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Obama Returns to Bush Era on Guantánamo

by Andy Worthington

Two distressing pieces of news emerged last week regarding the Obama administration's plans to close Guantánamo, and both were delivered by Defense Secretary Robert Gates in testimony to the Senate Appropriations Committee.

Discussing what would happen to the remaining 241 prisoners, [Gates announced](#) that the question was “still open” as to what the government should do with “the 50 to 100 — probably in that ballpark — who we cannot release and cannot try.” He also announced that the much-criticized military commission trial system, suspended for four months by Barack Obama on his first day in office, was “still very much on the table.”

Both admissions indicate that when it comes to Guantánamo, it is beginning to appear that the much-vaunted change promised by Barack Obama on the campaign trail has actually involved nothing more than [imposing a closing date on Guantánamo](#) while maintaining the Bush administration's approach to the men still held there.

Back in Bush's day, for example, those “who we cannot release and cannot try” were sometimes referred to as those who were “too dangerous to release but not guilty enough to prosecute” — essentially because the supposed evidence against them was the fruit of torture or other abuse.

As someone who has studied the story of Guantánamo and its prisoners in detail over the last three years, I'm aware that much of the information compiled by the Bush administration for use against the prisoners at Guantánamo was obtained through torture or coercion and is, therefore, unreliable, and that other, equally unreliable information was secured through the bribery of other prisoners.

As a [National Journal](#) investigation revealed in 2006, one prisoner, described by the FBI as a notorious liar, made false allegations against 60 prisoners in Guantánamo in exchange for more favorable treatment, and in February this year the [Washington Post](#) published the sobering tale of another informant, whose copious confessions should have set alarm bells ringing. In both cases, however, there is no indication that the officials responsible for compiling the information

examined by the president's review team have acknowledged that a substantial number of allegations against the prisoners are actually worthless.

Moreover, the defense secretary's talk of 50 to 100 suspicious prisoners (above and beyond those regarded as demonstrably dangerous) is at odds with repeated intelligence assessments reported over the years, which have indicated that the total number of prisoners with any meaningful connection to international terrorism is between 35 and 50. To this should be added [the recent revelation](#) by Lawrence Wilkerson, Colin Powell's chief of staff, that "no more than a dozen or two of the detainees" held in Guantánamo ever had any worthwhile intelligence.

In addition, the defense secretary's talk of reviving the military commissions is a distressing development for the many critics of the novel trial system invented by [Dick Cheney and David Addington](#), who hoped that the administration would resist all calls to reinstate them, and would, instead, move the relatively few prisoners regarded as genuinely dangerous to the mainland to face trials in federal court.

However, on Saturday, after speaking to Obama administration officials, the [New York Times](#) reported that, despite declaring that, as president, he would "reject the Military Commissions Act," and stating that "by any measure our system of trying detainees has been an enormous failure," President Obama was indeed considering reviving the commissions.

As the *Times* described it,

Administration lawyers have become concerned that they would face significant obstacles to trying some terrorism suspects in federal courts. Judges might make it difficult to prosecute detainees who were subjected to brutal treatment or for prosecutors to use hearsay evidence gathered by intelligence agencies.

As a result, they said, decision-makers were considering whether to tinker with the rules regarding the use of coercive interrogations and hearsay, in what the *Times* described as "walk[ing] a tightrope of granting the suspects more rights yet stopping short of affording them the rights available to defendants in American courts."

The "tightrope" analogy, though apt, is also something of an understatement. Almost universally derided in their seven-year history, the commissions demonstrated, above all, that inventing a legal system from scratch was a poor substitute for respecting the laws which have served the Republic well for over 200 years.

Nor can it be claimed that the federal court system is incapable of dealing with terrorism cases. As was explained in a 2008 report by Human Rights First, "In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts" ([PDF](#)), over 100 terrorism cases have been prosecuted successfully in the federal courts in the last 15 years.

Moreover, last Thursday, as Robert Gates was telling the Senate that the military commissions were still “on the table,” the Justice Department was taking a very different line in the case of [Ali al-Marri](#), a legal U.S. resident who was held in extreme isolation for nearly six years without charge or trial as an “enemy combatant” in a U.S. naval brig, until he was returned to the federal justice system by the Obama administration.

As al-Marri [accepted a plea agreement](#) and admitted that he had been sent to the United States as an al-Qaeda “sleeper agent,” Attorney General [Eric Holder announced](#) that the result “reflects what we can achieve when we have faith in our criminal justice system and are unwavering in our commitment to the values upon which this nation was founded and the rule of law.”

To remove the stain that Guantánamo has left on the reputation of the United States as a nation founded on the rule of law, Mr. Holder’s words should be repeated to him every time that the administration attempts to turn back the clock to the days of George W. Bush, with its dangerous talk of finding new ways to justify holding prisoners without charge or trial and its willingness to revive a trial system despised as nothing more than a “kangaroo court.”

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