic images of blindfolded detainees in orange jumpsuits, kneeling next to razor wire, still exist on the Internet. Those photos, taken in 2002 when most detainees were brought to Guantanamo, and temporarily housed in the Clinton-era facility called Camp X-Ray, are a relic of the past, and have been since 2003, when more permanent facilities were built.

There were, unfortunately, early on, instances of detainee abuse by members of the military. Those cases were investigated. Those that were substantiated resulted in the perpetrator being held accountable. But by President Bush's second term in office, the conditions of detention at Guantanamo were humane, and in full compliance with Common Article 3 of the Geneva Conventions.

Presidential War Power and Detainee Decisions

Under Article II of the United States Constitution, the President, as commander in chief, enjoys broad power to prosecute declared wars or authorizations for the use of military force passed by Congress. That power, exercised by all war-time presidents, includes, but is not limited to, deciding where to house prisoners of war.

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[10]See Executive Order 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Station and Closure of Detention Facilities," January 22, 2009, https://www.federalregister.gov/documents/2009/01/27/E9-1893/review-and-disposition-of-individuals-detained-at-the-guantaacutenamo-bay-naval-base-and-closure-of (accessed December 6, 2021).

[11]See Jim Garamore, "Guantanamo Complies with Geneva Conventions, Admiral Says," DVIDS, February 23, 2009, https://www.dvidshub.net/news/30346/guantanamo-complies-with-geneva-conventions-admiral-says (accessed December 6, 2021).

[12] See William Glaberson, "Administration Draws Fire for Guantanamo Report," New York Times, February 23, 2009, https://www.nytimes.com/2009/02/24/us/24detainees.html (accessed December 6, 2021).

Since the 9/11 attacks, the United States has held just over 100,000 detainees. The vast majority of those—around 75,000—were in Iraq.[13] In Afghanistan, the United States held around 25,000 detainees, and, in total, the United States has held 780 detainees at Guantanamo.[14]

The first detainees arrived at Guantanamo in January 2002. Today, no detainees are held by the United States in Iraq or Afghanistan, and only 39 detainees are held at Guantanamo.[15] The youngest detainee is 30, from Yemen; the oldest is 67, from Pakistan.

In 2002 and 2003, the Bush Administration released some detainees from Guantanamo Bay.[16] Others were properly classified as unlawful enemy combatants[17] and held under the law of war,[18] while others were transferred from the island to their home country or a third country that agreed to accept them.

The Bush Administration transferred or released a total of 532 detainees prior to January 22, 2009—the day President Barack Obama was sworn into office.[19] The three largest populations of detainees at Guantanamo were from Afghanistan, Saudi Arabia, and Yemen. All told, Guantanamo held detained individuals from dozens of countries. No American citizen was ever held there.

Before each detainee transfer, the United States engaged in extensive confidential executive branch discussions with the country willing to receive the detainee. Those transfer agreements, once reduced to writing, ensured that the terms of the transfer were clear to both sides and that, among other things, the receiving country would mitigate the threat that a particular detainee posed.[20] In addition to those countries that agreed to accept transfers of their own citizens, 33

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[13]The detainees held in Iraq legally were not "detainees" or "unlawful enemy combatants," but rather "security internees."

[14]See Carol Rosenberg, "The Guantanamo Docket," New York Times, updated November 29, 2021, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html?action=click&module=RelatedLinks&pgtype=Article (accessed December 4, 2021).

[15]When President Obama took office, there were 240 detainees at Guantanamo Bay, Cuba. Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," March 4, 2015, footnote a, http://www.dni.gov/files/documents/Guantanamo%20Unclassified%20Release_March%202015_FINAL.pdf (accessed September 7, 2015).

[16]A "release" from Guantanamo is fundamentally different from a "transfer" from the detention facility. A release allows the detainee to return to his home country or another country without any written agreement between the United States and the receiving country that requires the former to mitigate any threat the detainee might pose. In contrast, when a detainee is transferred from Guantanamo, the receiving country agrees in writing to certain conditions negotiated with the United States, and those conditions are designed to mitigate the threat the detainee poses. All releases from Guantanamo took place early on during the Bush Administration.

[17]The Obama Administration changed the nomenclature of Guantanamo detainees from the Bush-era "unlawful enemy combatants" to "unprivileged enemy belligerents."

[18]Charles D. Stimson, "Law of Armed Conflict and the Use of Military Force," testimony before the Armed Services Committee, U.S. House of Representatives, May 16, 2013, http://www.heritage.org/research/testimony/2013/05/the-law-of-armed-conflict.

