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Guantánamo: Charge or Release Prisoners, Say No To Indefinite Detention **by Andy Worthington**

So what's happening now? According to a joint [Washington Post/ProPublica](#) article on Friday, "The Obama administration, fearing a battle with Congress that could stall plans to close Guantánamo, has drafted an executive order that would reassert presidential authority to incarcerate terrorism suspects indefinitely," according to "three senior government officials."

The administration moved swiftly to refute the story, with the Justice Department maintaining that it would not comment on specific plans until after July 21, when the administration's inter-departmental Guantánamo Task Force is scheduled to complete its [review of all the Guantánamo cases](#), and an unnamed official [telling AFP](#) that "no such draft order existed, though internal deliberations were taking place on how to deal with those inmates who could not be released or tried in civilian courts." The *Post* accordingly revised its story online, stating that administration officials were only "crafting language for an executive order."

However, it is certainly true that the administration is struggling to deal effectively with the closure of Guantánamo, having recently [suffered a defeat](#) in Congress, when politicians of both parties supported a passage in a \$106 billion war funding bill, which "prohibits the use of any funds ... to release or to transfer ... any individual detained at Guantánamo Bay into the continental United States" and also authorized legislation that "requires the President to report periodically to Congress on the status of Guantánamo Bay detainees and plans for their transfer."

As a result, an executive order would indeed enable President Obama to "reassert presidential authority" over issues relating to the closure of Guantánamo, although whether indefinite detention is part of the plan is still unclear. Since last month, when the president [first made public](#) the options being looked at regarding the closure of Guantánamo (during an important [national security speech](#)), it has been clear that all options were being kept on the table.

It also appears that the administration is willing to test out responses to various proposals through strategic media leaks, as happened three weeks ago, when the [New York Times](#) published an article about a proposal, in draft legislation to be submitted to Congress, which was [apparently designed](#) to pave the way for the prisoners [accused of involvement](#) with the 9/11 attacks to plead

guilty in a trial by military commission (the “terror trials” introduced by former Vice President [Dick Cheney](#) in November 2001) and to be executed — thereby [fulfilling their stated aim](#) of becoming martyrs — without the government having to go through a full trial process. This latest story may, therefore, represent a similar testing of the waters.

Last month, President Obama spelled out the options being discussed: release or transfer, trials in federal courts, trials in a revamped version of the military commissions, and indefinite detention. At the time, civil liberties groups, lawyers, and numerous commentators — myself included — responded with undisguised hostility towards the last two options.

As [I explained in an article](#) following Obama’s speech and the simultaneous announcement that one of Guantánamo’s “high-value detainees,” [Ahmed Khalfan Ghailani](#), an alleged associate of the African embassy bombers, would be tried in a federal court in New York, “setting up a two-tier system — of federal courts on the one hand and military commissions on the other — appears to be nothing but a recipe for disaster.” I was even more worried about the prospect of indefinite detention, writing that I “would urge anyone who believes in the fundamental right of human beings, in countries that purport to wear the cloak of civilization with pride, to live as free men and women unless arrested, charged, tried, and convicted of a crime, to resist the notion that a form of ‘preventive detention’ is anything other than the most fundamental betrayal of our core values.”

As a result of opposition to military commissions and preventive detention, it was somewhat surprising that the *Washington Post*/ProPublica article also claimed that unspecified civil liberties groups had “encouraged the administration, that if a prolonged detention system were to be sought, to do it through executive order” and added that civil liberties groups “generally oppose long-term detention, arguing that detainees should either be prosecuted or released.” To the best of my knowledge, civil libertarians *always* oppose long-term detention without charge or trial, and no group has hinted that it would support plans for preventive detention, whether through an executive order or through legislation in Congress.

However, while this passage seems to me to provide another indication that the entire article was viewed by the “three senior government officials” behind it as another attempt to test responses to ongoing discussions within the administration, the article was more useful in its discussion of the government’s current analysis of the 229 prisoners who are still held.

After noting that, during congressional testimony last week, Attorney General Eric Holder confirmed that 50 prisoners have been approved for release, and, with some hesitation, responded affirmatively to a suggestion that no more than 25 percent of those still held (in other words, around 60 prisoners) would be put forward for trials, the authors added that one of the officials who spoke to them noted that the administration was “still hoping that as many as 70 Yemeni citizens will be moved, in stages, into a [rehabilitation program](#) in Saudi Arabia.”

Excluding the one prisoner already sentenced ([Ali Hamza al-Bahlul](#), who received a life sentence in a one-sided trial by military commission on the eve of the presidential election), that leaves 48 prisoners facing indefinite detention, rather less than the figure quoted in the article by “several” Justice Department officials, who apparently “said they have found themselves agreeing with conclusions reached years earlier by the Bush administration: As many as 90 detainees cannot be charged or released.”

Reading between the lines, therefore (and excluding, for a moment, the laughable suggestion that the Bush administration *had* any basis for reaching objective “conclusions” about the Guantánamo prisoners it had [rounded up so randomly](#)), what this means is that 48 prisoners face indefinite detention, plus 42 Yemenis *if* plans to put them through the Saudi rehabilitation program do not work out — and the lack of logic involved in that suggestion is, I hope, abundantly clear.

