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Cleared for Release and Still in Limbo **by Andy Worthington**

In the first detailed announcement about prisoners cleared for release from Guantánamo since September 28, when [a military spokesman announced](#) that a list of 78 cleared prisoners had been posted in the prison, Defense Secretary Robert Gates [told a Senate hearing](#) last Thursday that officials were “in the process of identifying detainees that we believe can be transferred to other countries” and “we’ve identified I think 116 at this point.”

This is certainly progress on the part of the administration, as it continues to work out how to close Guantánamo. Since the last announcement, senior officials have also made decisions about who to put forward for trial, [announcing on November 13](#) that five men — including [Khalid Sheikh Mohammed](#) — will face federal court trials for their alleged involvement in the 9/11 attacks, and another five will be put forward for trial by military commission. Officials also briefed journalists that the number of prisoners expected to face any kind of trial would not exceed 40.

Based on the current population of Guantánamo (211 prisoners), this means that, deducting the 116 prisoners cleared for release and those scheduled to face trials, just 55 men remain in the most contentious category of all: those who will not face a trial, but who are not scheduled to be released either. Back in May, cowed by attacks from ranting Republicans and cowardly members of his own party, President Obama first began to waver dreadfully on Guantánamo, and not only proposed reviving the [much-criticized military commissions](#) as a parallel (or second-tier) judicial system for the prisoners, but also, to what should be his eternal shame, explained his intention to continue to hold some prisoners without charge or trial.

In [a major national-security speech](#), he described these prisoners as those who “cannot be prosecuted yet who pose a clear danger to the American people,” apparently oblivious to the fact that, by doing so, the administration was ignoring an inconvenient truth; namely, that, if senior officials find themselves unable to prosecute someone in Guantánamo, it is because the information they are using does not rise to the level of evidence, or is otherwise tainted by torture, and is therefore inherently unreliable.

As [commentators](#), human-rights groups, and lawyers tore into Obama for even considering enshrining “preventive detention” in law, following his national security speech, another sub-text also eluded the administration: that officials were only proposing legislation that would, in effect, justify the Bush administration’s central conceit of the “war on terror,” as a by-product of their difficulties in deciding whether to charge or release prisoners whose predicament had arisen solely because of the Bush administration’s disregard for the law in the first place.

By September, [government officials acknowledged](#) that the president would not need to seek legislation to establish a new system of preventive detention for those held in Guantánamo, because existing legislation already allowed the administration to hold prisoners indefinitely. As [I explained at the time](#):

In dropping plans for new legislation ... the administration has realized that it can continue to hold prisoners based on the [Authorization for Use of Military Force](#), the congressional resolution passed the week after the 9/11 attacks, which authorizes the president “to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible” for the attacks.

This is by no means perfect, of course. As the [\[New York\] Times](#) noted, “In concluding that it does not need specific permission from Congress to hold detainees without charges, the Obama administration is adopting one of the arguments advanced by the Bush administration in years of debates about detention policies,” although it added, accurately, that the president’s advisers “are not embracing the more disputed Bush contention that the president has inherent power under the Constitution to detain terrorism suspects indefinitely regardless of Congress.” As the Justice Department explained in a statement, the administration will “rely on authority already provided by Congress” under the AUMF, and “is not currently seeking additional authorization.”

Quite why it took the administration so long to realize this is beyond me, although perhaps it is tied in with the Democrats’ incessant desire to want to appear tough on national-security issues. However, it should have been apparent all along, just as it should also have been apparent that, if the administration feared criticism, all it had to do was to leave it to the District Court judges who were ruling on the prisoners’ habeas corpus petitions courts to decide whether those held at Guantánamo met the AUMF’s threshold for detention.

Since June 2008, when the Supreme Court recognized the prisoners’ [constitutionally guaranteed habeas corpus rights](#), District Court judges have been examining the government’s

evidence and, in [31 of the 39 cases](#) in which they have reached a ruling, have concluded that the government has failed to establish, by a preponderance of the evidence, that these men were involved with al-Qaeda or the Taliban.

