Obama Makes the Case, But Has No Realistic Plan to Close GITMO

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by DAVID SCHANZER for ISLAMiCommentary on MAY 24, 2013:

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In his speech at the National Defense University, President Obama made his most impassioned and compelling argument to date about the need to close the prison for wartime detainees at the Guantanamo Bay Naval Base. But logic and presidential will are not enough to achieve this goal. It will take an intense effort by the Administration, cooperation from international partners, bipartisan congressional support, and perhaps forceful assertion of presidential prerogatives to get this done in Obama's second term. It is difficult to see how all these pieces will fall into place.

Remember, this issue has never been about closing a prison facility. It is about what to do with 166 people, some of whom are dangerous terrorists that will almost certainly attempt to kill innocents if they are allowed to go free.

There are three distinct groups of detainees – each with its own separate legal status and obstacles to removal from GITMO.

Cleared for Release

First, there are the 86 individuals who have been cleared for release by our defense and intelligence agencies. Critics of the Administration correctly point out that this is the one area
where Obama can take unilateral action to reduce the GITMO population, as Congress has left a narrow window for the president to transfer prisoners abroad through national security waivers.

With the announcement that transfers will now be allowed to Yemen – home to a large cohort of detainees – removals from GITMO could start up again after a hiatus of almost two years. But Obama suggested that the national security waiver process would be a halting, case-by-case review, which would have to meet the exacting standard set forth by Congress.

Yemen may be able to handle some detainees – but the U.S. is not likely to release dozens of them to Yemen’s custody very quickly given the fragile security situation there and the country’s checkered record on keeping militants behind bars.

Those hoping for a rapid releases based on the national security waiver process are going to be disappointed.

In his speech yesterday, Obama called on Congress to lift all of the other legislative transfer restrictions, but we should not hold our breath waiting for them to be repealed. These provisions have bipartisan support and therefore likely will again be included in this year’s defense authorization legislation. Obama was unwilling to veto the defense bills in prior years. Will he do so now that he has become re-energized on GITMO (and is no longer running for reelection)?

Vetoing a defense bill just because of GITMO transfers would risk an override and there is no certainty that Obama could muster 1/3 of the members in either chamber to support him on this topic. Perhaps there are enough Democrats with safe seats in the House to accomplish this. But this is an issue Democrats will probably want to avoid. Republicans would like nothing more than to pummel Democrats for voting to “release terrorists to dangerous countries.”

Military Convictions

The second category of detainees are those who have been or will be convicted of crimes by military commissions. There may be as many as two dozen of them, but we don’t know for sure as recent court rulings have limited the types of crimes that military commissions may adjudicate. Those who are eventually convicted will need to serve out their sentences somewhere – perhaps until they die many decades from now.

Obama noted that people as dangerous or more dangerous than the GITMO detainees are being held in U.S. prisons, but he did not say anything else in the speech about transferring convicted detainees to the continental U.S. If anything, this would be an even harder mountain to climb in Congress than international detainee transfers. It would require the type of congressional arm-twisting that Obama has not been particularly effective at on any issue, let alone playing the ‘no terrorists in my back yard’ game.

If Obama wants to be bold, he could exercise his commander-in-chief authority and order the convicted detainees to be moved from GITMO to military jails inside the United States. He hinted that he might be thinking about doing this because he has directed the Department of Defense to identify a place that could hold military commissions (where presumably the
detainees would be able to stay both during and after trial). This move would certainly instigate a direct confrontation with Congress that, first of all, Obama may lose, and second of all, could jeopardize other parts of his agenda, like immigration reform. For these reasons, advocates for a swift closure of GITMO should not expect to see this type of provocative move any time soon. Obama might designate a place for these trials to be held, but I am dubious that he would move detainees there against congressional will.

Insufficient Evidence to Try

Obama noted that the hardest parts of the GITMO matrix are the individuals (perhaps as many as 60) who represent a continuing security threat but cannot be tried because we do not have sufficient admissible evidence against them. Obama's approach seems to be that if we can get momentum toward closure with the other two categories, then “this legacy problem can be resolved, consistent with our commitment to the rule of law.”

Reliance on this optimistic platitude shows how far we are from closing Guantanamo. Obama is absolutely right that the thought of the United States maintaining custody of hunger striking detainees who have been charged with no crime, and must be fed with feeding tubes down their noses, perhaps for decades on end, is repulsive. But there are no good alternatives and Obama gave the country no insight whatsoever into how these hard cases can be resolved.

There is an interesting linkage, however, between Obama’s discussion of the Authorization for Use of Military Force (the AUMF) and GITMO. Obama called for repeal of the 2001 AUMF, which authorizes the President to use “all necessary force” against al Qaeda (without a temporal or geographical limitation). If this law is repealed, however, there will no longer be an active armed conflict. If there is no active armed conflict, there will be no legal authority to continue holding any detainees in GITMO that have not been tried and convicted. Repeal of the AUMF, therefore, would lead to the emptying of GITMO. But this is a nuance that will not be lost on Congress and is one, among many, reasons that a total AUMF repeal will be difficult to achieve.

Obama’s call for closing GITMO in the name of national security and our values is right on the money. Renewed presidential vigor to make progress on closure — like that which infused the beginning of Obama’s first term — can certainly make a difference. But the pragmatic and political difficulties that dogged the effort for years have not changed and are likely to take the wind out of this renewed effort as well. There is no clear, achievable path to total closure. A strong effort in the second Obama term could dramatically reduce the detainee population, but this is a nettlesome problem that will probably be left for Obama’s successor to finish off.

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