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**THE COST OF INDEFINITELY KICKING THE CAN: WHY CONTINUED  
“PROLONGED” DETENTION IS NO SOLUTION TO GUANTÁNAMO**

*Devon Chaffee\**

*On January 22, 2009 President Barack Obama committed to close the Guantánamo Bay detention facilities and established a process for reviewing the cases of the remaining detainees. In a May, the President indicated that this review would result in a “fifth category” of detainees who the administration would not seek to prosecute in U.S. courts or transfer or repatriate to other countries, but who would be kept in “prolonged” detention. This essay argues that continued indefinite detention of the detainees currently held at Guantánamo Bay threatens to undermine the imperative security and foreign policy objectives that the closure of the detention facility would otherwise achieve. Continuing to kick the cases of a category of detainees down the road for indefinite, repeated review will impede efforts to close the door on the legacy of flawed detention policies that the Guantánamo facilities have come to represent.*

I. INTRODUCTION

On January 22, 2009, President Barack Obama issued an executive order that laid out strong guidance for closing the Guantánamo Bay detention facility.<sup>1</sup> The order launched a case-by-case review of the Guantánamo detainees led by the Justice Department, emphasized civilian courts as the appropriate forum for criminal trials, and underscored the importance of diplomatic efforts to facilitate the transfer and release of detainees.<sup>2</sup> These provisions inspired hope that Guantánamo’s legacy of illegal detention and ill-treatment could be brought to end in a manner that would restore confidence in American justice and in the U.S. as a country committed to upholding the rule of law.

Since January 22, and despite allegations about the lack of a cohesive plan and President’s announcement that it will not meet the one year deadline, the Obama administration has made measureable progress towards closing the facility. As of November 24, the number of detainees in U.S. custody in Guantánamo has dropped from approximately two-hundred forty

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<sup>1</sup> Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

<sup>2</sup> *Id.* at 4,899.

to two-hundred fifteen.<sup>3</sup> The President has announced the transfer of the five alleged conspirators in the 9/11 attacks and one detainee, Ahmed Guilian, has been transferred and is being prosecuted in the Southern District of New York.<sup>4</sup> Dozens of other cases have reportedly been referred to prosecutors for trials before district courts and the Senate and the House have recently voted in favor of allowing these detainees to be brought to the U.S. to stand trial.<sup>5</sup> Nineteen additional detainees have been repatriated or transferred to other countries, with six European governments receiving or agreeing to receive detainees.<sup>6</sup> In June, the European Union (EU) members issued a joint statement with the U.S. setting forth a framework for the transfer of detainees cleared for release to European allies willing to help the U.S. “turn the page . . . in a manner that comports with the rule of law.”<sup>7</sup>

Notwithstanding progress in civilian court prosecutions, repatriation, and transfer of those held at Guantánamo, President Obama announced at the National Archives Building in May his intention to continue to indefinitely detain some prisoners without trial after the January deadline for

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<sup>3</sup> Associated Press, *Guantanamo by the Numbers*, <http://www.miamiherald.com/news/world/AP/story/1332285.html> (last visited Nov. 24, 2009).

<sup>4</sup> Press Release, U.S. Dep't of Justice, Attorney General Announces Forum Decisions for Guantanamo Detainees (Nov. 13, 2009), *available at* <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.

<sup>5</sup> *See Gitmo Cases Referred to U.S. Prosecutors*, CBS NEWS, Aug. 3, 2009, <http://www.cbsnews.com/stories/2009/08/03/national/main5208364.shtml>; U.S. HOUSE OF REPRESENTATIVES, ROLL CALL VOTE NUMBER 746 (Oct. 1, 2009); U.S. SENATE ROLL CALL VOTE NUMBER 00038 (Nov. 5, 2009).

