



# BULLETIN

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## The Implementation of the Decision to Close the Guantanamo Prison

by Bartosz Wiśniewski

*The implementation of U.S. president's decision on the closure of the Guantanamo prison and the accompanying review of U.S. anti-terrorist policy's legal instruments are in delay, a result of differences between the federal administration and Congress over procedures to be used towards the detainees. Moreover, Barack Obama's proposals enjoy little support among the American public. When coupled with emerging problems with international cooperation on Guantanamo, all this may pose a threat to on-time closure of the detention facility, even though the liquidation decision will stay in force.*

**Guantanamo Review: Its Mechanism and Effects So Far.** The implementation of President Obama's decision<sup>1</sup> has been assigned to three taskforces. The one in charge of reviewing U.S. interrogating techniques has had its proceedings prolonged for two months, but here the subject matter no longer provokes controversy, especially after the final banning of "special interrogation techniques," i.e. measures which the Obama administration equates with torture.

The second taskforce is going to formulate recommendations on further dealings with the Guantanamo detainees, who are being classified as either not posing national security threats, and therefore cleared for release, or as indictable based on available evidence. Around 50% of the 229 detainee cases have been reviewed, with release recommended for over 50. By the end of the year, the taskforce is also expected to propose what to do with the prisoners who can neither be released nor brought to trial (because evidence against them was collected using unlawful practices) or whom the U.S. government considers too dangerous to release but against whom no actionable charges can be brought. It is not clear how many such cases have been identified so far. Obama said they would be regulated by establishing a "prolonged detention" regime.

The third review deals with options for the detention, prosecution and transfer of persons captured in the course of anti-terrorist operations (and as such it is not confined to Guantanamo prisoners). The proceedings, not completed within the time limit set in President Obama's executive order, were prolonged for another six months. A preliminary report of 20 July notes that detainees may be tried for actions which either violated the war of law or infringed upon federal criminal law, which means that the administration should be able to refer them not only to federal courts but also to military tribunals. Set up under George W. Bush, the tribunals were found unconstitutional in their original form. During the election campaign, Obama said terror suspects would be tried only in federal courts, but now the administration is inclined towards reforming military tribunals, seeking to take into account national security interests (such as protection of intelligence sources) and realities of U.S. operations, in addition to providing fair trial protection to the detainees. The changes will involve the extent to which information obtained in battlefield conditions (mostly forced testimonies) could be used, and the freedom to choose an attorney will be broadened.

**Internal Determinants.** The administration's room for maneuver in implementing President Obama's decision is largely curtailed by Congress. As shown by the debate on how to solve problems emerging from Guantanamo closure, the administration must be prepared—in addition to the

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<sup>1</sup> See: R. Kownacki, "Legal Questions Raised by Implementation of Guantanamo Closure Decision," *Bulletin* (PISM), No. 12, 26 February 2009 r.

expected Republican opposition—for objections to be raised also by some of the Democrats, who control Congress. Last May, the Democratic Party refused to back the administration's funding request, citing the absence of plans on camp inmates' future. Finally, in late June, with the enactment of the Supplemental Appropriations Act, funding for letting the released Guantanamo detainees enter the U.S. was banned. Moreover, in respect of appropriations for change of prisoners' places of residence for the duration of trials, a condition was set for the administration to submit a detailed report, full with a guarantee that such a move would not imply adverse consequences for national security. The extent of differences between the administration and Congress is also reflected in the backing which several dozen Democrats gave to a proposal (later rejected in the voting) which would deprive the administration of some of the funds required to close the prison on time (June 2010). Worse still, according to a Gallup poll of 3 June, 65% Americans were against the closure, while 74% did not consent to transferring detainees to a prison in their home state.

On the other hand, the administration can expect bipartisan support for a reform of military tribunals. The reversal of Obama's position on the subject can be seen as a reaction to congressional warnings against the scale and pace of changes in detainee policy. And details of the "prolonged detention" regime will very likely be presented only after it is ascertained how many prisoners would be affected. Administration officials said detainees would be transferred to prisons on U.S. territory, which may provoke another spat with Congress and undermine Obama's popularity.

**International Cooperation.** Third countries' participation in Guantanamo closure is seen as a major factor helping Obama's initiative. Between January and July, 11 detainees were transferred to Saudi Arabia (where most of Yemeni detainees will most likely end up), Chad, France, Iraq, the UK and the territory of Bermuda. Interest in cooperation with the U.S. was also signaled by Palau.

In addition to France and the UK, there are other EU countries which have declared readiness to take detainees (Belgium, Spain, Ireland, Portugal, Italy). The sole competence of each member state to make such a decision was confirmed in the Conclusions of the Justice and Home Affairs Council of 4 June. In view of the possible consequences for other Schengen zone countries, a mechanism for exchange of information about former detainees was developed, and a recommendation was issued to admit those detainees who got cleared-for-release status. Coming close on the heel of these decisions was a joint statement by the U.S. and the EU (with its member states), which stressed EU countries' readiness to back the Guantanamo closure effort, while also noting that principal responsibility for solving the problem rested with the U.S. The U.S. contribution to financing detainee transfers to EU countries would be determined on a case-by-case basis, in line with the constraints imposed by Congress. The joint statement's practical weight will most likely be impaired by perceptible opposition in the U.S. against opening up its territory to detainees—a circumstance which prodded the German government, for instance, to forego admitting inmates of Uyghur origin. Neither is it clear how EU countries' willingness to cooperate with the U.S. will be influenced by plans for a virtual continuation of some instruments of the much criticized anti-terror policy of the Bush administration, or the introduction of "prolonged detention."

**Conclusions.** The delays in implementing the Guantanamo closure decision stem from legal (seeking the best way of prosecuting terror suspects) as well as political problems (congressional resistance, international partners' less pronounced enthusiasm for admitting detainees), but the decision itself will not be reversed. It is not inconceivable, though, that the closure deadline will not be kept, which would tarnish President Obama's image, especially abroad. But the administration is unlikely to press for punctual implementation. Rather, in the coming months, President Obama will seek to use his political capital and public support to push through important socio-economic projects (health care reform) and successive initiatives to fight the downturn.