[19]Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," p. 2.

[20]Domestic and international legal requirements may constrain the ability of the United States to transfer persons to foreign countries if they might face torture or other forms of persecution. Most notably, Article 3 of the U.N.

nations have resettled or offered temporary residency to detainees transferred from Guantanamo Bay.[21]

During the Obama Administration, 197 detainees were transferred.[22] In order to focus efforts on closing Guantanamo, President Obama created two senior governmental positions to manage the transfer and closure process: the State Department Special Envoy for Guantanamo Closure and the Defense Department Special Envoy for Guantanamo Detention Closure.[23]

The Obama Administration, pursuant to the President's executive order, studied each detainee and made recommendations for his disposition.[24] That report is, to date, the most thorough unclassified report on the disposition of detainees in existence. It is an impressive body of work. The findings and recommendations of the report were consistent with discussions and decisions taken by the Bush Administration.

One of the concerns about releasing the enemy during an ongoing armed conflict—unique to the war on terror—has been the potential for detainee reengagement. Because Congress was also concerned about this, it required the executive branch to track and publish recidivism rates for detainees released or transferred from Guantanamo.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and its implementing legislation prohibit transfer of persons to countries where there are substantial grounds for believing (i.e., it would be "more likely than not") that they would be subjected to torture. The Bush Administration took the position that CAT Article 3 and its implementing legislation did not cover the transfer of foreign persons held outside the United States in the war on terrorism. United States Department of State, "United States Written Response to Questions Asked by the Committee Against Torture," April 28, 2006, http://www.state.gov/g/drl/rls/68554.htm (accessed September 7, 2015). Both the Bush and Obama Administrations have stated that "it is the policy of the United States, consistent with the approach taken by the United States in implementing…[CAT], not to repatriate or transfer…[Guantanamo detainees] to other countries where it believes it is more likely than not that they will be tortured." Declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs, DOD, executed on June 8, 2007, at para. 3, *In re Guantanamo Bay* Detainee Litigation, Case No. 1:05-cv-01220 (D.D.C 2007). See also Michael John Garcia, Jennifer K. Elsea, R. Chuck Mason, and Edward C. Liu "Closing the Guantanamo Detention Center: Legal Issues," Congressional Research Service *Report for Congress*, May 30, 2013, pp. 9–12, https://www.fas.org/sgp/crs/natsec/R40139.pdf (accessed September 7, 2015). See also Robert M. Chesney, Leaving Guantanamo: The Law of International Detainee Transfers, Uni.Rich.L.Rev., Vol. 40, Issue 3, March 1, 2006.

[21]See Final Report, Guantanamo Review Task Force, January 22, 2010, https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf (accessed December 6, 2021).

[22]Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," 25 November 2019, https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Final_Version_11-26-19_ATTACH_Declassified_Summary_Reengagement_of_GTMO_Detainees_19-1392_A-DNI_Approved.pd.pdf (accessed December 6, 2021).

[23]Cliff Sloan was the first State Department Special Envoy for Guantanamo Closure. He was appointed in 2013, stepped down in 2014, and was replaced by Lee Wolsky on June 30, 2015. Paul Lewis was appointed in 2013 to be the Defense Department's Special Envoy for Guantanamo Closure and remains in that job.

[24] See Final Report, Guantanamo Review Task Force, January 22, 2010, https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf (accessed December 6, 2021).

Section 307 of the Intelligence Authorization Act for Fiscal Year 2012 required the Director of National Intelligence (DNI) to publicize every six months an unclassified summary of recidivism of detainees formerly held at Guantanamo Bay.[25] It required the DNI to consult with the Central Intelligence Agency (CIA) and the Defense Intelligence Agency (DIA) before reporting the results. As of November 25, 2019, 17 percent (124 of 729) of detainees were confirmed to have reengaged in combatant activity, and 14 percent (102 of 729) were suspected of reengaging in combatant activity, for a total of 31 percent.[26]

The Debate Over Closure

Conservatives opposed to its closure point out that Guantanamo Bay is a well-run, safe, and humane facility that should remain open during the ongoing armed conflict. The facility has been found to be in compliance with Common Article 3 of the Geneva Conventions by both the Bush and Obama Administrations.[27]

Supporters also argue that al-Qaeda waged war against the United States well before Guantanamo Bay became a terrorist detention facility. They also point out that there was no Guantanamo Bay when the World Trade Center was first bombed in 1993, when the U.S. embassies in East Africa were bombed in 1998, when the *USS Cole* was attacked in 2000, or for that matter on 9/11. They assert, therefore, that those who contend that the existence of the facility at Guantanamo Bay has fueled terrorism are misguided.