<sup>6</sup> *See* David Johnston, *Uighurs Leave Guantánamo for Palau*, N.Y. TIMES, Oct. 31, 2009, at A22, *available at* [http://www.nytimes.com/2009/11/01/world/asia/01uighurs.html?\\_r=1](http://www.nytimes.com/2009/11/01/world/asia/01uighurs.html?_r=1); Peter Finn, *Administration Makes Progress on Resettling Detainees*, WASH. POST, Aug. 20, 2009, at A03; Press Release, U.S. Dep't of Justice, United States Transfers Two Guantanamo Bay Detainees to the Government of Portugal (Aug. 28, 2009), *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-892.html>; Press Release, U.S. Dep't of Justice, United States Transfers Guantanamo Bay Detainee to Afghanistan (Aug. 24, 2009), *available at* <http://www.justice.gov/opa/pr/2009/August/09-ag-837.html>; Press Release, U.S. Dep't of Justice, United States Transfers Three Guantanamo Detainees to the Kingdom of Saudi Arabia (June 12, 2009), *available at* <http://www.justice.gov/opa/pr/2009/June/09-ag-587.html>; Press Release, U.S. Dep't of Justice, United States Transfers Two Guantanamo Detainees to Foreign Nations (June 11, 2009), *available at* <http://www.justice.gov/opa/pr/2009/June/09-ag-580.html>; Press Release, U.S. Dep't of Justice, United States Transfers Lakhdar Boumediene to France (May 15, 2009), *available at* <http://www.justice.gov/opa/pr/2009/May/09-ag-477.html>.

<sup>7</sup> Press Release, Council of the European Union, Joint Statement of the European Union and its Member States and the United States of America on the Closure of the Guantanamo Bay Detention Facility and Future Counterterrorism Cooperation (June 11, 2009), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/gena/108455.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/108455.pdf) [hereinafter Council of the EU].

closing the detention facility.<sup>8</sup> The President described the potential scope of such detention to include those currently detained who the administration asserts cannot be prosecuted—some he admitted due to “tainted evidence”—and who the administration does not want to release because they pose a security threat.<sup>9</sup>

To allow Guantánamo detainees to continue to languish in U.S. custody without trial, however, will jeopardize the very national security and foreign policy objectives that the administration is looking to achieve by closing the facility.<sup>10</sup> Putting detainees into indefinite detention in a new facility will simply serve to transfer the problem, not solve it, kicking the most difficult cases down the road for repeated review<sup>11</sup> and protracted litigation. Such a scheme would also risk tainting the legitimacy of U.S. detainee operations in theaters of armed conflict by potentially sparking fears that the mistakes at Guantánamo may be repeated. If the U.S. is to truly turn the page on past detention policy, the Obama administration must continue to vigorously pursue options for implementing its commitment to closing Guantánamo in a manner that fully comports with fundamental principles of justice and the rule of law.

## II. ACHIEVING U.S. NATIONAL SECURITY AND FOREIGN POLICY GOALS IN CLOSING GUANTÁNAMO

The most oft cited reasons by current and former government officials for closing Guantánamo is the damage that Guantánamo detention policies have had on the reputation of the U.S. and on U.S. counterinsurgency and counterterrorism efforts. Intelligence experts, diplomats, military leaders, former Secretaries of Defense, and former Secretaries of State all recognize that the Guantánamo legacy has hurt our relationships with our allies and our counterinsurgency and counterterrorism efforts.<sup>12</sup> In January, Dennis Blair, then the nominee for Director of National Intelligence testified, “I agree with the President that the detention center at Guantanamo has become a damaging symbol to the world and that it must be closed. It is a

<sup>8</sup> See President Barack Obama, Remarks on National Security (May 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) [hereinafter Remarks on National Security].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Testimony of Attorney General Eric Holder Before the Senate Judiciary Committee* (Nov. 18, 2009) (“There would be continuous reviews, as I said to make sure that person’s detention—continued detention—was appropriate.”) (on file with author).

<sup>12</sup> Dennis Blair, Statement Before the Senate Select Committee on Intelligence 7 (Jan. 22, 2009), available at [http://www.dni.gov/testimonies/20090122\\_testimony.pdf](http://www.dni.gov/testimonies/20090122_testimony.pdf); Thom Shanker, *Gates Counters Putin’s Words on U.S. Power*, N.Y. TIMES, Feb. 12, 2007, at A6, available at <http://www.nytimes.com/2007/02/12/world/europe/12gates.html>.

rallying cry for terrorist recruitment and harmful to our national security, so closing it is important for our national security.”<sup>13</sup>