I also have my doubts about the figure of 60 or so prisoners to be put forward for trials (as intelligence estimates over the years — mentioned most recently by [Lawrence Wilkerson](#), Colin Powell’s former chief of staff — have indicated that no more than two to three dozen of the prisoners had any meaningful connection to terrorism), but I was at least reassured that two Justice Department officials involved in a review of possible prosecutions told the *Washington Post/ProPublica* that the administration “is strongly considering criminal charges in federal court for [Khalid Sheikh Mohammed](#) and three other detainees accused of involvement in the Sept. 11, 2001, attacks.”

This contradicts the earlier leak, mentioned above, indicating that they would face a fast-track trial by military commission, and, I hope, for two particular reasons, that it is true: firstly, because any trial by military commission — however tweaked by Obama — would lack legitimacy in the eyes of many at home and abroad, after the commissions’ [manifest failures](#) throughout the Bush years; and secondly, because, if any genuine evidence exists whatsoever to prove that Khalid Sheikh Mohammed and his co-accused were actually involving in planning and facilitating the 9/11 attacks, then no jury in the U.S. will fail to convict them, despite their government-sanctioned torture at the hands of the CIA.

Even so, all is not well, as the *Washington Post/ProPublica* article also indicated. According to “one senior official,” one of the men who could be subjected to preventive detention is Walid bin Attash, one of the five men accused of involvement in the 9/11 attacks. Bin Attash (also known as Khallad, or Tawfiq bin Attash), who is also accused of involvement in the African embassy bombings in 1998 and the bombing of the USS *Cole* in 2000, was seized in April 2003 and was held in secret CIA prisons for nearly three and a half years before his transfer to Guantánamo in September 2006.

In the leaked report on the “high-value detainees” that was compiled by the International Committee of the Red Cross, based on interviews with the men after their transfer to Guantánamo

(and the subject of a major [New York Review of Books](#) article by Mark Danner in April), bin Attash, who lost a leg in Afghanistan many years before his capture, described some of the ways in which he was treated in a secret CIA prison in Afghanistan:

On arrival at the place of detention in Afghanistan I was stripped naked. I remained naked for the next two weeks. I was put in a cell measuring approximately [3 1/2 by 6 1/2 feet]. I was kept in a standing position, feet flat on the floor, but with my arms above my head and fixed with handcuffs and a chain to a metal bar running across the width of the cell. The cell was dark with no light, artificial or natural....

After some time being held in this position my stump began to hurt so I removed my artificial leg to relieve the pain. Of course my good leg then began to ache and soon started to give way so that I was left hanging with all my weight on my wrists. I shouted for help but at first nobody came. Finally, after about one hour a guard came and my artificial leg was given back to me and I was again placed in the standing position with my hands above my head. After that the interrogators sometimes deliberately removed my artificial leg in order to add extra stress to the position....

Noticeably, however, when bin Attash was brought before a tribunal at Guantánamo in 2007, he produced what appeared to be an unprompted confession, when he said that he was the link between Osama bin Laden and the Nairobi cell during the African embassy bombings in 1998, and also admitted that he had played a major part in the bombing of the USS *Cole* in 2000, explaining that he “put together the plan for the operation for a year and a half,” and that he bought the explosives and the boat, and recruited the bombers.

Despite this, it was noticeable that the senior official did not even mention bin Attash’s own confession, and focused instead on what was described as the Justice Department’s conclusion that “none of the three witnesses against him can be brought to testify in court. One witness, who was jailed in Yemen, escaped several years ago. A second witness remains incarcerated, but the government of Yemen will not allow him to testify [and] Administration officials believe that testimony from the only witness in U.S. custody, Abdul Rahim al-Nashiri, may be inadmissible because he was subjected to harsh interrogation while in CIA custody.”

It is difficult to know quite what conclusion to draw from this. Certainly, there is a problem with [the case against al-Nashiri](#) — one of three prisoners [subjected to waterboarding](#), according to Gen. Michael Hayden, the former director of the CIA — although the problem is less to do with the manner in which he was treated in CIA custody and more to do with the fact that, in his tribunal in Guantánamo, he denied every allegation against him. He stated that he made up

stories tying him to the bombing of the USS *Cole* and confessed to involvement in several other plots — including plans to bomb American ships in the Gulf, a plan to hijack a plane and crash it into a ship, and claims that Osama bin Laden had a nuclear bomb — in order to get his captors to stop torturing him. “From the time I was arrested five years ago,” he said, “they have been torturing me. It happened during interviews. One time they tortured me one way, and another time they tortured me in a different way. I just said those things to make the people happy. They were very happy when I told them those things.”

Considering that, in the 9/11 Commission Report ([PDF](#)), bin Attash was specifically mentioned in connection with investigations by the CIA, the FBI, and Yemeni intelligence following the bombing of the USS *Cole*, and information provided during his interrogations in CIA custody was quoted from extensively, it strikes me as remarkable that no reliable evidence apparently exists that can be used to prosecute him in a U.S. federal court. Is this because no evidence really exists, or is it because of reticence in providing information on the part of the intelligence agencies? If the former, then I fail to see how a case can be made for continuing to hold him; if the latter, then the administration should find a way to put him on trial. As was explained in [a press release](#) that accompanied the transfer of Ahmed Khalfan Ghailani to the U.S. mainland, the Justice Department has “a long history of ... successfully prosecuting terror suspects through the criminal justice system,” and, to prove it, the DoJ [attached a list](#) of successful prosecutions over the last 16 years. Surely the case of Walid bin Attash should be no different.

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