President Obama argued that it was imperative to close Guantanamo Bay because it had, in his opinion, and the opinion of others, weakened national security and set back the moral authority of the United States.[28] Human rights organizations similarly claim that Guantanamo Bay "is a grave threat to both human rights and U.S. national security"[29] and is "emblematic of the gross human rights abuses perpetrated by the U.S. government."[30]

Matthew Waxman, my friend and predecessor as the first Deputy Assistant Secretary of Defense for Detainee Affairs during the Bush Administration, opined in *The Washington Post* that

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[25]Intelligence Authorization Act for Fiscal Year 2012, Public Law 112–87, § 307.
[26]The actual number is not knowable because one is not classified as "confirmed" unless and until proof exists of reengagement. It is entirely possible, and indeed likely, that some percentage of Guantanamo detainees who have been released or transferred from the island have reengaged but have not been discovered to have done so.
[27]Charles Babington and Michael Abramowitz, "U.S. Shifts Policy on Geneva Conventions," *The Washington Post*, July 12, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.htm (accessed September 8, 2015); Peter Finn and Del Quentin Wilber, "Pentagon Review Finds Guantanamo Conditions Meet Geneva Conventions, but Urges More Interaction for Some Detainees," *The Washington Post*, February 21, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/20/AR2009022002191.html (accessed September 8, 2015).
[28]See President Barack Obama, "Remarks by the President on National Security," address delivered at the National Archives, Washington, D.C., May 21, 2009, https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09 (accessed August 6, 2015).
[29]Human Rights First, "Guantanamo," http://www.humanrightsfirst.org/topics/guantanamo (accessed August 5, 2015).
[30]Amnesty International, "Guantanamo, Bagram and Illegal U.S. Detentions," http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo (accessed August 6, 2015).

Guantanamo Bay has "hampered cooperation with our friends such as critical counterterrorism tasks as information sharing, joint military operations and law enforcement."[31] No doubt that was true at the time Professor Waxman wrote that op-ed.

Some, including President Obama, have claimed that the existence of Guantanamo Bay has acted as a recruiting tool for terrorists.[32] However, a study of jihadist propaganda concluded that Guantanamo Bay has "grown far less salient over the last few years…and has never played a big role in any terrorist groups' propaganda compared to issues that really animate those groups."[33] The study concluded that "it is hardly clear that Guantanamo's *closure* would matter much, so far as concerns the contents of jihadist propaganda."[34]

When ISIS was active, they used social media to exploit the image of orange jumpsuits—worn by the first Guantanamo Bay arrivals—by dressing their victims in the same orange garb and brutally executing them.

Today, there is barely a mention of Guantanamo in the press. And although I no longer have access to confidential and classified information, it is my understanding that communications between our foreign military partners and diplomatic counterparts do not start with—much less mention—the topic of Guantanamo. What was a hot topic during the Bush Administration, and a topic during the first term of the Obama Administration, is no longer a pressing issue.

The reasons for that likely include the fact that most major media outlets around the world have visited Guantanamo and seen for themselves that the conditions of detention are safe, humane, and not the "torture palace" depicted by foes of Guantanamo. Another likely factor is that the remaining 39 detainees are well known in intelligence circles, at home and abroad. They know who they are, what they represent, and that detaining them as law of war detainees is not only not an injustice, but what they deserve.

The year 2009 was the most opportune time for an Administration to close Guantanamo. President Obama won the White House, promising to close Guantanamo. The Democrats held a

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[31]Matthew Waxman, "The Smart Way to Shut Gitmo Down," *The Washington Post*, October 28, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/10/26/AR2007102601761.html (accessed August 6, 2015).
[32]See, for example, transcript, "News Conference by the President," The White House, April 30, 2013, https://www.whitehouse.gov/the-press-office/2013/04/30/news-conference-president (accessed August 6, 2015).
[33]Cody M. Poplin and Sebastian Brady, "Is Guantanamo Really a Major Recruiting Tool for Jihadists?" Lawfare, June 3, 2015, http://www.lawfareblog.com/guantanamo-really-major-recruiting-tool-jihadists (accessed September 8, 2015). See also rebuttal at Adam Jacobson, "Closing Guantánamo Will Help Combat Terrorist Propaganda," Just Security, June 12, 2015, https://www.justsecurity.org/23749/closing-guantanamo-combat-terrorism/ (accessed September 10, 2015).
[34]Poplin and Brady, "Is Guantanamo Really a Major Recruiting Tool for Jihadists?" (emphasis added).