If the administration continues to indefinitely detain Guantánamo detainees without trial or charge, it risks prolonging the legacy of flawed and illegal detention policies that Guantánamo has come to symbolize. One week before the President’s National Archive speech, three retired senior military leaders wrote the President stating that attempting to establish a system of indefinite detention without trial would perpetuate “the harmful symbolism of Guantánamo, undermining our counterterrorism efforts and squandering an opportunity to demonstrate the strength of the American system of justice.”<sup>14</sup> The letter goes on to state:

The Guantánamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not great enough to warrant departure from hundreds of years of western criminal justice traditions.<sup>15</sup>

The military leaders recognize the disagreeable company that the U.S. keeps when engaging in indefinite detention without trial. U.S. allies in Europe have implemented no comparable long term detention scheme in armed conflict or administrative preventive detention outside of the deportation context.<sup>16</sup> The governments of countries in Egypt, Malaysia, Zimbabwe, and Kenya have authorized indefinite or successive detention schemes in the name of fighting threats from terrorists or insurgents and all those schemes have resulted in violations of fundamental due process norms.<sup>17</sup> In response to this criticism, such governments have cited Guantánamo Bay detention policies to justify repressive schemes of prolonged

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<sup>13</sup> Blair, *supra* note 12.

<sup>14</sup> Letter from Vice Admiral Lee F. Gunn, Rear Admiral John D. Hutson, and Brigadier General James P. Cullen to President Barack Obama (May 14, 2009), available at <http://www.humanrightsfirst.org/pdf/090515-etn-opp-mil-camp.pdf>.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Hearing on the Legal, Moral and National Security Consequences of Prolonged Detention: Before Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sarah H. Cleveland, Professor of Human and Constitutional Rights, Columbia Law School), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3896>.

<sup>17</sup> See PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE STUDY (Andrew Harding & John Hatchard eds. 1993); INTERNATIONAL COMMISSION OF JURISTS, EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, ASSESSING DAMAGE, URGING ACTION: REPORT ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS (2009), available at [news.bbc.co.uk/2/shared/bsp/hi/pdfs/16\\_02\\_09\\_ejp\\_report.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_09_ejp_report.pdf).

detention without trial—schemes that the U.S. criticizes as authorized arbitrary detention.<sup>18</sup>

Indefinite detention regimes aimed at preventing security risks are known to foster human rights abuses and to create perverse incentives against bringing criminal charges against prisoners. That is why the U.S. has been consistently critical of governments that detain indefinitely without charge, including regimes that involve successive review or unrestrained renewable time limits.<sup>19</sup> If the Obama administration continues to pursue a detention regime for former Guantánamo detainees that permits indefinite detention without charge, it will impact detention policies of governments throughout the world and will likely embolden other governments to circumvent the protections guaranteed in criminal trials by citing security concerns.

The world is watching to see whether the Obama administration fulfills its promise to close Guantánamo, but also to see how it faces the difficult questions that must be confronted to truly resolve the detainee cases and not simply move them elsewhere. If the handling of the former Guantánamo detainees falls short of the standards that U.S. allies expect, those allies are likely to have continuing concerns about cooperating with the U.S. in joint detention operations. Moreover, if our European allies perceive that the process afforded some of the Guantánamo detainees falls short of international standards, they will be less likely to continue to offer their much needed assistance in relocating other detainees. When the Council for the EU expressed support for receiving Guantánamo detainees it did so with the explicit understanding that the underlying policy issues would be addressed in a manner consistent with international law, presumably as that law is understood not just by the U.S. but also by EU member states.<sup>20</sup>

In his speech in May, the President spoke of continued detention at Guantánamo as a system to “hold individuals to keep them from carrying out an act of war . . . .”<sup>21</sup> But the continued indefinite detention of Guantá-

<sup>18</sup> See HUMAN RIGHTS FIRST, DEFENDING SECURITY: THE RIGHT TO DEFEND RIGHTS IN AN AGE OF TERRORISM 8 (2004), available at [http://www.humanrightsfirst.org/defenders/hrd\\_global/Defending\\_Security\\_Draft.pdf](http://www.humanrightsfirst.org/defenders/hrd_global/Defending_Security_Draft.pdf) (quoting Malaysian Minister of Justice Dr. Rais Yatim, in *Rais: Sept. 11 Rendered Consultation on Terror Laws Impossible*, MALAYSIKINI, Dec. 12, 2003, <http://malaysiakini.com/news/18103> (last visited Nov. 7, 2009)); U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS REPORT: MALAYSIA (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119046.htm> (last visited Nov. 24, 2009).

