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Obama's Failed Attempt to Close Gitmo: Why Executive Orders Can't Bring About Systemic Change

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Obama's Failed Attempt to Close Gitmo: Why Executive Orders Can't Bring About Systemic Change

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I. INTRODUCTION

In the lead up to the 2008 Presidential election, there was broad bipartisan support for closing the detention facility at Guantanamo Bay. President Bush was quoted as saying, "I'd like it to be over with."¹ John McCain and General Colin Powell echoed similar sentiments for ending detention at the naval base.² In addition to prom-

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1. Jane Mayer, *The Trial*, NEW YORKER, Feb. 15, 2010, at 58 (discussing U.S. Attorney General Eric Holder's role in implementing President Obama's executive orders to suspend military commissions at Guantanamo Bay and the President's timeline for closing the naval base).

2. *Id.*

inent Republicans calling for closure, public opinion began to support finding alternative solutions for prisoners held at Guantanamo Bay.³

Barack Obama wasted no time once sworn into office executing his central campaign promises. On January 22, 2009, two days after becoming the forty-fourth President of the United States,⁴ Obama signed three executive orders in the presence of sixteen retired admirals and generals in the Oval Office.⁵ These orders (1) suspended military commissions;⁶ (2) set a timetable and created procedures to shut down the Guantanamo Bay detention facility;⁷ (3) revoked all existing executive orders that were inconsistent with U.S. Geneva Convention treaty obligations concerning interrogation of detained individuals;⁸ and (4) created a task force to review U.S. detention policy options and U.S. interrogation techniques.⁹

With the public backing its shutdown, prominent Republicans and Democrats alike calling for its closure, and the President's executive orders creating the framework and timeline for implementation, the end of U.S. detentions at Guantanamo Bay seemed a *fait accompli*. Yet, in 2011, Guantanamo Bay continues to operate and currently houses approximately 180 post-9/11 detainees who have

3. See Jon Cohen & Jennifer Agiesta, *Public Supports Closing Guantanamo*, WASH. POST, Jan. 22, 2009, at A6 (stating that fifty-three percent of Americans support finding alternative means "to deal with" the detainees at Guantanamo Bay).

4. See Peter Baker, *Obama Takes Oath, and Nation in Crisis Embraces the Moment*, N.Y. TIMES, Jan. 21, 2009, at A1. President Obama was sworn into office at 12:05 p.m. on January 20, 2009. *Id.*

5. Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 22, 2009, at A1 (included in the sixteen retired admirals and generals witnessing President Obama sign these orders was Retired Rear Admiral John D. Hutson, former Dean and President of the University of New Hampshire School of Law).

6. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4899 (Jan. 27, 2009).

7. *Id.* at 4898 (establishing a one-year timeline for the closure of Guantanamo Bay and calling for the immediate and individual review of all Guantanamo detentions).

8. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4893-94 (Jan. 27, 2009).

9. Exec. Order No. 13,493, 74 Fed. Reg. 4901, 4901 (Jan. 27, 2009).

not been tried for any crimes.¹⁰ This essay asks: Why, what happened?

The world watched in January 2009 as Obama delivered his promise to close Guantanamo Bay. However, by May 20, 2009, the U.S. Senate, controlled by Democrats, voted ninety to six to prohibit the use of federal funds “to transfer, release, or incarcerate detainees detained at Guantanamo Bay, Cuba, to or within the United States.”¹¹ More recently, Congress, in approving the 2010 Defense Authorization Bill, banned the transfer of detainees held at Guantanamo Bay to the United States, even for criminal prosecution, and required that the Secretary of Defense sign off on the transfer of any detainee to a third country.¹² Despite overwhelming support in the abstract for its closure, congressional pushback on implementation has stalled efforts to bring the U.S. practice of detaining individuals at Guantanamo Bay to an end. In particular, the U.S. Senate balked at providing the President the necessary funds to begin phasing out the Guantanamo Bay detention facility.¹³ What caused this disconnect between the newly-elected President and his Democrat-controlled Congress? What did the Obama Administration fail to calculate or understand about the legislature that resulted in the President failing to deliver on a key campaign promise?

This article examines the Obama Administration's failure to execute its plans to close Guantanamo Bay and analyzes the lessons to be learned from this early misstep by the executive branch. Part II of this article provides an overview of the three executive orders Obama signed and the actions and funding necessary to effectuate these orders. This section also delineates the complex issues not addressed by the executive orders. Part III identifies the different classes of individuals who were detained at Guantanamo Bay when the executive orders were signed and explains why each group ne-

10. *JTF Fact Sheets: Detainees*, JOINT TASK FORCE GUANTANAMO, <http://www.jtfgtmo.southcom.mil> (last updated Jan. 27, 2011) (on file with author).

11. 155 CONG. REC. S5766 (daily ed. May 20, 2009) (vote count for Senate Amendment 1133).

12. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032–34, 124 Stat. 4137, 4351–53 (2010).

13. *See, e.g.*, 155 CONG. REC. S5766.

cessitates a different course of action with respect to its detention. Part IV provides a historical account of Congress' successful efforts to thwart the President's agenda by banning federal spending necessary to effectuate the executive orders. In the process, this section explores the politics that shaped the decision makers' votes. Part V argues that legislation would have been a more successful vehicle to effectuate the closure of Guantanamo Bay than the President's unilateral issuance of executive orders to commence the process. In conclusion, Part VI highlights the lessons to be learned by human rights activists from President Obama's failed effort to deliver on a key campaign promise.

II. SWIFT EXECUTIVE BRANCH ACTION, NO FUNDING, AND GAPING HOLES—STAGNATION

On January 22, 2009, President Obama issued his first three executive orders as the new President.¹⁴ This section provides a brief overview of each executive order and summarizes the cost estimates of implementing each executive order.

Executive Order 13,491, "Ensuring Lawful Interrogations," revoked all "executive directives, orders, and regulations" issued between September 11, 2001 and January 20, 2009 that contravene U.S. obligations to the Geneva Conventions.¹⁵ The executive order also articulated the Obama Administration's standards and practices for interrogation of persons detained in armed conflict.¹⁶ Specifically, the executive order required that all interrogations, at a minimum, must comply with existing U.S. law and Common Article 3.¹⁷ In

14. Mazzetti & Glaberson, *supra* note 5, at A1.

15. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4893 (Jan. 27, 2009).