57–41 majority in the United States Senate, enjoying a 59–41 vote advantage.[35] Similarly, in the House of Representatives, the Democrats enjoyed a 257–178 advantage.[36]

If the President needed any legislation to close Guantanamo—a debatable point—or simply the political backing of the majorities in both houses of Congress, the stars were aligned for him to do so. But he failed, in large part because members of his own party failed to show the political courage of their own convictions, as demonstrated below.

As stated above, on January 22, 2009, President Obama signed Executive Order 13492 requiring that the joint detention facility at Guantanamo be closed within a year.[37] The order stated that any individuals still in detention after the one-year mark "shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States."[38]

Yet 2009 ultimately proved to be a pivotal year in the detainee saga not because of any substantial steps toward shuttering Guantanamo, but because, with regard to the question of closure, a series of missteps turned Congress against the Administration. These mistakes soured the mood in the Democratically-controlled Congress regarding the Administration's judgment with respect to how to deal with some detainees and resulted in the Democrat-controlled House and Senate passing legislation to prevent the Administration from importing detainees into the United States—a key part of the original executive order and all closure plans.

In May 2009, President Obama gave an in-depth speech on national security and Guantanamo detainee policy at the National Archives.[39] He acknowledged that "there are no neat or easy answers" with respect to Guantanamo but said that he refused "to allow this problem to fester." In fact, he admitted that "it is my responsibility to solve the problem." To this end, Obama proposed five distinct categories to deal with detainees:

- Federal court trials,
- Reformed military commissions trials,
- Releasing those ordered released by federal courts,
- Transferring those deemed by the Administration to be worthy of transfer, and
- Continued military detention of those who cannot be tried but still pose a national security risk to the United States.

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[35]In addition, one Independent and one Independent Democrat caucused with the Democrats. U.S. Senate, Senate History, "Party Division in the Senate, 1789–Present," http://www.senate.gov/history/partydiv.htm (accessed September 13, 2015).
[36]U.S. House of Representatives, History, Art & Archives, "Party Divisions of the House of Representatives, 1789–Present," http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (accessed September 13, 2015).
[37]Executive Order 13492, January 22, 2009, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," *Federal Register*, Vol. 74, No. 16 (January 27, 2009), pp. 4897–4900, http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf (accessed September 11, 2015).
[38]Ibid., Sec. 3. Note that the executive order included bringing some number of detainees into the United States for continued detention, which in January 2009 was not prohibited by law.
[39]Amnesty International, "Guantanamo, Bagram and Illegal U.S. Detentions."

President Obama acknowledged that the last category is "the toughest single issue we will face" and further promised that he was not going to "release individuals who endanger the American people." He also promised to "work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution."

The President, however, failed to deliver on these promises, and a month later, on June 9, 2009, the Administration transferred Ahmed Ghailani from Guantanamo to the United States for trial in a federal district court in New York. The charges against Ghailani were based on his role in the 1998 U.S. embassy bombings in Kenya and Tanzania. The move was controversial not only because Congress was not given prior notice of the transfer, but also because it was thought that Ghailani was a prime candidate for a reformed military commission trial.[40] Officials in New York were upset because they believed his trial would inspire new terrorist attacks against the city and impose additional security costs for law enforcement.

Congress reacted swiftly to the Ghailani transfer by adding transfer restrictions to the Supplemental Appropriations Act of 2009, approved on June 24, 2009.[41] The act included language that prohibited the use of funds to transfer any detainee into the United States unless certain criteria were met. If the Administration wanted to bring a Guantanamo detainee into the United States for prosecution, the act required that the Administration submit a classified plan that included a risk analysis, costs, legal rationale, mitigation plan, and a certification by the Attorney General that the transfer posed "little to no security risk to the United States."[42] Furthermore, no funds could be spent to effect a transfer to the United States until at least 45 days after the plan was submitted to Congress.

