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Obama's Guantánamo Appeasement Plan

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Two days after his inauguration, President Obama pledged to close Guantánamo within one year. The Republicans, led by Senators John McCain, Mitch McConnell and Pat Roberts, immediately launched a concerted campaign to assail the new president. They claimed his plan would release dangerous terrorists into U.S. communities and allow released terrorists to resume fighting against our troops. Fox News agitator Sean Hannity and Bush team players like torture-memo lawyer John Yoo filled the airwaves and print media with paranoia.

The Republican attacks were bogus. A 2008 McClatchy investigation revealed that the overwhelming majority of Guantánamo detainees taken into custody in 2001 and 2002 in Afghanistan and Pakistan were innocent of wrongdoing or bit players with little intelligence value. A substantial number of those prisoners were literally sold to U.S. officials in exchange for bounty payments offered by the U.S. military. A Seton Hall Law Center report has debunked Pentagon claims that many released detainees have "returned to the fight." And no one has ever escaped from one of the U.S. super-max prisons, which house hundreds of people convicted of terrorist offenses.

The Republicans have continued to oppose the effort to close Guantánamo. In an attempt to burnish his image and forestall war crimes charges, Dick Cheney now leads the charge, making ubiquitous attacks on Obama. Keeping Guantánamo open is "important," Cheney declares. He claims that closing Guantánamo would endanger Americans, and warns that if detainees are brought to the United States , they would "acquire all kinds of legal rights." Obama is also taking heat from the intelligence community. Those officials, like Cheney, seek to justify what they did under the Bush regime.

And now even the Democrats are piling on the bandwagon. Reacting defensively to the Republican attack campaign, the Senate voted 90 to 6 to deny Obama funds to close Guantánamo until he comes up with a "plan" for relocating the detainees there. "We spent hundreds of millions of dollars building an appropriate facility with all security precautions on Guantánamo to try these cases," said Democratic Senator Jim Webb on ABC News. "I do not believe they should be tried in the United States ," he added.

The pressure has caused Obama to buckle. Timed to coincide with a Cheney speech to the right-wing American Enterprise Institute, Obama announced an appeasement plan to deal with the 240 remaining Guantánamo detainees. Parts of his plan would threaten the very foundation of our legal system – that no one should be held in custody if he has committed no crime. These are Obama's five categories for disposition of detainees once Guantánamo is closed:

1) Those who violated the laws of war will be tried in military commissions.

Obama's plan would backtrack on an early promise to shut down the military commissions. Obama now claims that such commissions can be fair because they will no longer permit the use of evidence obtained by cruel, inhuman or degrading interrogation methods. He fails to mention, however, that the Pentagon is using "clean teams" to re-interrogate people who were previously interrogated using the prohibited methods. When they once again give the same information, it miraculously becomes untainted. Obama also fails to acknowledge that those tried in the military commissions are forbidden from seeing all the evidence against them, a violation of the bedrock principle that the accused must have an opportunity to confront his accusers.

Even the U.S. Supreme Court has disagreed with this part of Obama's proposed plan of action. In *Ex parte Milligan*, the Supreme Court declared military trials of civilians to be unconstitutional if civil courts are available.

Prisoners falling in this category should be tried in the courts of the United States , because the laws of war are actually part of U.S. law. The Supremacy Clause of the Constitution says that treaties shall be the supreme law of the land. The Geneva Conventions and the Hague Convention, which the United States has ratified, contain the laws of war.

2) Those who have been ordered released from Guantánamo will remain in custody.

Seventeen Uighurs from China were ordered released after they were found not to be enemy combatants. But they continue to languish in custody because they would be imperiled if returned to China , which considers them enemies of the state. Suggestions that they be brought to the United States have been met with paranoid NIMBY (not in my backyard!) protestations. So, under Obama's plan they will remain incarcerated in a state of legal limbo.

3) Those who cannot be prosecuted yet "pose a clear danger to the American people" will remain in custody with no right to legal process of any kind.

These are people who have never been charged with a crime. Obama did not say why they cannot be prosecuted. Secretary of Defense Robert Gates claims as many as 100 people may fall into this category. Included in this group are those who have "expressed their allegiance to Osama bin Laden." They will suffer "prolonged detention."

Obama's plan for "prolonged detention" is nothing more than a newly-coined phrase for "preventive detention," a policy that harks back to the bad old days of the Alien and Sedition Acts of 1798 and the internment of people of Japanese extraction in the 1940's. If Obama succeeds in convincing Congress to legalize "prolonged detention," the United States will continue to be a pariah state among justice-loving nations. The U.S. Congress, still rendered catatonic by post-9/11 rhetoric, will probably capitulate along with Obama.

Michael Ratner, president of the Center for Constitutional Rights, noted that Obama's new system of preventive detention will just "move Guantánamo to a new location and give it a new name."

4) Those who can be safely transferred to other countries will be transferred.

Obama noted that 50 men fall into this category. It is unclear what will happen to them when they reach their destinations.

5) Those who violated U.S. criminal laws will be tried in federal courts.

Obama cited the examples of Ramzi Yousef, who tried to blow up the World Trade Center, and Zacarias Moussaoui, who was identified as the 20th 9/11 hijacker. Both were tried and convicted in U.S. courts and both are serving life sentences.

This is the only clearly acceptable part of Obama's plan. All detainees slated to remain in custody should be placed into this category. The federal courts provide due process as required by the Fifth Amendment to the Constitution, which does not limit due process rights to U.S. citizens: "No person … shall be deprived of life, liberty, or property without due process of law."

The federal courts are well suited to deal with accused terrorists. Indeed, federal judges who have presided over such cases say that the Classified Information Procedures Act can effectively protect classified intelligence in federal court trials.

If Mr. Obama proceeds with the plan he announced this week he will empower those who point to U.S. hypocrisy on human rights as a justification to do us harm. Obama's capitulation to the intelligence gurus and the right-wing attack dogs will not only imperil the rule of law; it will actually make us more vulnerable to future acts of terrorism.

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