

# Guantánamo quandary

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## PRESIDENT OBAMA orders a thorough review of pending terror cases.

President Obama's pledge to close the terror prison camp at Guantánamo Bay, Cuba, is being hailed as a major step toward restoring world opinion of the United States as a champion of human rights and the rule of law.

But it remains unclear to what extent Mr. Obama will make a clean break from controversial policies in the Bush administration's global war on terror.

Obama administration officials agree that certain Al Qaeda suspects at Guantánamo should be tried in federal or regular military courts rather than the special military commissions set up under President Bush. And they agree that many of the remaining 245 detainees can be returned to their home countries for release or further detention.

But there is less agreement over what to do with a potential third category of detainees – an uncertain number of terror suspects whose cases do not lend themselves to prosecution in civilian or military courts but who are viewed as too dangerous to release.

In one of his first acts in office, the new president asked military judges at Guantánamo to halt ongoing commission trials pending a top-to-bottom policy review of the detention facility and the terror tribunals. See [GITMO page 10](#)

Some experts urge imposition of a bright-line policy to force the US government to either charge detainees with a crime or release them. They suggest that creating a third category of detainees deemed too dangerous to release would perpetuate Mr. Bush's policy authorizing the indefinite detention without charge of persons he deemed "enemy combatants."

"The problem with this is all fear," says Mark Denbeaux, a law professor at Seton Hall University School of Law in Newark, N.J., who wrote a series of reports criti-

cal of US actions at Guantánamo. Some pundits and security experts are "playing political games about dangerousness."

The best way to close Guantánamo, he says, is to file criminal charges against detainees who can be prosecuted and release the rest. "Everyone is looking for a perfect solution to an intractable pair of choices," Mr. Denbeaux says. "There is no magic bullet."

What makes the issue so difficult is trying to maneuver around controversial past US actions at Guantánamo – harsh interrogations and alleged torture, bypassing the Geneva Conventions, use of coerced statements to justify further detention, military commissions with stripped-down due process protections. "Everybody is ... trying to make policy and determine issues out of a half dozen absolutely disgusting aberrations," Denbeaux says. "Somehow we want to both convict these people and separate ourselves from the evil we did to them."

Many human rights advocates and detainee lawyers are urging Obama to turn a new page. "The most expeditious way to close Guantánamo is to announce as a matter of principle that 'charge or release' is going to be the methodology for sorting through these cases," says Shayana Kadidal, managing attorney of the Guantánamo Project at the [Center for Constitutional Rights](#) in New York.

### Prosecution may not be possible

Other analysts warn of the potential consequences of trying to force the prosecution of cases built on evidence tainted by coercive interrogations or torture.

"It may make it impossible to prosecute them under the normal rules of criminal procedure," says Tung Yin, a national security law expert at the University of Iowa College of Law in Iowa City. "In a regular criminal case we would say the



government violated the constitutional rules so the remedy is to suppress the evidence. The government can't make its case without the suppressed evidence so the defendant has to be let go."

Professor Yin says the prospect of releasing so-called high value terror suspects may force the new administration to create a system of preventive incapacitation similar to Bush's enemy combatant

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detention regime.

"I think there is going to be some discomfort level with simply releasing Khaled Shaikh Mohammed," Yin says.

Mr. Mohammed has admitted to being the mastermind behind the 911 attacks. But government officials have also acknowledged that he was subjected to harsh interrogation techniques, including waterboarding, which many experts consider a form of torture.

Special FBI teams have been working to assemble evidence against Mr. Mohammed and other top terror suspects that is not tainted or otherwise linked to statements induced through harsh interrogations.

Another potential candidate for preventive incapacitation is Mohammed Qahtani, a Saudi national believed to have been selected as the 20th hijacker for the 9/11 attacks. After being denied entry to the US, he was captured in Afghanistan and transferred to Guantánamo in 2002. He was subjected to an array of coercive interrogation tactics, including severe isolation, sensory deprivation, stress positions, and sexual humiliation.

### **Was evidence tainted by torture?**

After examining Mr. Qahtani's interrogation records, the top military commissions official at the Pentagon, Susan Crawford, refused to authorize military commission charges against him. She told the Washington Post last week that she considered Qahtani's treatment torture.

Qahtani's lawyers say he should be allowed to return home to Saudi Arabia and enter a Saudi rehabilitation program. Bush administration officials have said he remains a dangerous man.

The Obama administration is expected to conduct a new assessment of the dangerousness of each detainee at Guantánamo as part of its plan to close the detention facility as quickly as possible.

"It is hard for someone on the outside

to say what threat still exists, how credible those threats are, and how many people we are talking about," says Diane Amann, an international and military law expert at the University of California, Davis, School of Law. "My suspicion is that it is not going to end up being that many people at the end of the day. We may end up with three, four, five people that are the nut of the concerns that have been raised."

Professor Amann says it would be a mistake to continue to rely on a version of the Bush enemy combatant detention regime. "Are we going to depart from 200 years of legal tradition prohibiting this kind of detention [without charge] and craft an entirely new program on account of three people?" she asks. "It is a political decision that we need to make, and we need to make it with open eyes rather than out of vague fears."

Releasing terror suspects isn't necessarily a setback for the US. American intelligence agents could be tasked to watch them, trace their movements overseas, and tap their phones. If former detainees seek to contact Al Qaeda, their movements and contacts could provide fresh intelligence on the terror group.

"To me, released detainees are a window into the world that is out there, and if we are not looking through that window it is a waste," Denbeaux says.

## Timeline of events at Guantánamo Bay military prison

**January 2002:** First 20 detainees arrive at Guantánamo Bay military prison and are held in cages with concrete floors.

**December 2002:** Defense Department authorizes use of interrogation methods including hooding, sensory deprivation, and dogs on Guantánamo detainees.

**May 2003:** Gitmo's population peaks at 680 people.

**October 2003:** International Red Cross notes the deterioration of the mental health of many detainees.

**August 2004:** Combatant Status Review Tribunals begin to determine whether each detainee is an enemy combatant.

**June 2004:** US Supreme Court rules that detainees have some right to challenge their captivity.

**March 2005:** Thirty-eight detainees are found not to be enemy combatants and therefore eligible for release.

**May 2005:** Riots erupt over alleged desecration of the Koran at Guantánamo.

**February 2006:** A UN report recommends closure of Guantánamo.

**June 2006:** Three detainees die in apparent suicides.

**March 2007:** Australian detainee David Hicks pleads guilty to material support for terrorism during hearing, is sent to prison in Australia, and later released.

**June 2006:** Supreme Court rules that Geneva Conventions apply to Gitmo detainees.

**June 2008:** Supreme Court rules that detainees have a constitutional right to challenge detention in federal court.

**June 2008:** Five detainees are arraigned in connection with the 9/11 attacks.

**July 2008:** The first trial of a Guantánamo detainee, Salim Hamdan, takes place before a military commission. Mr. Hamdan, Osama bin Laden's driver, is convicted of providing material support for terrorism and acquitted of conspiracy, then transferred to Yemen in November to serve the remaining month of his term.

**January 2009:** Hours after taking office, President Obama orders military prosecutors in Guantánamo war crimes tribunals to ask for a 120-day suspension in all pending cases.



BRENNAN LINSLEY/AP

**CHANGE OF COMMAND:** Chief Petty Officer Bill Mesta replaces George Bush's photo with President Obama's in the lobby of the headquarters of the US Naval Station in Guantanamo Bay, Cuba.