<sup>19</sup> See, e.g., U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS REPORT: SINGAPORE (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119056.htm> (last visited Nov. 24, 2009); U.S. DEP’T OF STATE, 2008 INVESTMENT CLIMATE STATEMENT: MALAYSIA (2008), available at <http://www.state.gov/e/eeb/ifd/2008/101777.htm> (last visited Nov. 24, 2009).

<sup>20</sup> Council of the EU, *supra* note 7.

<sup>21</sup> Remarks on National Security, *supra* note 8.

namo detainees under the auspices of a law of war framework is in stark contrast to past examples of U.S. armed conflict detention or current detention policies in Iraq or Afghanistan. In previous conflicts, the U.S. afforded prisoners the procedures proscribed in the Geneva Conventions<sup>22</sup> and U.S. military regulation<sup>23</sup> at the point of capture and it released or transferred the prisoners promptly upon the end of the conflict.<sup>24</sup> The prisoners currently held at Guantánamo were afforded no review at the point of capture, and many were held for over two years before any process was provided. As Lawrence Wilkerson, Colin Powell's chief of staff recently wrote, "no meaningful attempt at discrimination was made in-country by competent officials, civilian or military, as to who we were transporting to Cuba for detention and interrogation."<sup>25</sup> That many of the Guantánamo detainees were denied process at the point of capture and that they have already been detained for such an extended period of time increases the importance of ensuring that the cases are dealt with in a manner that is consistent with the approach of our allies and with American traditions of justice. A policy that involves continued indefinite detention without charge falls short of what is needed to repair the damage inflicted on U.S. diplomatic power and ability to champion human rights abroad.

### III. STRATEGIC CONSEQUENCES FOR PERPETUATING A GLOBAL INDEFINITE DETENTION SCHEME

Guantánamo was a key instrument in the Bush administration's effort to wage a "Global War on Terror" which involved asserting a global authority to bring individuals into U.S. custody regardless of their place of capture. In exploiting this global detention authority, the Bush administration's policies demonstrated a disregard not only for international law, but also for the domestic laws of other countries in a manner that provoked outrage from the international community. In the context of the congressional

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<sup>22</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>23</sup> U.S. ARMY, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, AR 190-8 (1997), available at [http://www.army.mil/usapa/epubs/pdf/r190\\_8.pdf](http://www.army.mil/usapa/epubs/pdf/r190_8.pdf).

<sup>24</sup> See, e.g., No. 1991 Memorandum of Understanding Between the United States of America and France on Repatriation and Liberation of Prisoners of War (Mar. 1947), available at [http://untreaty.un.org/unts/1\\_60000/4/25/00007208.pdf](http://untreaty.un.org/unts/1_60000/4/25/00007208.pdf) (laying out a rate of repatriation of German prisoners of war at a rate of twenty thousand a month that would be completed by October 1, 1947).

<sup>25</sup> Posting of Lawrence Wilkerson to the Washington Note (Mar. 17, 2009 19:27), [http://www.thewashingtonnote.com/archives/2009/03/some\\_truths\\_abo/](http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/) (last visited Nov. 24, 2009).



debate, the Obama administration has expressed an interest not only in continued detention of Guantánamo detainees, but also in considering statutory authority for long-term law of war detention beyond the Guantánamo context.<sup>26</sup> Continuing to pursue a global detention policy that ignores the relevant domestic legal, political, and strategic framework will prolong the problems caused by the detentions at Guantánamo and by the Bush administration's "Global War on Terror."