Throughout the summer of 2009, Congress held hearings on reforms needed to improve the Military Commissions Act of 2006. On October 28, 2009, Congress passed the NDAA for Fiscal Year 2010. Those meaningful reforms of military commissions became the Military Commissions Act of 2009.[43]

Sixteen days later, on November 13, 2009, then-Attorney General Eric Holder announced that the five Guantanamo terrorists responsible for the 9/11 attacks would be brought to New York to face a criminal trial in federal district court.[44] Politicians from both parties objected vigorously, including Democratic Senator Chuck Schumer and Republican Representative Peter King, both from New York.[45]

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[40]Ghailani was convicted in 2010 of one count of conspiracy and acquitted of 280 other counts. In January 2011, he was sentenced to life in prison, and his case is on appeal.
[41]Supplemental Appropriations Act, 2009, Public Law 11-32, 111th Cong., June 24, 2009, http://www.gpo.gov:80/fdsys/pkg/PLAW-111publ32/html/PLAW-111publ32.htm (accessed September 13, 2015)
[42]Ibid.
[43]National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84, 111th Cong., October 28, 2009, http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/pdf/PLAW-111publ84.pdf (accessed September 13, 2015).
[44]News release, "Attorney General Announces Forum Decisions for Guantanamo Detainees," U.S. Department of Justice, November 13, 2009, http://www.justice.gov/opa/speech/attorney-general-announces-forum-decisions-guantanamo-detainees (accessed September 13, 2015).
[45]Peter Finn and Anne E. Kornblut, "Opposition to U.S. Trial Likely to Keep Mastermind of 9/11 Attacks in Detention," *The Washington Post*, November 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111207508.html (accessed September 8, 2015).

As if those moves did not poison the relationship between the Obama Administration and Congress enough with respect to Guantanamo, on December 15, 2009, President Obama issued a Presidential Memorandum to the Attorney General and Secretary of Defense to purchase the state-run Thomson Correctional Facility in Thomson, Illinois, for the express purpose of housing Guantanamo detainees.[46] That was a viable alternative, but that was a bridge too far for some. The controversial move produced another political backlash against the Administration. Senator Dick Durbin, who at first supported the move,[47] withdrew his support when it became "politically impossible."[48]

As a result of these moves, Congress began to include a provision in annual appropriations or defense authorization enactments that barred the use of funds to construct or modify a facility in the United States to house detainees who remain under the custody or control of the Department of Defense.[49]

The closure of the Guantanamo Bay detention center did not have to unfold in such a contentious fashion. The Obama Administration could have worked with Congress to close Guantanamo in a responsible manner. Although closing the facility within the self-imposed one-year deadline was ambitious, it could have been accomplished by sharing the work and the credit with Congress. But when push came to shove, the President's plan fell apart when members of his own party refused to accept the political consequences of bringing Guantanamo detainees to their home states.

Four Big Challenges to Closing Guantanamo Bay

In 2006, at the direction of Secretary of Defense Donald Rumsfeld, I conducted the first classified study on how to close detention operations at Guantanamo Bay. The Secretary wanted to have a plan in place in case President Bush ordered the detention facility shuttered, as President Bush had said publicly that he would like to close the facility.

Although the study remains classified, it contained four components. Not surprisingly, Obama's Guantanamo Review Task Force also contained the same, or similar, components. To wind down detention operations in a responsible manner, any Administration must focus on logistical, legal, political, and diplomatic challenges.

Logistical Challenges

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[46]President Barack Obama, "Presidential Memorandum—Closure of Detention Facilities at the Guantanamo Bay Naval Base," December 15, 2009, https://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base (accessed September 13, 2015).
[47]News release, "Durbin, Quinn Praise Administration Decision to Purchase Thomson Correctional Center," Office of Senator Dick Durbin, December 15, 2009, http://www.durbin.senate.gov/newsroom/press-releases/durbin-quinn-praise-administration-decision-to-purchase-thomson-correctional-center (accessed September 13, 2015).
[48]News release, "Durbin: Obama Administration Will Not Transfer Prisoners from Guantanamo Bay to Thomson," Office of Senator Dick Durbin, April 4, 2011, http://www.durbin.senate.gov/newsroom/press-releases/durbin-obama-administration-will-not-transfer-prisoners-from-guantanamo-bay-to-thomson (accessed September 13, 2015).
[49]Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues," p. 5.

The logistical challenges posed by the closing of Guantanamo Bay are perhaps the simplest to solve. The military, if ordered, could plan for and execute the transfer of all 39 detainees from Guantanamo Bay within short order. To date, that order has never been given.