16. *Id.* at 4894.

17. *Id.*; see *The Geneva Conventions of 1949 and Their Additional Protocols*, INT'L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (last visited Feb. 20, 2011). "The Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects." *Id.* Specifically, Convention I "protects wounded and sick soldiers on land during war." *Id.* Convention II "protects wounded, sick and shipwrecked military personnel at sea during war." *Id.* Convention III governs the treatment of

addition to circumscribing acceptable interrogation methods, the executive order required the closure of all CIA detention facilities and ordered unfettered access for the International Committee of the Red Cross to any individuals detained as a result of armed conflict.¹⁸ Finally, the executive order created an interagency task force on interrogation and transfer of detainees, which is chaired by the U.S. Attorney General.¹⁹

Executive Order 13,492, "Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities," required the immediate review of all 241 Guantanamo Bay detainees by an interagency review team led by the U.S. Attorney General.²⁰ The executive order also established a one-year timeline for closing the detention facilities at Guantanamo Bay and suspended the use of military commissions.²¹

Executive Order 13,493, "Review of Detention Policy Options," established a "Special Task Force on Detainee Disposition," co-chaired by the U.S. Attorney General and U.S. Secretary of Defense.²² The task force was charged with conducting a comprehensive review of the lawful options available to the U.S. Government in apprehending, detaining, putting on trial, transferring, and releasing all individuals in U.S. custody due to armed conflicts and counterterrorism operations.²³ Finally, the task force was required to make policy recommendations on what lawful tactics are in the best

"prisoners of war," and Convention IV relates to the protection of civilians during a time of war or armed conflict "in occupied territory." *Id.* All four of these conventions contain the identical Article 3, which requires the humane treatment of all persons who are involved in non-international armed conflict and "establishes fundamental rules from which no derogation is permitted." *Id.* It requires humane treatment for all persons in enemy hands and specifically prohibits murder, mutilation, torture, cruel, humiliating, and degrading treatment, the taking of hostages, and unfair trials. *Id.*

18. 74 Fed. Reg. at 4894.

19. *Id.* at 4895.

20. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009).

21. *Id.*

22. Exec. Order No. 13,493, 74 Fed. Reg. 4901, 4901 (Jan. 27, 2009).

23. *Id.*

interests of the United States with respect to its “national security and foreign policy interests.”²⁴

The costs of implementing these orders are unclear. However, the President, in his 2010 and 2011 annual budget submissions to Congress, requested additional funding for the Department of Justice for “activities and expenses related to detainees currently or formerly detained by the Department of Defense at Guantanamo Bay Naval base or elsewhere.”²⁵ In addition, the President, in his April 9, 2009 transmittal to Congress for the 2010 supplemental appropriations funding, requested thirty million dollars for the Department of Justice to support the creation of task forces to review the statuses of the approximately 240 detainees at Guantanamo Bay.²⁶ Additionally, the President requested fifty million dollars for the Department of Defense for costs related to trying, transferring, and detaining individuals.²⁷ Congress has categorically refused to fund any of these requests.²⁸

In addition to causing a standoff between the legislative and executive branches, these executive orders impacted the judiciary. Several of the detainees’ habeas corpus proceedings, which the Su-

24. *Id.*

25. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE BUDGET OF THE UNITED STATES GOVERNMENT, APPENDIX, FISCAL YEAR 2011, at 739 (2010) (requesting an additional \$72,771,000 for the Department of Justice’s salaries and expenses account); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE BUDGET OF THE UNITED STATES GOVERNMENT, APPENDIX, FISCAL YEAR 2010, at 719 (2009) (requesting an additional sixty million dollars for the Department of Justice’s salaries and expenses account) [hereinafter 2010 BUDGET REQUEST].

26. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FY 2009 SUPPLEMENTAL (VARIOUS AGENCIES): APPROPRIATIONS REQUEST THAT WILL FUND OUR ONGOING MILITARY, DIPLOMATIC, AND INTELLIGENCE OPERATIONS, at 71 (Apr. 9, 2009) [hereinafter SUPPLEMENTAL APPROPRIATIONS REQUEST].

27. *Id.* at 28–29.

28. *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3157 (2009) (refusing to fund the President’s request for the Department of Justice); Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1920 (2009) (refusing to fund any of the President’s supplemental funding requests to close Guantanamo Bay). Currently, the funding for fiscal year 2011 is in limbo. Congress has approved a continuing resolution that is set to expire on March 4, 2011. *See* Continuing Appropriations and Surface Transportation Extensions Act, 2011, Pub. L. No. 111-322, § 1, 124 Stat. 3518, 3518 (2010).

preme Court had recently ruled detainees were entitled to,²⁹ were stayed until the task forces “ma[de] a broad assessment of detention policy.”³⁰

While the orders contemplated a timeline and bureaucratic structure for reviewing the detainees’ statuses and the legally permissive detention scenarios, there were key issues fundamental to ensuring an expedient closure of the naval base that were ignored. For example, where would the detainees in U.S. custody be housed one year later when the base was closed? The Obama Administration knew that, at the very least, there was a subset of detainees that could not be repatriated to their home countries or a third country. Furthermore, if some detainees were going to stand trial, where would they be housed during the pendency of their cases? For those released, what responsibility did the United States have to make sure those individuals would not engage in terrorist activity? For example, the day after Obama signed the executive orders, the *New York Times*, in a front page story, reported that Said Ali al-Shiri, a Guantanamo Bay detainee released by the Bush Administration, “had returned to terrorist activity as the head of al-Qaeda’s Yemeni branch.”³¹

III. WHO REMAINS? THE DEMOGRAPHICS OF THE DETAINEES LANGUISHING AT GUANTANAMO BAY

When Obama signed the executive orders on January 22, 2009, of the 779 prisoners who spent time at Guantanamo Bay, approximately 242 individuals remained there.³² Today, approximately 180

29. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Constitution’s guarantee of access to the writ of habeas corpus extends to detainees held at Guantanamo Bay); Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 887 (2010) (arguing that detainees held at Bagram Airbase in Afghanistan are entitled to access of the constitutional guarantee of the writ of habeas corpus).

