Buying Time for Guantanamo

The president may miss his deadline to close the terrorist prison, but some fancy legal footwork may help him avoid paying a political price.

By Shane Harris

Although the original January deadline to close the island prison at Guantanamo Bay looms, a series of unexpected maneuvers by President Obama has neutralized the issue for now. The more the president delays a permanent solution for detaining, trying, or freeing prisoners, however, the more he invites intervention from federal judges, and possibly the Supreme Court.

After his inauguration, Obama issued an executive order to shutter Guantanamo by January 22, 2010. It was a grand symbolic gesture, but the administration soon realized that it might have been imprudent. That’s because the cases of 241 men then held at Guantanamo presented a Gordian knot of legal, political, and ethical considerations that the officials couldn’t untie by Obama’s deadline.

Last month, the White House acknowledged that it would be difficult to close the prison by January and that it would take longer than expected to resolve the fate of the 223 prisoners still there. In another significant announcement, officials said that the administration wouldn’t seek new authorities from Congress to hold those detainees. Instead, the president would rely on the 2001 Authorization for Use of Military Force Against Terrorists, which Congress passed just after the 9/11 attacks.

This position has put human-rights activists in the unlikely position of applauding the president’s choice—not because they support indefinite detentions but because they don’t want Congress to pass another law giving the president more powers. Obama delayed a fight with lawmakers and civil libertarians by disregarding his own deadline and embracing his predecessor’s claims of executive power.

“That is a good development,” said Christopher Anders, the senior legislative counsel for the American Civil Liberties Union. “It means that the possibility of legislation that would make the detention authority either broader or permanent is less likely.”

Obama has disappointed liberals and progressives by not repudiating more of the Bush administration’s counter-terrorism policies. But these advocates are unlikely to challenge his use of the military authorization, even while they continue to push the president to resolve the prisoners’ cases.

Whether the authorization is adequate for doing what Obama wants “depends on whom he may want to detain in military custody, and whether the courts ultimately construe the authorization to include that category of person,” said Robert Chesney, a professor and national security law expert at the University of Texas School of Law. “The existing authorization is silent on this question,” Chesney noted, “and legal experts disagree about the boundaries of the detention authority it provides. Ideally, Congress would take responsibility for resolving that ambiguity.”

Anders said that human-rights groups don’t support claims of executive detention authority. But he acknowledged that Congress would be unlikely to curtail the president’s powers at this time. “The problem is that the president continues to assert that he has the authority to detain people without charge, which is carrying over at least in part the claim of detention authority made by President Bush.... We’re urging the president to change his views on that issue.

“We’re not remotely happy there’s continued indefinite detention without charge,” he added. “Institutionally, it’s our leading priority for the entire ACLU to end detention without charge.”

Politically, the administration has bought itself some time. The issue of where to eventually house prisoners who aren’t released, or who aren’t tried in U.S. federal courts, still lingers. But with the deadline on closing Guantanamo slipping, Obama will put off the bruising controversy over whether to move detainees to prisons in the U.S. Few lawmakers are willing to see suspected terrorists move into their districts, and Congress has blocked any new funds for closing Guantanamo until the administration presents a plan for dealing with the detainees.

Of course, Obama may just be postponing the inevitable. Last year, the Supreme Court decided that all prisoners at Guantanamo can challenge their detention through habeas corpus proceedings in U.S. federal courts. As those cases grind on, various judges have disagreed on several central issues, making it likelier that the Supreme Court will ultimately have to write the “rules of the road” on detention, according to Benjamin Wittes, a Brookings Institution senior fellow, who wrote a Washington Post op-ed last month chastising the president for not seeking a long-term detention solution from Congress. Wittes predicted that the rules for detention will remain “murky, ever-shifting, and unclear,” and that in the absence of clear law, a Supreme Court that “has not a single national security expert” among its justices will ultimately enter the fray.

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