Instead of a mass exodus of detainees from Guantanamo Bay, the Obama Administration, like its predecessor, culled the population detainee-by-detainee through negotiated transfers. The Trump Administration transferred one detainee from the island.

Negotiating for the transfer of a detainee is a time-consuming and difficult task. Each detainee poses a unique risk.

But if the Biden Administration really wants to close Guantanamo, and it is willing to accept more risk than his predecessors, the President could overrule his advisors and order any or all detainees at Guantanamo to be released or transferred. He would, or course, own the political consequences of doing so.

Legal Challenges

There are several categories of legal challenges associated with detainees at Guantanamo Bay, each of which must be considered and evaluated before attempting to close the facility in a responsible manner.

Over its 103-year history as an American naval base, Guantanamo Bay has not been a stranger to litigation. Well before the Naval Station at Guantanamo Bay was first used as a terrorist detention facility, it was used by the United States government as a detention facility for refugees picked up on the high seas—a use that resulted in litigation ultimately decided by the U.S. Supreme Court.[50]

Weeks after the first terrorist detainees arrived in January 2002, they filed lawsuits against the United States government to protest their detention. Despite these legal challenges to military detention and commissions, the courts have reaffirmed that the detainees may be detained under the law of war for the duration of the hostilities. Those hostilities continue as a matter of law, and the President therefore may continue to hold any unprivileged enemy belligerent he chooses to detain at Guantanamo Bay.

As a legal matter, every President, starting with President George W. Bush, could have released any or all of the detainees at Guantanamo Bay at any time. Doing so, of course, would have been dangerous and irresponsible, not to mention fraught with political peril. The point, however, is that a President has the inherent legal authority to order the release of detained enemy fighters, even during an ongoing armed conflict.

In 2009, there were no federal statutes prohibiting President Obama from bringing Guantanamo Bay detainees to the United States for continued detention. Nor was there any statute that prohibited the Administration from spending money to acquire or upgrade an existing detention facility in the United States to house Guantanamo Bay detainees.

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[50] *Haitian Centers Council, Inc. v. Sale*, 509 U.S. 155 (1993).

That all changed in 2010 when, as noted, the Democratic-controlled Senate and House of Representatives included a provision in the annual appropriations or defense authorization acts that barred the use of funds (1) to construct or modify a facility in the United States to house Guantanamo Bay detainees and (2) to transfer or release detainees into the United States.[51] Each subsequent NDAA has contained similar provisions.[52]

Critics of military detention have nicknamed detainees the "forever detainees." That phrase is meaningless because, as a matter of law, no one has asserted that the United States may detain Guantanamo Bay detainees under the law of armed conflict after the armed conflict has ended.

Moreover, ever since the publication of the Guantanamo Review Task Force's final report, the Obama Administration maintained that any closure plan necessarily requires bringing some of those then-48 detainees into the United States for continued military detention—despite the fact that public opinion at the time favored the continued existence of Guantanamo Bay as a detention facility and rejected the idea of bringing detainees into the United States.[53]

As detailed in a 2013 Congressional Research Service Report, myriad restrictions on detainee transfers have been imposed since 2010.[54] These restrictions include a requirement that Congress be notified 30 days before any transfer occurs and a prohibition on transfers to a country if there is a confirmed case that a former Guantanamo detainee has reengaged in combatant activity in that country. Starting in 2011, use of any appropriated funds to transfer detainees into the United States for any purpose has been prohibited.[55]

Thus, unless Congress is persuaded to change the law and allow some detainees to come to the United States for continued detention or trial, the President may not legally bring detainees to the United States as part of any closure plan.

Political Challenges

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[51]Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues." The National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383, 111th Cong., January 7, 2011, § 1034(a)-(b), applied only to DOD funds for FY 2011. Later versions of the prohibition found in continuing appropriations legislation have extended it to all funds made available under any act. See Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10, 112th Cong., April 15, 2011, § 1114; Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112-55, 112th Cong., November 18, 2011, § 533; Consolidated Appropriations Act, 2012, Public Law 112-74, 112th Cong., December 23, 2011, Div. A, § 8121, and Div. H, § 511; Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113-6, 113th Cong., March 26, 2013, Div. B, § 531, and Div. C, § 8111.

[52]The Administration's repeated claims that the Republican Congress has blocked the President's efforts to close Guantanamo by enacting legislative restrictions ignores the fact that those restrictions were first put into place by the Democratic-controlled Senate and House.