30. Jay Yagoda, *Habeas Corpus: What the Closing of Guantanamo Bay Means for Future Challenges to Executive Detention From Abroad*, 20 U. FLA. J.L. & PUB. POL’Y 347, 349 (2009) (citation omitted).

31. Robert F. Worth, *Freed by U.S., Saudi Becomes a Qaeda Chief*, N.Y. TIMES, Jan. 23, 2009, at A1.

32. See BENJAMIN WITTES & ZAAHIRA WYNE, *THE CURRENT DETAINEE POPULATION OF GUANTANAMO: AN EMPIRICAL STUDY* 6 (2008).

individuals remain in custody at Guantanamo Bay.³³ Deciding what to do with these detainees is complicated by the fact that there are individuals from thirty different countries who were, or currently are, detained at Guantanamo Bay.³⁴ Five broad categories have been created “to help illuminate the role each detainee allegedly played” in terrorist activity: (1) twenty-seven members of al-Qaeda’s leadership cadre; (2) ninety-nine lower-level al-Qaeda operatives; (3) nine members of the Taliban leadership cadre; (4) ninety-three foreign fighters; and (5) fourteen Taliban fighters and operatives.³⁵ The task force led by the Department of Justice,³⁶ in a report released on January 22, 2010, recommended dividing the Guantanamo Bay detainees into three main categories: (1) forty-four who should be prosecuted in federal or military courts; (2) 126 who can be released either immediately or eventually; and (3) nearly fifty who must be detained without trial.³⁷ Clearly, not all of the individuals are known or suspected terrorists.

For example, when the executive orders were signed, seventeen Chinese Uighurs were among the detainees.³⁸ A federal judge had ordered the seventeen Chinese Uighurs to be released into the United States because they could not be returned to China because of legitimate fears of religious and ethnic persecution and torture.³⁹ The

33. *JTF Fact Sheets*, *supra* note 10.

34. WITTES & WYNE, *supra* note 32, at 7.

35. *Id.* at 2.

36. See Exec. Order No. 13,493, 74 Fed. Reg. 4901, 4901 (Jan. 27, 2009).

37. GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 9–10 (2010); see also Peter Finn, *Justice Task Force Recommends About 50 Guantanamo Detainees to Be Held Indefinitely*, WASH. POST, Jan. 22, 2010, at A1.

38. Since September 11, 2001, twenty-two Uighurs have been held at Guantanamo Bay. Warren Richey, *Supreme Court Declines Case: U.S. Can Move Detainees Without Notice*, CHRISTIAN SCI. MONITOR (Mar. 22, 2010), <http://www.csmonitor.com/USA/Justice/2010/0322/Supreme-Court-declines-case-US-can-move-detainees-without-notice>. Five of those Uighurs had been resettled prior to Obama signing the executive orders. Besar Likmeta, *From Albania, Freed Guantánamo Prisoner Watches Detainee Debate Unfold*, CHRISTIAN SCI. MONITOR (May 23, 2009), <http://www.csmonitor.com/World/Europe/2009/0523/p06s01-woeu.html>.

39. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 34, 42 (D.D.C. 2008), *rev'd*, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (finding that the continued detention of the seven-

U.S. government had cleared fifteen of the seventeen Uighur petitioners for release prior to the filing of their habeas petitions, but all remained at Guantanamo Bay.⁴⁰ In fact, the U.S. government decided in August 2008 that the Uighurs were not enemy combatants and provided them less restrictive housing at Guantanamo Bay.⁴¹ The judge held that the U.S. government's continued detention of these seventeen Uighurs was unlawful and that the remedy should be admitting the Uighurs into the United States.⁴² While an appeals court overturned the judge's order requiring the United States to admit these individuals,⁴³ his finding that their detention was unlawful still stands. To date, the United States has resettled all but five of the Uighurs in several countries, including Albania, Bermuda,⁴⁴ Switzerland, and Palau.⁴⁵ The five remaining Uighurs have refused offers of resettlement, and, on May 28, 2010, the D.C. Circuit Court of Ap-

teen Uighurs was unlawful and requiring the U.S. government to admit these individuals into the United States). Under U.S. and international law, a country is prohibited from returning an individual to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85; *see also* 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (Senate ratification of Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment with list of reservations, understandings, and declarations).

40. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d at 35.

41. *Id.* (citing to a Joint Status Report and Notice of Status filed with the court).

42. *Id.* at 38–39, 42.

43. *Kiyemba*, 555 F.3d at 1028–29 (holding there is no legal basis to require the United States to admit individuals into the United States).

44. Dafna Linzer & Anne E. Kornblut, *Obama Guantanamo Closing: White House Regroups After Missteps*, HUFFINGTON POST (Sept. 25, 2009), http://www.huffingtonpost.com/.../obama-admin-officials-adm_n_299420.html.

The U.S. decision to resettle four Uighurs in Bermuda caused a diplomatic rift between Britain and the United States. *Id.* "Bermuda [is] a self-governing British territory whose international relations are administered by Britain." *Id.* The United States only provided Britain with two hours of notice that the Uighurs were going to be resettled in Bermuda. *Id.*

45. Richey, *supra* note 38.

peals held that the Uighurs must either accept the offer of resettlement to a third country or remain in detention at Guantanamo Bay.⁴⁶

Also, the U.S. government struggled with what to do with ninety-four Yemenis who comprised more than one-third of the remaining population.⁴⁷ Although all of the Yemeni detainees were subject to Combatant Status Review Tribunals,⁴⁸ only eight were released from Guantanamo Bay.⁴⁹ This is in sharp contrast to the Pentagon's decision to release 113 Saudi detainees to Saudi custody and repatriate 102 Afghani detainees to Afghanistan, where many of them were transferred to the Pul-e-Charkhi detention facility in Kabul.⁵⁰ Arguably, the continued U.S. detention of the Yemenis has more to do with the inability of the United States to broker a suitable arrangement with the Yemeni government than "a judgment about the individual dangerousness posed by Yemeni versus Saudi and Afghan detainees"⁵¹ The Detainee Review Task Force report concluded that about thirty Yemeni detainees were eligible for immediate repatriation or resettlement to a third country, and about thirty others

46. *Kiyemba v. Obama*, 605 F.3d 1046, 1047 (D.C. Cir. 2010) (holding that the five remaining Uighurs at Guantanamo Bay must either accept U.S. offers to resettle them in a third country or remain detained).