The U.S. counterinsurgency manual, updated in 2006, makes clear the importance of criminalizing insurgent behavior and grounding counterinsurgency efforts not only in U.S. domestic and international law, but also in the laws of the host nation. The manual states:

When insurgents are seen as criminals they lose public support; if they are dealt with by an established legal system in line with local culture and practices, the legitimacy of the host government is enhanced . . . . [P]articipation in counterinsurgency operations by United States forces must be pursuant to United States law, which includes domestic laws and international treaties to which the United States is party as well as certain laws of the host nation.<sup>27</sup>

The Obama administration has initiated many reforms in detention policy in Afghanistan and Iraq that recognize the importance of ensuring that U.S. detainee operations are seen as legitimate and lawful under international and governing domestic law. In Afghanistan, the Department of Defense has announced new procedures for detainees held at the Bagram Theater Internment Facility that take into consideration Afghan-run rehabilitation programs and the option of transfer to Afghan custody for prosecution.<sup>28</sup> While these procedures fall short of establishing a clear domestic legal framework for U.S. detention operations in Afghanistan, they recognize the importance of tailoring detainee operations in order to reduce recidivism and win the support of the local population.<sup>29</sup> Likewise, in Iraq the U.S. military continues to release and transfer detainees at a reported rate of approximately seven hundred and fifty a month as provided for in the Strategic Framework

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<sup>26</sup> *H. Armed Services Comm. Hearing on Reforming the Military Commissions Act of 2006 and Detainee Policy* (2009) (opening statement of Chairman Ike Skelton), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/House-Armed-Services-July-24-2009.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/House-Armed-Services-July-24-2009.pdf).

<sup>27</sup> U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 1-19 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24fd.pdf>.

<sup>28</sup> See Brief for Respondents-Appellants at 11, *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf>.

<sup>29</sup> See U.S. DEP'T OF DEFENSE, COMISAF INITIAL ASSESSMENT (UNCLASSIFIED) 26-27, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/21/AR2009092100110.html> (declassified on Sept. 21, 2009).



Agreement that came into effect on January 1st.<sup>30</sup> On September 16, the U.S. military announced the closure of the U.S. maintained prison camp Camp Bucca, once the largest prisons in Iraq, transferring all remaining detainees to Iraqi prisons.<sup>31</sup>

Codifying a global system of U.S. detention would inevitably restrict the ability of the U.S. to ensure that U.S. detention policies adhere to domestic legal requirements and strategic needs in countries where the U.S. is engaged in armed conflict. A detention scheme that purports to provide procedures for all U.S. detentions operations worldwide will complicate efforts to ensure that the detention practices on the ground are consistent with the laws of the host nation and perceived as legitimate by the local population. For instance, the scheme for armed conflict detention proposed by the Senate Armed Services Committee in 2008 made no reference to the importance of involving the domestic government or considering the applicable domestic law.<sup>32</sup> The provision, if adopted, would also have mandated access only to a U.S. adjudicatory system even where access to review before a domestic body or a hybrid system that incorporates representation from the domestic government would have been more appropriate.<sup>33</sup>

The consequences of the codification of a global detention reform outside of a country where the U.S. is actively engaged in hostilities is equally concerning. The global approach to executive detention authority led the Bush administration to pickup individuals far from any situation of armed conflict—including the streets of Bosnia, Thailand, Indonesia, Mauritania and elsewhere—and to transfer them to Guantánamo. Continued assertion of the authority to take individuals into U.S. custody from anywhere in the world, outside of any law enforcement context, will threaten to undermine international standards for transfers of individuals across national borders. It would also set a dangerous example for other countries facing security threats. The American public would—rightfully—be outraged if foreign governments came into U.S. territory and took individuals into custody without affording them any domestic process. Presumably this is, in part, why at his confirmation hearing in January, now CIA Director Leon Panetta asserted that under his watch the CIA would not be transferring detainees to the custody of other governments or to black sites for the pur-

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<sup>30</sup> Richard Tomkins, *Iraqi Detainee Numbers Lessen*, UPI.COM, July 16, 2009, [http://www.upi.com/Top\\_News/Special/2009/07/16/Iraqi-detainee-numbers-lessen/UPI-42561247782916](http://www.upi.com/Top_News/Special/2009/07/16/Iraqi-detainee-numbers-lessen/UPI-42561247782916).

<sup>31</sup> See Steven Lee Meyers, *The Green Zone Takes Fire for a Second Day During Biden's Visit to Baghdad*, N.Y. TIMES, Sept. 17, 2009, at A12.

<sup>32</sup> National Defense Authorization Act for Fiscal Year 2008 (Reported in Senate), S. 1547 (June 5, 2007).