Of the 55 prisoners that the administration currently fears releasing, despite lacking the evidence to put them forward for a trial, eight are those who lost their habeas corpus petitions, and it would, therefore, make sense for the administration to allow the other 47 cases to proceed, secure in the knowledge that, whatever the outcome, the government can blame the courts, rather than accept responsibility itself.

This is no comfort to those who have already lost their habeas petitions, as they are waiting for a new conversation to begin, which, at present, shows no sign of starting up. This, in essence, involves asking whether it is justifiable that the AUMF, which fails to distinguish between al-Qaeda (a terrorist group) and the Taliban (the government of Afghanistan at the time of the U.S.-led invasion in October 2001), can legitimately be used to endorse the indefinite detention of those who may have done nothing more than [cook for Arab forces](#) supporting the Taliban, or [attend a military training camp](#) in Afghanistan for one day only.

It seems to me that the answer may well be that the AUMF needs to be abandoned, as it is effectively the mechanism that was used to establish Guantánamo in the first place, and that, instead, those responsible for directing U.S. policy need to decide whether those held at Guantánamo who have lost their habeas petitions were soldiers (in which case they should be held as prisoners of war, with the protections of the Geneva Conventions) or terrorists, who should face trials.

At present, however, these are nothing more than thoughts for the future. Right now, the administration needs to reconcile itself to the fact that the only way of dealing with the 47 prisoners about whom it has unverifiable doubts is to let judges test the basis of their detention, as ordered by the Supreme Court 18 months ago, especially as, on that occasion, the justices [made a point of stressing](#) that “[T]he cost of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.”

When it comes to the 116 men who have now been cleared for release from Guantánamo, the administration needs to do more than just send Robert Gates to the Senate to make announcements that sound as though they mean something. Since May, when President Obama [personally dropped a plan](#), engineered by his counsel, Greg Craig, to bring two cleared prisoners from Guantánamo to settle on the U.S. mainland (as [ordered by a District Court judge](#) in October 2008), the struggle to close Guantánamo has become noticeably harder, as European countries, pushed to take cleared prisoners themselves, have [found themselves unable to resist](#) asking why they are being obliged to clean up America’s mess when America is doing nothing itself.

Being cleared for release means nothing if you remain locked up in Guantánamo forever, and unless the administration has some significant plan up its sleeve, the future of these men is

bleak. Since the announcement of the number of cleared prisoners two months ago, it is almost certain that many of the additional prisoners cleared prisoners are Yemenis (as around 95 of the remaining 211 prisoners are Yemeni), so perhaps it is worth reading something into Robert Gates' refusal to back up the president's recent admission that [Guantánamo will not close](#) by [the self-imposed deadline](#) of January 22, 2010, when he told the Senate hearing last Thursday that the president "has every intention of doing this and we will," and explained, "Principally the logistics of it have proven to be more complicated (than expected)."

A deal on the repatriation of the Yemenis — of whom, I suspect, between 50 and 60 have now been cleared for release — would certainly help fulfill Barack Obama's ailing promise, and may have been hinted at by Robert Gates. However, I still think that any decent person's demand — that men cleared for release after their long ordeal should not be held one minute longer than necessary — will not be achieved until the people of the United States accept that it is not enough for [Belgium](#), [Bermuda](#), [France](#), [Hungary](#), [Ireland](#), [Palau](#), and [Portugal](#) to take the odd cleared prisoner as a favor to President Obama, and for the United States to do nothing.

As a result, Congress must be persuaded to drop its opposition to the release of any cleared prisoner into the U.S., and the American people need to [follow the example of the town of Amherst](#), Massachusetts, which recently voted to accept two prisoners from Guantánamo, and also to tell Congress to drop its ban. The principle is quite simple, and generally well understood: If you break it, you fix it.

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