47. WITTES & WYNE, *supra* note 32, at 7.

48. The Department of Defense ordered the creation of the Combatant Status Review Tribunals in response to two Supreme Court rulings in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Rasul v. Bush*, 542 U.S. 466 (2004). Generally speaking, the Supreme Court held that detainees classified as enemy combatants by the U.S. government were entitled to impartial review of their status. *Hamdi*, 542 U.S. at 533; *Rasul*, 542 U.S. at 484. The Supreme Court only held that U.S. citizens were entitled to review by a court. *Hamdi*, 542 U.S. at 533. The tribunals were created to provide review of enemy combatant statuses of non-U.S. citizens held at Guantanamo Bay. See Order from Paul Wolfowitz, Deputy Sec'y of Def., to Sec'y of the Navy (July 7, 2004) (order establishing Combatant Status Review Tribunals) (on file with author); see also Neil A. Lewis, *Guantanamo Prisoners Getting Their Day, But Hardly in Court*, N.Y. TIMES, Nov. 8, 2004, at A1.

49. CTR. FOR CONSTITUTIONAL RIGHTS & FORDHAM UNIV. SCH. OF LAW INT'L JUSTICE CLINIC, THE ROLE OF THE YEMENI GOVERNMENT WITH REGARD TO CURRENT AND FORMER GUANTÁNAMO DETAINEES FROM YEMEN 2 (May 30, 2007), http://ejp.icj.org/IMG/CCR_Fordham_submission.pdf.

50. WITTES & WYNE, *supra* note 32, at 7.

51. *Id.* at 7 & 30 n.27 (citing a series of newspaper articles discussing the U.S. foreign policy relationship with Yemen).

were placed in a category in which their release was predicated on conditions in Yemen stabilizing.⁵²

In addition to struggling to find third countries to resettle detainees who were determined not to be a threat and are not enemy combatants, the Obama Administration is also struggling with what to do with the approximately fifty detainees that cannot be released and, as the Obama Administration is arguing, cannot be tried due to security reasons.⁵³ Initially, there was some speculation that these detainees would be transferred to Fort Leavenworth, Kansas, which met strong objections from U.S. Senators Sam Brownback and Pat Roberts of Kansas.⁵⁴

Finally, although the Detainee Review Task Force recommended trying thirty-six detainees in federal court or military commissions,⁵⁵ and although the President issued a memorandum in December 2009 to the Secretary of Defense and the Attorney General to “acquire and activate” the Thomson Correctional Center in Thomson, Illinois as a U.S. penitentiary to accommodate the relocation of Guantanamo Bay detainees to the United States,⁵⁶ many detainees have not been transferred. While several detainees have been transferred to the United States for prosecution⁵⁷ or have pleaded guilty in military commis-

52. GUANTANAMO REVIEW TASK FORCE, *supra* note 37, at 11; *see also* Finn, *supra* note 37, at A1.

53. *See* Finn, *supra* note 37, at A1; *see also* Devon Chaffee, *The Cost of Indefinitely Kicking the Can: Why Continued “Prolonged” Detention Is No Solution to Guantanamo*, 42 CASE W. RES. J. INT’L L. 187, 189 (2009) (providing a compelling argument on how allowing any detainees to languish in indefinite detention without a trial undermines the very national and foreign policy goals the Administration seeks to achieve by closing the naval base).

54. 155 CONG. REC. S5600 (daily ed. May 19, 2009) (statement of Sen. Roberts); 155 CONG. REC. S5602 (daily ed. May 19, 2009) (statement of Sen. Brownback).

55. GUANTANAMO REVIEW TASK FORCE, *supra* note 37, at 9–10.

56. Memorandum from President Barack Obama to the Sec’y of Def. and the Att’y Gen. (Dec. 15, 2009) (Presidential Memorandum—Closure of Detention Facilities at Guantanamo Bay Naval Base), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base> (last visited Feb. 20, 2011).

57. For example, Ahmed Ghailani was sent to New York in June 2009 to face charges that he helped blow up U.S. embassies in Africa in 1998. *See* Devlin Barrett, *Gitmo Cases Referred to U.S. Prosecutors*, CBS NEWS (Aug. 3, 2009), <http://cbsnews.com/stories/2009/08/03/national/main5208364.shtml>.

sion proceedings,⁵⁸ most of them remain at Guantanamo Bay. Congress recently thwarted any executive branch action to move detainees from Guantanamo Bay to U.S. soil, even for the purpose of prosecution.⁵⁹ The President continues to publicly decry Congress' refusal to implement his executive orders; however, the Obama Administration has done little to overcome these legislative hurdles.⁶⁰

IV. NEVER UNDERESTIMATE THE PUBLIC'S FICKLENESS: CONGRESS PUSHES BACK AS PUBLIC SUPPORT PLUMMETS

When President Obama was sworn into office in January 2009, a Gallup poll reported that fifty-three percent of Americans supported closing the Guantanamo Bay detention facility, up from thirty-three percent in 2007.⁶¹ Yet, by February 4, 2009, weeks after Obama signed the order setting a timeline for closing the naval base, a Gallup poll found that the President received his second-highest negative rating of fifty percent for his order to close the Guantanamo Bay

58. See, e.g., Charlie Savage, *Deal Averts Trial in Disputed Guantanamo Case*, N.Y. TIMES, Oct. 26, 2010, at A12 (discussing plea agreement reached with Omar Khadr, who was fifteen when he was captured by the United States and held at Guantanamo Bay, and a side agreement reached between the U.S. and Canadian governments that allowed Khadr to serve out the remainder of his sentence in Canada); Charlie Savage, *Guantanamo Detainee Pleads Guilty in Terrorism Case*, N.Y. TIMES, July 8, 2010, at A15 (summarizing detainee Ibrahim Ahmed Mahmoud al-Qosi's guilty plea to charges of conspiracy and providing material support to terrorism).

59. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2010) ("Prohibition on the use of funds for the transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba."). President Obama signed the bill into law on January 7, 2011. Press Release, The White House, Statement by the President on H.R. 6523 (Jan. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523>.

60. See Charlie Savage, *Closing Guantanamo Fades as a Priority*, N.Y. TIMES, June 26, 2010, at A13.

61. Kenneth Jost, *Closing Guantánamo: Can Obama Close the Detention Camp Within One Year?*, 19 CQ RESEARCHER 177, 183 (2009) (citing 2007 and 2009 Gallup Poll results asking "Do you think the United States should close the prison at Guantanamo Bay?").

detention facility.⁶² By June 3, 2009, public support for closing Guantanamo Bay dropped precipitously to thirty-two percent, while sixty-five percent of those polled opposed closing Guantanamo Bay.⁶³ Even when the public supported closing Guantanamo Bay, it was never a priority in the public's eye. In a December 2008 Washington Post-ABC poll, closing Guantanamo Bay "fell last on an eight-item list of things [Obama] should do after taking office"⁶⁴ So why then was it the first action Obama took as President?

In part, the Obama Administration was deeply concerned about repairing the United States' standing internationally. During President Bush's tenure, international opinion of the United States plummeted as the Bush Administration condoned the use of black sites, torture,⁶⁵ and extra-judicial detention at Guantanamo Bay.⁶⁶ "Former British Prime Minister Tony Blair, former Secretary-General of the United Nations Kofi Annan, German Chancellor Angela Merkel, and other heads of state have also unequivocally called for the closure of the Guantánamo facility."⁶⁷ A 2005 Pew report found that

62. See Jeffrey M. Jones, *Americans Approve of Most Obama Actions to Date*, GALLUP (Feb. 2, 2009), <http://www.gallup.com/poll/114091/Americans-Approve-Obama-Actions-Date.aspx>.

63. Jeffrey M. Jones, *Americans Oppose Closing Gitmo and Moving Prisoners to U.S.*, GALLUP (June 3, 2009), <http://www.gallup.com/poll/119393/americans-oppose-closing-gitmo-moving-prisoners.aspx>.

64. Cohen & Agiesta, *supra* note 3, at A6.

65. The Department of Justice advised the White House that CIA interrogation tactics used on al-Qaeda terrorist suspects were lawful because they did not constitute physical torture. The memo went on to argue that physical torture must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." See Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002); see also Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3 (discussing the August 1, 2002 memo from the Department of Justice to Alberto Gonzales).

66. Dakota S. Rudesill, *Foreign Public Opinion and National Security*, 36 WM. MITCHELL L. REV. 5223, 5234-35 (2010); see also Dicky Grigg, *Guantanamo: It Is Not About Them—It Is About Us*, 50 ADVOC. (TEXAS) 1, 3-4, 7 (2010) (discussing historical developments of dealing with Guantanamo Bay detainees).

67. Matthew Ivey, Note, *A Framework for Closing Guantánamo Bay*, 32 B.C. INT'L & COMP. L. REV. 353, 354 (2009).

China had a better image than the United States among eleven of the sixteen countries publics who were polled.⁶⁸ In addition, the poll found that attitudes about America were focused on policies of the “Bush Administration, not on the American people themselves.”⁶⁹

Some experts have viewed Obama’s closing of the base as a necessary step to repair the U.S. image abroad.⁷⁰ To that end, Obama took decisive steps as the new President to restore the international community’s support of the United States. In addition to signing the executive orders to close Guantanamo Bay and reaffirm the U.S. Geneva treaty obligations,⁷¹ the President traveled to Europe in April 2009.⁷² Significantly, Obama’s commitment to restore America’s image resonated with the American people. An April 2009 CNN/Opinion Research Corporation poll found that seventy-nine percent of Americans surveyed felt that “Obama has had a ‘more positive effect’ on how people in other countries view the United States.”⁷³

While Obama and his Administration were able to make inroads in repairing the U.S. image abroad, they did little to court support from U.S. lawmakers.⁷⁴ The Democrat-controlled Congress, which included a filibuster-proof Senate,⁷⁵ was not consulted about the

68. Andrew F. Tully, *Poll Finds Iraq War, Guantanamo Controversy Hurting Image Abroad*, RADIO FREE EUR. RADIO LIBERTY (June 24, 2005), <http://www.rferl.org/articleprintview/1059485.html>.

69. *Id.*

70. See Cohen & Agiesta, *supra* note 3, at A6.

71. See Exec. Order 13,491, 74 Fed. Reg. 4893, 4893 (Jan. 27, 2009); Exec. Order 13,492, 74 Fed. Reg. 4897, 4898 (Jan. 27, 2009); Exec. Order 13,493, 74 Fed. Reg. 4901, 4901 (Jan. 27, 2009).

72. John Vinocur, *Analyzing Obama’s European Tour*, N.Y. TIMES, Apr. 14, 2009, <http://www.nytimes.com/2009/04/14/world/europe/14iht-politicus.html>.

73. Bonnie Erbe, *Obama’s Trip to Europe a Success, Public Opinion-Wise*, CBS NEWS (Apr. 7, 2009), <http://www.cbsnews.com/stories/2009/04/08/usnews/whispers/main4929167.shtml>.

74. Linzer & Kornblut, *supra* note 44 (reporting that senior White House advisors acknowledged that the Administration failed to provide a plan on where to move the detainees and also mishandled Congress).