<sup>33</sup> *Id.*

pose of long-term detention without trial and interrogation.<sup>34</sup> On the other hand, the establishment of a new authority or new procedures that continue to be based on the premise that the U.S. is rightfully engaged in a global detention enterprise will spark justified concerns that not only has the U.S. failed to resolve the legacy of Guantánamo, but it has left the door open for that legacy to be repeated in the future.

#### IV. INDEFINITELY KICKING THE CAN AND THE TRUE MEANING OF “PROLONGED” DETENTION

President Obama’s pledge to close the Guantánamo detention facility within one year implicitly acknowledges that absent a firm deadline the situation could fester indefinitely. In defending the administration’s decision to close Guantánamo, Secretary Gates asserted his commitment to confronting the tough decisions that had to be made about detainee cases. Secretary Gates stated in January:

I believe that if we did not have a deadline, we could kick that can down the road endlessly . . . the only way we’ll come to grips with some of the tough decisions that have to be made with respect to Guantanamo is by having a deadline that then forces the rest of us to turn to and figure out solutions to some of these problems.<sup>35</sup>

But leaving a category of the Guantánamo detainees that are not charged or transferred in unending limbo will be, in effect, sidestepping the difficult issues and putting off the hard cases for potentially lifetimes.

After all, the Guantánamo detainees are being held in the context of a counterterrorism struggle without a foreseeable end. Given the indefinite nature of the current conflict some suggest that periodic review can cure the indefinite nature of continued detention of those in Guantánamo. But the detention authority being asserted by the administration and interpreted by the D.C. district court is one that is based on an evaluation of the detainees’ past acts. Hence, an individual’s detention status, as determined by either the administration or the courts, will not change so long as the conflict continues. Whether or not the Obama administration conducts a periodic review to consider the threat posed by or intelligence value of a detainee, as the Bush administration did with the Annual Review Boards at Guantánamo, the Obama administration is still asserting the legal authority to detain indefinitely.

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<sup>34</sup> *Hearing Before the Sen. Select Comm. on Intelligence on the Nomination of Leon Panetta to Be Director of the CIA* (Feb. 5, 2009) (on file with author).

<sup>35</sup> *Testimony of Defense Secretary Robert Gates Before the H. Armed Services Comm.* (Jan. 27, 2009) (on file with author).

The prohibition against indefinite detention is one of the most important principles governing detention under international humanitarian and international human rights law.<sup>36</sup> In asserting the need for a new legal regime to continue to detain without trial, Senator Lindsay Graham stated in May: “[T]his war is different. There will never be an end to this war. . . . An enemy combatant determination could be a de facto life sentence.”<sup>37</sup> That Senator Graham, an influential member of the Senate Armed Services Committee, contemplates a war without end in which the U.S. will hold detainees for the rest of their lives without trial sends a disturbing message about the indefinite nature of any continued detention of Guantánamo detainees without trial, with or without periodic review.

#### V. CONCLUSION

The detention policies pursued by the Bush administration at Guantánamo were a costly mistake and President Obama set his administration on the right path on his second full day in office when he laid out a process for closing the detention facility. But if the administration continues to indefinitely detain without trial under a new scheme, it will risk simply transferring the problems caused by the Guantánamo detentions and perpetuating the detrimental impact on essential foreign policy and national security goals. Kicking Guantánamo cases down the road for continued, prolonged, and repeated review will impede the administration’s efforts to enlist the power of fundamental American values and to pursue a counterterrorism strategy that strengthens our ability to cooperate with U.S. allies. It will also impede the ability of the U.S. to advance democracy and the rule of law around the world. Only by firmly rejecting a policy of continued indefinite detention will the Obama administration be able to truly turn the page on Guantánamo.

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<sup>36</sup> Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 382 n.25 (2005) (citing Report of the Working Group on Arbitrary Detention, ¶ 60, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) (“[I]n no event may an arrest based on emergency legislation last indefinitely . . . .”); ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1976, OAS Doc. OEA/Ser.L/V/II.40. (“[T]he declaration of a state of emergency or a state of siege cannot serve as a pretext for the indefinite detention of individuals, without any charge whatever. It is obvious that when these security measures are extended beyond a reasonable time they become true and serious violations of the right to freedom . . . .”).

<sup>37</sup> 115 CONG. REC. S5652 (daily ed. May 20, 2009) (statement of Sen. Graham).