

The Catch-22 of Closing Gitmo

President Obama's plan to close Guantanamo – even if it could be implemented – would still leave several dozen detainees in the legal limbo as “non-releasable,” albeit inside U.S. prisons, as Helen Schietinger explains.

By Helen Schietinger

The lineup of presenters at Human Rights First's Closing Guantanamo event earlier this month promised to provide the inside scoop on how Obama is going to close the Guantanamo Bay prison and what the key roadblocks might be. But what I heard did nothing to allay my alarm that the Obama administration will continue the policy of indefinite detention of many “war on terror” detainees and will do nothing to hold accountable those who orchestrated and oversaw the torture of Muslim men in U.S. custody.

The two administration special envoys to close Guantanamo (the Pentagon's Paul Lewis and Lee Wolosky of the State Department) and their predecessor, State's Clifford Sloan, laid out the President's plan for dealing with the remaining 91 detainees. Wolosky explained that the plan's key objective is to complete the Periodic Review Board reviews and whittle down the number of “non-releasable” prisoners to a “mere” 30 or 40, thus making the job of dealing with a smaller group much easier.

Sloan added that sending those 30 prisoners elsewhere won't be a problem after all those cleared for release are expeditiously transferred to other countries. The options for the ones to be prosecuted (perhaps 14 of the 30 or 40) include transfer for prosecution in a third country, trial by Military Commissions or trial in federal courts in the U.S.

The plan for prisoners who are not released or charged is to hold them in indefinite detention inside the U.S. Wolosky asserted that under no circumstances will the detainees being held under law of war authorities be released. He insisted that they are not entitled to more or fewer legal rights than other law of war detainees and would not have more rights if transferred to the U.S. than they now enjoy in Guantanamo, including habeas corpus rights.

Never mind that this seems to be in conflict with the concerns of Gregory G Garre, U.S. Solicitor General when he argued in 2008 that the Uighur detainees should not be brought into the United States to allow their habeas petitions to be heard in U.S. court.

The other two speakers, U.S. Marine Major General Michael Lehnert – who initially set up the prison – and Alberto J Mora – who as General Counsel for the Navy early on opposed the use of torture at Guantanamo prisoners – both challenged the legality of indefinite detention.

Lehnert said it was a grave mistake not to have applied an appropriate judicial process as soon as the prison was opened as demanded by the Geneva Convention and that this has fed into the narrative that we're not a nation of the rule of law. He asserted that the prisoners' extralegal status is inconsistent with U.S. law.

Lehnert also told us that the military at Guantanamo swore an oath to uphold the Constitution, not the bidding of the president. Allowing enhanced interrogation, which he called a euphemism for torture, was beneath us and is a blight on the United States.

Mora listed mistakes committed by the George W. Bush administration, including establishing indefinite detention, using torture as a weapon of war, opening Guantanamo to detain prisoners beyond the protection of U.S. law, treating officials as though they are above the law, and using a judicial process lacking in independence and due process. He added that Obama's decision to hold no one accountable for torture is largely responsible for the sad fact that 58 percent of Americans believe that torture is acceptable.

Mora's and Lehnert's counterpoints to administration policies were reinforced by the retired generals who attended the forum. There was a complex discussion about the number and fate of prisoners who were deemed too dangerous to release but for whom there is no good evidence with which to prosecute, either because the men were tortured or there is no evidence of wrongdoing.

U.S. Army Brigadier General Stephen N Xenakis, a psychiatrist, challenged the validity of attempts to predict detainees' "dangerousness" and said that predicting such future behavior is no better than the flip of a coin. In response, Lewis defended the criteria the government uses to determine how much of a threat a given detainee poses and claimed the U.S. has a right to keep enemies off the battlefield.

U.S. Army Lt. General Robert G Gard strongly challenged the use of Guantanamo to lock up a handful of prisoners indefinitely because they might be dangerous: "Looking at the broad security challenge of there being 25,000 to 30,000 radicals in ISIL, what possible marginal impact would there be to releasing these men, whom the U.S. cannot try because of its own misbehavior?"

