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Newsroom

March 14, 2016

Closing Guantanamo Isn't Enough

As guest columnist for JURIST, Professor Jared Goldstein discusses the implications of President Obama's proposal to close the prison in Guantanamo Bay.

Professor Jared Goldstein is this week's guest columnist for JURIST, discussing the implications of President Obama's proposal to close the prison in Guantanamo Bay.



March 12, 2016: Last month President Obama announced his latest [plan](#) to close the prison in Guantanamo Bay. Under the proposal the government will continue to look for countries to take in three dozen detainees who have been cleared for transfer, while the remaining 55 detainees would be moved to a federal facility in the United States.

Closing the prison at Guantanamo deserves support because Guantanamo has come to symbolize the abandonment of the rule of law. For almost fifteen years Guantanamo has been a prison outside the law, where the rules that the United States long ago agreed to follow in the conduct of war have been rejected in favor of indefinite detention without trial, waterboarding and other forms of "enhanced interrogations." Yet the president's plan to merely transfer the detainees from one prison to another seeks only to address Guantanamo as a symbol, without doing what is really needed: re-committing the nation to detention only in accordance with law.

Both sides in the fight over closing the Guantanamo prison have acted as if all that matter is symbols. President Obama [said](#) that the prison should be closed because of its symbolic value, because terrorists "use it as propaganda in their efforts to recruit." Republicans counter that the prison should be kept open

to symbolize our nation's resolve in the war against terrorism. Senator Marco Rubio [said](#) that "We should be putting people into Guantánamo, not emptying it out," and Senator Ted Cruz agrees: "don't shut down Gitmo, expand it and let's have some new terrorists there." Upping the stakes, Donald Trump longs to torture new detainees: "I would bring back waterboarding, and I'd bring back a hell of a lot worse than waterboarding."

What is missing in the debate over Guantanamo is any discussion about the actual persons kept there. Republicans in favor of keeping Guantanamo open often describe the detainees as inhuman monsters. After tweeting a video in which he threw Obama's proposal to close Guantanamo into the trash, Senator Pat Roberts took to the Senate floor to [declare](#) that the country could never safely hold the detainees at Guantanamo because they are "fixated on the destruction of America and they have no regard for life, not that of their own and especially not for the lives of innocent civilians." Bringing the detainees to the United States would threaten national security, republicans warn ominously, because their presence inside the country would attract new acts of terrorism.

The fears provoked by the proposed closure shows that we have forgotten our history. During World War II, the Army held 425,000 German prisoners of war in the United States—including thousands of committed Nazis and members of the SS—while Germany was committing acts of brutality and massacres of civilians on a scale far beyond anything al Qaeda or ISIS has attempted. There were thousands of American Nazi sympathizers, far more than the estimated number of al Qaeda and ISIS supporters in the U.S. today, who might have been tempted to commit acts of sabotage or terrorism against the detention of their comrades. Yet the U.S. military somehow handled the massive security arrangements necessary to hold hundreds of thousands of German prisoners without any significant national security problems. Perhaps this history suggests that we could handle a few dozen al Qaeda members kept in maximum security facilities without jeopardizing national security.

Even more, what is missing from the debate is any [discussion](#) of the actual persons who have now been held at Guantanamo for fourteen years, more than ten years longer than any of the World War II prisoners of war. The POW status of Germans and other combatants in past wars went largely unquestioned because they were captured on the battlefield wearing enemy uniforms. In contrast the military found it nearly impossible to determine whether the 800 detainees brought to Guantanamo really were enemy combatants. They were not captured on the battlefield but were rounded up by Afghani and Pakistani locals for large bounties. The U.S. did not receive dossiers or files on these men; no investigation had been done about who they were. All the evidence that has been gathered to justify their continued detention was gathered after they were in custody, most of it obtained through interrogations of the

detainees themselves through abusive and improvised techniques conducted by officers with no training in interrogation.

For many detainees the evidence linking them to terrorism is extremely flimsy. The government has argued that the fact that many of them were Arabs in Afghanistan or Pakistan after September 11, 2001 by itself suggests that they are terrorists. For some detainees, the best the military could come up with to show a link with terrorists is that the detainees were caught wearing a Casio wristwatch associated with known terrorists. By the military's own estimates, a large percentage of the detainees were held by mistake. But since they had no reliable way to tell who had worked for al Qaeda and who had not, the government made the calculation that it was safer to imprison them all rather than let some dangerous men go free.

My client Mohammed al Daihani was a Kuwaiti accountant who was brought to Guantanamo in December 2001. The United States never claimed that Mr. Daihani had taken part in any terrorist activities against the United States or that he was a member of al Qaeda, the Taliban or any other anti-American group. Instead Mr. Daihani was accused of having given a few hundred dollars to an organization that appeared to be a legitimate charity, which had given money to another organization, which in turn was alleged to be associated with al Qaeda. After years of imprisoning and interrogating Mr. Daihani at Guantanamo, the military had developed no evidence that he had intended to support any terrorist group. Yet it did not matter whether Mr. Daihani had intended or even known that his donation may have indirectly supported terrorism. He was designated an enemy combatant because his donation supported terrorism, whether he meant to or not. And on that basis Mr. Daihani was locked up 24 hours a day for four years in solitary confinement in a 9- by 6-foot cell, forbidden from speaking to his family or even reading a newspaper.

Supporters of the Guantanamo prison continue to repeat the lie perpetrated by Donald Rumsfeld that the detainees are the "worst of the worst," but by 2003 Rumsfeld privately admitted in documents that have been [declassified](#) that the majority of the detainees were at most "low-level" operatives. Very few detainees have even been accused of committing acts of terrorism or violence against the United States. Fewer than 20 are likely to face trial before military commissions. The rest have simply been held indefinitely without charges and without any formal process for determining whether they actually did anything to justify detention that has lasted more than fourteen years and threatens to go on indefinitely.

The betrayals of our commitment to law have been perpetuated not only by the president and Congress but by the courts as well. In 2008 the Supreme Court ruled in *Boumediene v. Bush* that the detainees have a constitutional right to pursue habeas corpus, which would ensure that the detentions continue only upon sufficient proof that the detainees really are enemy combatants whose imprisonment can be lawfully

justified. In several cases, however, the D.C. Circuit has gutted habeas for the Guantanamo detainees, ruling in *Kiyemba v. Obama* that the detainees may be imprisoned indefinitely without due process; and ruling in *Al-Adahi v. Obama* and *Latif v. Obama* that detention may be justified on unreliable and untested information. Together these rulings have made meaningless Boumediene's promise of a "meaningful opportunity" to contest the basis for the detentions.

Without any valid legal process to determine whether the indefinite imprisonment is justified, Guantanamo remains a prison outside the law. President Obama is right that Guantanamo should be closed because it conflicts with our nation's commitment to the rule of law. But to close the prison without providing a fair process to make sure the detentions are lawful would be an empty gesture, a symbol lacking in substance.

Jared A. Goldstein is a Distinguished Research Professor of Law at Roger Williams University School of Law and former Associate at Shearman & Sterling where he represented clients held at Guantanamo Bay.

For full story in JURIST