[53]Justin McCarthy, "Americans Continue to Oppose Closing Guantanamo Bay," Gallup, June 13, 2014, http://www.gallup.com/poll/171653/americans-continue-oppose-closing-guantanamo-bay.aspx (accessed September 8, 2015).

[54]See Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues."

[55]Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383, 111th Cong., January 7, 2011, § 1032; Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10, 112th Cong., April 15, 2011, § 1012.

From the very beginning, political considerations have been the most important—and complicated—aspect of closing the detention facility. Had President George W. Bush sought and received congressional backing for the use of Guantanamo as a terrorist detention facility in 2001, the controversy over the facility might have been muted. The Bush Administration, however, did not request legislation to establish Guantanamo as the "official" terrorist detention facility post-9/11, and just as opening Guantanamo had political consequences, closing it down takes an act of political action and willpower.

As noted, the most politically opportune time for the Obama Administration to force the closure of Guantanamo was during the President's first two years in office, when his own political party was in the majority in both houses of Congress. Political power is evanescent: It must be spent quickly before it slips away. But instead of working behind the scenes with members of the President's own party to forge an acceptable closure plan, the Administration took unilateral action, which in turn soured its relationship with Congress.

The cumulative effect of the mistakes made by the Obama Administration in 2009, the then-ongoing terrorist plots against the United States by radical Islamist extremists or those they inspire,[56] the fact that the Administration did not make closing Guantanamo an actionable priority, and other external factors all contributed to the current, complicated nature of the Guantanamo question. Whether the political landscape can change remains to be seen.

The Biden Administration has not made closing the detention facility at Guantanamo a priority, so far as I can tell. Unless and until it does so and works with Congress while members of his own party control the Senate and House, the likelihood of it closing anytime soon is low.

Diplomatic Challenges

On the diplomatic front, the Bush and Obama Administrations spent an enormous amount of time working with other countries to ensure that they understood U.S. detention policies.[57] Prior to 2009, many countries worked with the United States through diplomatic channels on

[56]In 2009 alone, authorities thwarted the synagogue terrorism plot in New York City and arrested Najibullah Zazi for planning to blow up the New York City subway; Hosam Maher Husein Smadi for planning to bomb a Dallas skyscraper; Michael Finton for trying to blow up the federal courthouse in Springfield, Illinois; and Tarek Mehanna and Ahmad Abousamra for conspiracy to provide material support to a terrorist organization. The infamous attempted attack of 2009 involved Umar Farouk Abdulmutallab, a 23-year-old Nigerian student living in London who took a flight from Nigeria to Amsterdam and then on to Detroit. On the second leg of his trip, he attempted to detonate a bomb hidden in his underwear. Luckily, the device did not detonate, and passengers stopped him from trying again. The bomb, containing the explosives PETN and TATP, was similar to the bomb used by shoe bomber Richard Reid in 2001.

[57]The issue of Guantanamo was emblematic of a broader discussion in legal and diplomatic circles relating to the United States decision to treat the attacks of 9/11 as an act of war, thus triggering the law of armed conflict. There were numerous discussions between American officials and our international partners with respect to Guantanamo and our detention policies. John Bellinger, the top lawyer in the State Department, gave a speech on October 31, 2006, at the London School of Economics on "Legal Issues in the War on Terrorism" that encapsulated the legal and diplomatic framework for our detention operations and the tension between the American approach and the European approach. See John Bellinger, "Legal Issues in the War on Terrorism," speech at the London School of Economics, October 31, 2006, http://www.state.gov/s/l/2006/98861.htm (accessed September 13, 2015).

Guantanamo-related issues, and many, if not most, of them welcomed the prospect of Guantanamo Bay's eventual closure. The diplomatic stage was set for its closure.

Prior to the Obama Administration, many countries worked with the United States to effect the release and/or transfer of detainees from Guantanamo, either to their own country or to other countries. For example, 532 detainees were released or transferred from Guantanamo before January 2009, and each of those cases involved delicate, confidential, and extensive diplomacy between the United States and other countries.

As stated above, 197 detainees were transferred during the Obama Administration to various countries, and each of those transfers involved similar difficult diplomatic negotiations. But the 2014 transfer of the so-called Taliban Five detainees to Qatar in exchange for U.S. Army Sergeant Bowe Bergdahl complicated the legal and diplomatic landscape. Although it is difficult to know how this controversial decision—made in violation of the 30-day congressional notification requirement—has affected ongoing diplomatic transfer negotiations, it is easy to gauge congressional sentiment on the matter.