75. The 2008 elections increased the margins for Democrats to a filibuster-proof majority. *Franken Wins Senate Seat After Opponent Concedes*, CBC NEWS (June 30, 2009), <http://www.cbc.ca/world/story/2009/06/30/franken-us-senate06300>

Administration's decision to close the naval base, nor did the Administration provide any details on how the President's orders would be implemented.⁷⁶

It was as if the Administration had completely failed to notice Congress' fickle views about Guantanamo Bay. In 2007, the debate over whether detention at Guantanamo Bay should continue to operate came to a head. Secretary of Defense Robert Gates testified before a House Committee that Guantanamo Bay should cease to operate.⁷⁷ News reports depicted an internal disagreement among high-level Bush Administration officials on how to handle Guantanamo Bay, fueling Congressional involvement.⁷⁸ In April 2007, Senator Feinstein filed legislation to close Guantanamo Bay, which ultimately languished in the Senate Judiciary Committee after hearings on the bill.⁷⁹ Trying to get her bill attached to must-pass legislation, Senator Feinstein filed the text of her legislation on July 11, 2007 as a floor amendment to the National Defense Authorization Act for Fiscal Year 2008.⁸⁰ Ultimately, Senator Feinstein withdrew her

9.html. The final Senate election results were fifty-eight Democrats, two Independents, and forty Republicans. *See id.*

76. Majority Leader Harry Reid in a Senate floor statement stated that "[t]he Democrats, under no circumstances, will move forward without a comprehensive, responsible plan from the President. . . . Once that plan is given to us, then we will have the opportunity to debate his plan." 155 CONG. REC. S5589 (daily ed. May 19, 2009) (statement of Sen. Harry Reid).

77. In March 2007, Secretary of Defense Robert Gates testified before the Defense Subcommittee on Appropriations that Guantanamo Bay should be closed and that there is a "taint" to how the process was undertaken. *See Fiscal Year 2008 Defense Posture: Hearing Before the Subcomm. on Def. of the H. Comm. on Appropriations*, 110th Cong. 123 (2007) (statement of Secretary of Defense Robert Gates).

78. *See* Thom Shanker & David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantánamo Prison*, N.Y. TIMES, Mar. 23, 2007, at A1.

79. S. 1249, 110th Cong. § 1 (2007) (requiring Guantanamo Bay to be closed within one year of enactment and all detainees to either be transferred to a U.S. military or civilian detention facility or released). The U.S. Senate Judiciary Committee held hearings on the proposed legislation but never voted it out of committee. At the end of the 110th Congress, the legislation died.

80. 153 CONG. REC. S9055 (daily ed. July 11, 2007) (offering S. Amend. 2125 to H.R. 1585).

amendment because Senate procedural rules precluded her from forcing a vote on the amendment.⁸¹

While Administration officials publicly acknowledged the need to shut down the naval base, the Senate was pushing back on the idea of moving detainees from Guantanamo Bay to the United States. On July 19, 2007, the Senate passed a Sense of the Senate resolution by a vote of ninety-four to three,⁸² stating that “detainees housed at Guantanamo Bay, Cuba, including senior members of al Qaeda, should not be released into American society, nor should they be transferred stateside into facilities in American communities and neighborhoods.”⁸³ Although the Sense of the Senate was not binding legislation,⁸⁴ the vote publicly demonstrated an overwhelming opposition by a Democrat-controlled Senate to bringing Guantanamo Bay detainees to the United States.⁸⁵ Interestingly, Senator Feinstein, who was actively pursuing legislation to close Guantanamo Bay, voted in support of this resolution.⁸⁶

Moreover, instead of engaging Senate leadership on strategy to implement his executive orders, the President simply requested a total of eighty million dollars for these orders, thirty million dollars

81. See 153 CONG. REC. S9233–35 (daily ed. July 16, 2007) (statement of Sen. Feinstein).

82. 153 CONG. REC. S9579 (daily ed. July 19, 2007) (rollcall vote no. 259). Senators not voting included Senators Brownback, Byrd, and Obama. *Id.*

83. *Id.* at S9578. The legislative clerk read the full text of the amendment sponsored by Senator McConnell. *Id.* at S9577–78.

84. PAUL S. RUNDQUIST, CONG. RESEARCH SERV., “SENSE OF” RESOLUTIONS AND PROVISIONS 1 (2003) (summarizing the legal authority of “sense of” resolutions in the U.S. House and Senate).

85. In the 2006 midterm elections, the Democrats took control of both the House and Senate. In the Senate, the Democrats took control by a slim margin of fifty-one to forty-nine (fifty-one seats included Independent Senators Bernie Sanders (VT) and Joe Lieberman (CT) who caucused with the Democrats). *Election 2006: Final Senate Results*, RASMUSSEN REPORTS, http://www.rasmussenreports.com/public_content/politics/elections/election_2006/election_2006_final_senate_results (last visited Feb. 20, 2011). The 2008 elections increased the margins for Democrats to a filibuster-proof majority. The final Senate elections results were fifty-eight Democrats, two Independents, and forty Republicans. See FED. ELECTION COMM’N, OFFICIAL ELECTION RESULTS FOR UNITED STATES SENATE 78, <http://www.fec.gov/pubrec/fe2008/2008congressultr.pdf>.

86. See 153 CONG. REC. S9579 (daily ed. July 19, 2007) (rollcall vote no. 259).

for the Department of Justice⁸⁷ and fifty million dollars for the Department of Defense, when he transmitted his request for supplemental funding to Congress.⁸⁸ This request was buried in a ninety-nine page budget transmittal to Congress, the primary focus of which was funding for the war in Afghanistan.⁸⁹ The House and Senate marked up their respective bills for supplemental funding for the war. The House bill reported out the House Committee on Appropriations did not provide funding for the President's request.⁹⁰ In contrast, the Senate bill voted out of the Full Committee on Appropriations contained the President's request.⁹¹ The decision by the Senate to fund the President's request was not prompted by any overtures from Senate leadership. Instead, the Subcommittee Chairs⁹² made the decision to include the funding in their portion of the supplemental.⁹³

When the Senate bill came to the floor for full consideration, public opinion for closing Guantanamo Bay had eroded, and Republicans had finally found an issue that the public agreed with them

87. SUPPLEMENTAL APPROPRIATIONS REQUEST, *supra* note 26, at 71 (requesting thirty million dollars to execute the new task forces contemplated by the President's executive orders as well as litigation and incarceration expenses).