Gard added that he deeply resents the holding of prisoners deemed too dangerous

to release but who cannot be prosecuted because of tainted evidence, pointing out that every day prisoners in the U.S. are released for precisely that reason.

Moderator Elisa Massimino, president of Human Rights First, noted that some criticize the closing of Guantanamo because “high value” terrorist suspects who might have valuable information are being killed by drone strikes rather than being captured and interrogated. She added that a suspected senior-level terrorist was recently captured in Iraq and is now being interrogated; so, what is the policy?

Lewis asserted that we need a detention policy going forward and that using Article III interrogations on a case-by-case basis without torture can be very effective, there being lots of incentives that can be used to extract intelligence.

Moderator Carol Rosenberg, Military Affairs Correspondent of The Miami Herald, pushed the question of why accountability was not being pursued. Journalist Charles Savage of The New York Times pointed out that we came close to establishing a means of accountability after the Senate Torture Report was published, when a truth and reconciliation process was explored, but that the idea never made it beyond the Justice Department.

Mora maintained that even if individuals are not prosecuted some form of accountability is needed, such as a U.S. admission of wrongdoing and compensation of victims, as with the Japanese-Americans sent to internment camps during World War II. However, he also said, “It is legally unthinkable that there won’t be accountability, but it’s politically unthinkable that there will be [accountability].” This speaks volumes coming from Mora, who was in the forefront of those few lawyers resisting the use of torture.

My interpretation of the President’s plan is that in essence the U.S. will continue to indefinitely detain suspected terrorists (mostly Muslim men) based on an assessment of their future dangerousness and that this is considered justified under the law of war.

Somehow this has been expanded to cover persons who 1) have been captured under circumstances not defined by the agreed-upon laws of war (including that soldiers wear uniforms, represent and claim allegiance to a nation-state, fight on a battlefield or at least in a war zone); and 2) have been held at great distance from the conflict where they happened to be captured (Guantanamo for prisoners from Afghanistan, for example). The law of war is meaningless if it is arbitrarily amended to suit the State’s purposes.

But now, in this presidential election year, when bigots are whipping up racist

hatred and fear with the help of mainstream media, I can fast-forward in my mind to a time when those same unconstitutional precedents are the basis for concentration camps for much larger groups of people than are presently locked up in Guantanamo.

Remember: the German people elected Hitler. Laws were passed to protect the German way of life from the likes of Jews, homosexuals and gypsies and those laws incrementally reinforced the xenophobic mentality instilled in the general population. In a remarkably short period of time, Germany went from being an open democratic society to one in which people who did speak out against the state lost their jobs, were rounded up, and some of them ultimately executed. And the lawyers, and the generals, and even the churches acquiesced.

I am more afraid of those in power who erode the rule of law in the name of state security than I am of "suspected terrorists." I am watching the U.S. become a state in which police who gun down unarmed black people continue to go free, Muslim communities are surveilled, individuals are recruited to spy on one another, and innocent young Muslims who are entrapped by the FBI accept guilty convictions rather than risk serving life sentences for crimes they did not commit.

To those colleagues who say I'm being alarmist, I suggest that you start reading what Muslim communities and communities of color reveal is happening to them. Start listening to people who have resigned from military and government posts so that they can speak out about what they have witnessed. Question the truth of the state's slander of whistleblowers, as well as how it is played up in the mainstream media.

Too many remain silent regarding the fact that Obama's plan not only perpetuates but strengthens the mechanisms by which basic Constitutional protections are being circumvented. The very existence of Guantanamo represents the flouting of basic legal standards our nation is founded on. Closing the prison will be worse than meaningless if we simply import into the U.S. the practice of indefinite detention without charge, while refusing to hold accountable those responsible for torture.

Helen Schietinger, a retired RN, is an organizer with Witness Against Torture, a grassroots organization calling for an end to torture, the prosecution of those responsible for torture by the U.S. and the closing of Guantanamo Bay Prison.
