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Obama's Minimalist Approach to Guantanamo

Obama's executive order on closing Guantánamo is a step in the right direction. But it still doesn't go far enough toward addressing the worst of the Bush administration's moral and legal quagmires.

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President Barack Obama, accompanied by Vice President Joe Biden and retired military members, signs executive orders and a presidential directive aimed at closing the Guantánamo Bay detention center. (AP Photo/J. Scott Applewhite)

As majestic and spacious as it is vague, President Obama's **draft executive order** directing the shuttering of the prison colony at Guantánamo is at once transformative and evasive.

Obama has taken a critical step in the right direction. But he has also evaded the hardest moral and legal quagmires of the Bush administration, denying both his critics a target and the many innocent detainees the swift relief they deserve. The result is a masterpiece of subtle political indirection -- one that captures and exploits the moral poverty and specious reasoning of national debate over Guantánamo, even as it offers a promissory note for transformation in the future.

To understand the draft executive order's acuity and its limits, it's helpful to recall a term popularized by Cass Sunstein, a Harvard Law School professor, former Obama adviser, and the **new head** of the White House's Office of Information and Regulatory Affairs -- "minimalism."

According to Sunstein, "**minimalism**" is the best way for judges to decide cases: They should render "narrow" and "shallow" decisions. "Narrow" means that a judge adjudicates no more than necessary to settle the case before her. "Shallow" means that the judge avoids signing off upon any deep or controversial principles but tries to find some common ground where people of reasonable principled differences can meet.

"Minimalism" captures to a tee Obama's approach to Guantánamo. The draft executive order has all of the virtues -- and vices -- of minimalism.

At the heart of the new executive order is the direction that "the detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than one year from the date of this order."

The order does not state, however, what will happen to the detainees. Rather, it orders an "immediate review" of the detentions, by a task force of Cabinet-level officials (or, more likely, their designees) led by the attorney general. Disparate information on each detainee, which the Bush administration did not even bother to collate in **one place**, will be gathered. The draft executive order invites the possibility of transfer to another country, prosecution -- although likely not in military tribunals, widely recognized as shabby facsimiles of justice -- or some unspecified "other dispositions." At the same time, the secretary of state is directed to engage in diplomatic efforts to facilitate the transfer of detainees while the military is ordered to ensure humane conditions for those detainees who remain held.

This is minimalism hard at work. No detainee is released now. Indeed, the order might conceivably not lead to the release of a single detainee (although this seems unlikely). No option, including trials in some modified military court, is wholly ruled out. Further, the time frame of the order allows a year for any policy to unfold: Obama artfully buys himself enough time to defuse some of the political tension over the base's future, while doing enough to placate most civil-liberties groups. This despite the fact that a year, as the Center for Constitutional Rights has properly **emphasized**, is astonishingly long considering the fact that a considerable number of concededly innocent detainees have been held for up to six years.

Yet there is much to be praised in the order. If this is an incremental move, at least it's in the correct direction: toward closure, resolution of pending cases of illegal or immoral detention, and compliance with international human-rights norms.

The order also subtly shifts the political valence of detainee policy, by placing the attorney general -- rather than the secretary of defense -- in charge of the task force. During the Bush administration, it was the FBI, which is within the Justice Department, that **took greater care** than the CIA did in avoiding interrogation measures that violated the law.

This nudge toward legality, transparency, and decency is of vital importance: For the past seven years, the implicit message from the executive branch has been that while America tells the world it doesn't torture, it will blink when detainees in its control or care are violated. Changing the tone in this fashion is a significant step toward stopping the worst practices.

Moreover, the order directs compliance with "Common Article 3" of the 1949 Geneva Conventions. While this merely tracks the Supreme Court's instruction in the 2006 case of *Hamdan v. Rumsfeld*, it is a marked improvement on the evasive approach of the Bush administration, which sought ways to circumvent this rule.

One final telling detail is worth observing: During the Bush administration, the base was always called "Guantanamo," without the acute accent that appears in Spanish. This petty gesture of linguistic imperialism has disappeared in the draft order I have seen.

Nevertheless, minimalism has its drawbacks besides the protracted time frame.

First, the order, like the national debate on Guantánamo, is very "shallow": It does not explicitly recognize the *moral* catastrophe that has drawn the world's opprobrium to the base . To the contrary, it rests on "the national security and foreign policy interests of the United States" before "the interests of justice." The priority of security, notwithstanding the fine phrases of this week's Inaugural Address, is telling: For the public, consensus on Guantánamo is shockingly thin. The calls for the prison base's closure almost always harp on U.S. interests. Few overtly recognize the human calamity of the hundreds of people who have been wrongfully detained. As long as our reputation is restored, the fate of those men falls away.

Moreover, any allegedly new commitment to international law is thin, too. *The New York Times* hence **reports** that the order compels observance of the "humanitarian requirements of the Geneva Convention." But that is at least an overstatement: The order compels compliance with Common Article 3, not with the whole set of rules and regulations that make up the several hundred provisions of the four Geneva Conventions. Certainly, the order does not undo one of the critical mistakes of the Bush administration -- its **decision** that the Taliban, even while acting as the government of Afghanistan, did not benefit from full-spectrum Geneva protection. At best then, this is a partial return to legal form.

Second, the order is narrow in the sense that it does nothing to remedy immediately those who even the Bush administration admitted were improperly detained. Still held at the base are detainees, including most notably a group of Chinese Uighurs, who even the Bush administration conceded are improperly detained. Yet the former administration had refused to resolve even these clear cases.

Third, the order envisages transfers but says nothing specific about the risk of torture upon transfer. It says nothing about how a program of transfers will be accomplished given the risk to detainees of, for example, Algerian nationality.

It is one of the hidden scandals of Guantánamo that several detainees were transferred to places where they either disappeared or were tortured. Significant questions remain about what officials responsible for those transfers knew (or should have known) about what would happen to those detainees. Whether those questions are ever answered, no Guantánamo detainee should have to confront even a colorable risk of torture upon transfer.

Moreover, the order says nothing about whether the United States will accept detainees who should be released but cannot be transferred to their own countries for fear of torture. A decision to admit former Guantánamo detainees into the United States would have tremendous moral and political significance. It would be the most tangible admission of culpability we could muster. It may be the only way to resolve the Uighur's situation

It would also be a critical signal to other countries. Former State Department legal adviser John Bellinger has argued that it is "fundamentally unfair" for other countries to criticize Guantánamo without agreeing to take detainees. Aside from the fact that it is the United States, not its European allies, that bears moral and legal blame for Guantánamo, Bellinger is criticizing other countries for doing what the United States has itself obdurately done -- refusing to admit the detainees who are presently wrongfully detained.

The draft order "closing" Guantánamo is both less than its advocates hoped for and more significant than its opaque generalities would suggest. Still unresolved are a host of pressing questions, largely about the fate of the detainees themselves. And without resolution of those issues, no decent solution to Guantánamo is yet in clear sight.

Fifty-four years ago, the Supreme Court issued a minimalist decision in *Brown v. Board of Education*, requiring that a massive constitutional wrong of segregation be addressed with "all deliberate speed." Minimalism on that day in May 1954 did not yield an immediate victory. It was, rather, the civil-rights movement that put blood and flesh on *Brown's* bones.

Like *Brown*, Obama's Guantánamo order is at once deeply admirable and profoundly frustrating -- just like the national debate on Guantánamo. Yet it would not have happened this way, one imagines, had the other fellow won. And yet it also could have been so much more. And now, as with *Brown*, it remains the task of people of good will and clear sight to ensure that the "much more" that needs to happen in fact does happen before too long.



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