Shortly after the Bergdahl fiasco, the House-passed NDAA included a provision that essentially required the Administration to disclose all correspondence between the United States and Qatar as it relates to the Taliban Five transfer. The Obama Administration was reluctant to do so, not only because the substance of the agreement was politically indefensible, but also because doing so would violate the unspoken principle behind all previous transfer agreements during both the Bush and Obama Administrations: that negotiations between countries with respect to detainee transfers is the prerogative of the executive branches of the respective governments, not the legislative branches. By definition and custom, transfer agreements have been negotiated by executive branch officials—primarily the State Department—with no direct input from or oversight by the legislative branch. Complying with the House amendment, if it had become law, could have infringed on core separation of powers issues and set a bad precedent not only for future transfer agreements, but also for other matters outside the context of detention policy.

That House amendment, understandable on one level, could have had a chilling effect on ongoing diplomatic negotiations with respect to other transfers. For example, countries that otherwise might be amenable to accepting a Guantanamo transferee hesitate if they concluded that the written agreement would be shared with the United States Congress.

Conclusion

The United States is still engaged in an ongoing armed conflict. Domestic, international, and Supreme Court precedent allow the United States to detain those men at Guantanamo under the law of war.

The fact that when these hostilities will end is uncertain does not alter the legality of the law of war detention, including for those detained at Guantanamo Bay, Cuba.

Guantanamo detainees do not live in a law-free zone in southeastern Cuba, as evidenced by the rulings of the Supreme Court. Rather, they enjoy the constitutional writ of habeas corpus to

challenge their detention—the first time any wartime prisoner in United States history has enjoyed such a right.

A handful of detainees were mistreated at Guantanamo early in its existence, but policies and practices have improved since the Bush Administration, and according to one European parliamentarian who visited the facility in 2006, has been a "model prison"[58] and in compliance with Common Article 3 of the Geneva Conventions.

Whether the facility is a recruiting tool for jihadists is highly debatable. If detainees were moved from Guantanamo Bay to a secure facility in the United States, those same jihadists would use the new location as a proxy for their contempt and hatred toward the United States and Western values.

The fiscal argument that Guantanamo is too expensive to maintain might be a good political talking point, but it rings hollow. As one scholar has stated, the marginal cost of Guantanamo "is a rounding error on a rounding error."[59]

Those who favor closing Guantanamo assert, in essence, that if the U.S. just changes the ZIP code of detention from Cuba to some facility in the United States, the "un-American-ness" of Guantanamo will vanish. But for America's enemies, Guantanamo is only the latest proxy for their ire against the United States: If you change the ZIP code, they change the proxy.

Those who support Guantanamo's role in detaining the enemy during wartime also focus on the ZIP code, but for a totally different reason. They assert that because it is an exceptionally well-run facility and is far from U.S. shores, there is no chance that there will be any escapes, and the courts—at least to date—have intervened only to grant detainees the writ of habeas corpus. Moreover, as these detainees are not in the United States, there have been no immigration consequences.

Regrettably, however, rather than debating and passing a sustainable long-term detention framework—a topic Heritage Foundation scholars have written about since 2009[60]—Congress and the Administration remain fixated on *where* the enemy should be kept rather than on *how* best to incapacitate non-state actors lawfully for the long war against terrorism. That's the real injustice.

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[58]See comment by Alain Grignard, deputy head of the Organization for Security and Cooperation in Europe's federal police anti-terrorism unit, after his visit to Guantanamo in March 2006: "At the level of the detention facilities, it is a model prison, where people are better treated than in Belgian prisons." Reuters, "Guantanamo Better than Belgian Prisons: OSCE Expert," *Sydney Morning Herald*, March 7, 2006, http://www.smh.com.au/news/world/guantanamo-better-than-belgian-prisons-osce-expert/2006/03/07/1141493645389.html (accessed September 13, 2015).

[59]Benjamin Wittes, "The Arguments About Guantanamo Are Nearly All Wrong, Disingenuous, Irrelevant, or Just Plain Dumb," Lawfare, January 21, 2015, https://www.lawfareblog.com/arguments-about-guantanamo-are-nearly-all-wrong-disingenuous-irrelevant-or-just-plain-dumb (accessed September 13, 2015).

[60]Charles D. Stimson, "Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War," Heritage Foundation *Legal Memorandum* No. 35, January 23, 2009, http://www.heritage.org/research/reports/2009/01/holding-terrorists-accountable-a-lawful-detainment-framework-for-the-long-war.

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