88. *Id.* at 29 (requesting fifty million dollars to fund transfers and further detention of individuals detained at Guantanamo Bay associated with the closing of the facility).

89. *See id.*

90. *See* Supplemental Appropriations Act, 2009, H.R. 2346, 111th Cong. (2009) (refusing to fund any of the President's supplemental funding requests to close Guantanamo Bay).

91. *See* Supplemental Appropriations Act, 2009, S. 1054, 111th Cong., at 4–5, 11 (2009). This bill was reported out of the Senate Committee on Appropriations and filed and adopted on the Senate floor as an amendment to substitute the passed House bill, H.R. 2346. *See* 155 CONG. REC. S5589 (daily ed. May 19, 2009) (statement of Sen. Reid).

92. Senator Barbara A. Mikulski (D-MD) and Senator Daniel K. Inouye (D-HI) chaired the Subcommittee on Appropriations for Defense and Commerce, Justice, Science, and Related Agencies in the 111th Congress. U.S. GOV'T PRINTING OFFICE, OFFICIAL CONGRESSIONAL DIRECTORY, 2009–2010, 111TH CONGRESS 339–340 (2009).

93. *See* 155 CONG. REC. S5590 (daily ed. May 19, 2009) (statement of Sen. Inouye) (explaining how the bill was compiled and how each Subcommittee Chair was charged with reviewing the President's request for agencies within their jurisdictions and putting those recommendations into Appropriations Committee mark).

about.⁹⁴ Republicans capitalized on the momentum of public support and began speaking on the Senate floor in strong opposition to closing Guantanamo Bay as the 2009 Supplemental Appropriations was being debated.⁹⁵ Senator Mitch McConnell, the Republican leader, began his opening remarks about the supplemental by deriding the President's decision to put a timetable on closing Guantanamo Bay.⁹⁶ He also encouraged members to support efforts to strip all funding for Guantanamo Bay out of the bill.⁹⁷

Republican Senators began coming to the Senate floor expressing concern about safety of their constituents if detainees were incarcerated in their states.⁹⁸ Some Democrats pushed back, arguing that the Federal Bureau of Prisons has successfully detained convicted terrorists on U.S. soil.⁹⁹ For example, Senator Feinstein argued that the public was safe even if terrorists are detained in the United States:

Our system of justice is more than capable of prosecuting terrorists and housing detainees before, during, and after trial. We have the facilities to keep convicted terrorists behind bars indefinitely and keep them away from American citizens.

... One example is the supermax facility in Florence, CO. It is in not in a neighborhood or community.

It is an isolated supermax facility. It has 490 beds. They are reserved for the worst of the worst. This facility houses not only drug kingpins, serial murderers, and gang leaders, but also terrorists who have already been convicted of crimes in the United States.

94. See Trish Turner, *Senate Dems Pull \$80 Million in Gitmo Closure Funding, Oppose Transfer of Detainees to U.S.*, FOX NEWS (May 19, 2009), <http://www.foxnews.com/politics/2009/05/19/senate-dems-pull-million-gitmo-closure-funding-oppose-transfer-detainees#ixzz1As6G2Gc>.

95. See, e.g., 155 CONG. REC. S5589 (daily ed. May 19, 2009) (statement of Sen. McConnell).

96. *Id.*

97. *Id.*

98. See, e.g., 155 CONG. REC. S5653–54, S5658–59 (daily ed. May 20, 2009) (statements of Sen. Thune & Sen. Chambliss).

99. See, e.g., *id.* at S5660 (statement of Sen. Feinstein).

There have been no escapes, and it is as far, as I said, from America's communities and neighborhoods, as are just about all the maximum and supermax facilities.¹⁰⁰

Yet, Republicans kept hammering away that the Administration had not submitted any plan to Congress on how it intended to carry out the executive orders, that the one-year timeline was artificial and unrealistic, and that the Administration had failed to consult with Congress.¹⁰¹ These arguments gained momentum, and the Democrats, not wanting to be seen on the wrong side of public opinion, offered an amendment to the supplemental bill to strike all funding for closing Guantanamo Bay and to prohibit the transfer, release of, or incarceration in the United States of any of the Guantanamo Bay detainees.¹⁰² The amendment passed ninety to six.¹⁰³

In addition to the amendment-stripping funding to close Guantanamo Bay, the Senate unanimously adopted¹⁰⁴ a Sense of the Senate resolution recognizing the 2007 Sense of the Senate resolution, stating that "detainees housed at Guantanamo should not be released into American society, nor should they be transferred stateside into facilities in American communities and neighborhoods"¹⁰⁵ and that the Secretary of Defense should consult with state and local authorities before making any decisions about where to transfer detainees housed at Guantanamo Bay.¹⁰⁶

100. *Id.* (statement of Sen. Feinstein). Senator Durbin also made a floor statement arguing that the United States was equipped to try and house detainees from Guantanamo Bay and that he supported the President's request for funding. *See id.* at S5654–57 (statement of Sen. Durbin).

101. *See* 155 CONG. REC. S5589 (daily ed. May 19, 2009) (statement of Sen. McConnell); 155 CONG. REC. S5653–54, S5658–59 (daily ed. May 20, 2009) (statements of Sen. Thune & Sen. Chambliss).

102. 155 CONG. REC. S5591 (daily ed. May 19, 2009) (text of S. Amend. 1133).

103. 155 CONG. REC. S5663 (daily ed. May 20, 2009) (rollcall vote no. 196). Senators Durbin (D-IL), Harkin (D-IA), Leahy (D-VT), Levin (D-MI), Reed (D-RI) and Whitehouse (D-RI) opposed. *Id.*

104. *Id.* at S5687 (rollcall vote no. 199). The vote was ninety-four to zero, and five Senators were not present: Byrd (D-WV), Coburn (R-OK), Hatch (R-UT), Kennedy (D-MA), and Rockefeller (D-WV). *Id.*

105. 155 CONG. REC. S5602 (daily ed. May 19, 2009) (quoting the text of S. Amend. 1140 from the 2007 resolution).

106. *Id.*

As Congress debated funding for the war supplemental, the Obama Administration was also furiously working to submit an amended budget request to Congress to fund the government for the 2010 fiscal year.¹⁰⁷ In his 2010 request, Obama asked Congress to provide sixty million dollars for the Department of Justice “for activities and expenses related to detainees currently or formerly detained by the Department of Defense at Guantanamo Bay Naval base or elsewhere.”¹⁰⁸ In addition, he requested one hundred million dollars for the Department of Defense to fund costs associated with transferring or releasing detainees from Guantanamo Bay.¹⁰⁹ Unlike the supplemental request, the Senate Subcommittee did not fund the President’s request for funding for Guantanamo Bay and explicitly stated that it would not.¹¹⁰ The House of Representatives Subcommittee again refused to fund the President’s request for Guantanamo Bay funding.¹¹¹ The President’s request for fiscal year 2011 funding for Guantanamo Bay met with a similar fate.¹¹²

107. Pursuant to the Budget and Accounting Act of 1921, the President is required to submit his annual budget request to Congress by the first Monday in February. See Pub. L. No. 67-13, § 201, 42 Stat. 20 (1921) (current version at 31 U.S.C. § 1105 (2006)). Since President Obama was sworn into office on January 20, 2009, his Administration was not able to submit a comprehensive budget request to Congress by the February deadline. Instead, the Administration submitted a notice to Congress that a comprehensive request would be submitted in April 2009. Lori Montgomery & Ceci Connolly, *Obama’s First Budget Seeks to Trim Deficit*, WASH. POST, Feb. 22, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/21/AR20090221_00911.html (reporting on the timing of President Obama’s first budget submission to Congress). The initial request was submitted to Congress on February 26, 2009. See *id.*

108. 2010 BUDGET REQUEST, *supra* note 25, at 719.

109. See *id.* at 269 (request for one hundred million dollars is imbedded within a larger request); see also PAT TOWELL, CONG. RESEARCH SERV., R 40567, DEFENSE: FY 2010 AUTHORIZATION AND APPROPRIATIONS 18 (2009) (explaining how the President’s request for funding related to Guantanamo Bay was in the Iraq Freedom Fund account).

110. S. Rep. No. 111-34, at 27 (2009).

111. H. Rep. No. 111-149, at 33 (2009) (refusing the President’s request for funding and directing the President to submit a comprehensive plan for closing Guantanamo Bay and its estimates and requiring Congressional approval of the plan in order to receive funding).

112. Currently, the funding for fiscal year 2011 is in limbo. A continuing resolution is set to expire on March 4, 2011 allows for government agencies to operate

Most recently, Congress, in passing its annual National Defense Authorization Act, enacted three provisions that prohibited transferring Guantanamo Bay detainees.¹¹³ The first provision bans the use of any funding to transfer any detainee, even for prosecution, into the United States.¹¹⁴ The second provision forbids the transfer of detainees to another country unless the Secretary of Defense signs off on the safety of doing so.¹¹⁵ The third provision bans the purchase of, or construction of, any facility in the United States for housing detainees held at Guantanamo Bay.¹¹⁶ Ultimately, although the President chided Congress for tying the executive branch's hands, he did not attempt to assert his executive branch powers on the back end and bypass Congress' mandate by issuing a signing statement arguing that the legislative ban on transfers was unconstitutional when he signed the 2010 National Defense Authorization bill into law.¹¹⁷

on fiscal year 2010 levels until Congress passes fiscal year 2011 appropriation bills. Senate Subcommittees on Appropriations did not include funding for the President's request in their respective committee mark-ups of their bills. S. Rep. No. 111-229, at 28 (2010) (refusing the fund the President's request of \$72,771,000 for the Department of Justice for expenses related to prosecuting five suspected terrorists held at Guantanamo Bay). The House Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies as well as the House Appropriations Subcommittee did not mark up their bills for fiscal year 2011.

113. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032–34, 124 Stat. 4137, 4351–53 (2010) (signed by the President on Jan. 7, 2011).

114. *Id.* § 1032.

115. *Id.* § 1033.

116. *Id.* § 1034.

117. Charlie Savage, *New Measure to Hinder Closing of Guantánamo*, N.Y. TIMES, Jan. 8, 2011, at A11 (discussing President Obama's decision not to issue a signing statement claiming that the 2010 National Defense Authorization Bill is unconstitutional and that he would bypass the bill's provisions); Charlie Savage, *Obama May Bypass Guantánamo Rules, Aides Say*, N.Y. TIMES, Jan. 4, 2011, at A15 (summarizing the debate among Presidential aides about whether Obama should issue a signing statement to bypass restrictions in the 2010 Defense Authorization Bill when he signs the bill into law).

V. HOW EFFECTIVE ARE EXECUTIVE ORDERS? THE ADVANTAGE OF
MAKING CONGRESS THE ARCHITECTS OF FUNDAMENTAL POLICY
CHANGE

So as Congress stymied one of the President's key campaign promises, the same Congress delivered on some other arguably more controversial issues, such as passing a huge spending bill to jumpstart the fledgling economy,¹¹⁸ overhauling health care,¹¹⁹ repealing the Department of Defense's "Don't Ask, Don't Tell" policy,¹²⁰ and extending tax cuts for the middle class and unemployment benefits for the jobless.¹²¹ All of these Presidential victories were also hard-fought victories for Democrats in Congress. The key difference seems to lie in the President's execution of his campaign promises. When promises were delivered as legislation and not implemented by fiat, President Obama emerged triumphant.

This section provides a brief overview of executive orders, when they are typically used, and why. This section concludes by arguing that President Obama would have been more successful in getting closer to closing Guantanamo Bay if he had enlisted Congress to draft and pass legislation. His greatest misstep was assuming Congress would rubberstamp his budget request without providing Congress a comprehensive plan and consulting with the members at the outset.

118. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

119. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

120. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (bill that repealed the Department of Defense's "Don't Ask, Don't Tell" policy towards gays serving in the military). "Don't Ask, Don't Tell" was a 1993 legislative compromise that allowed gays to continue to serve in the military if they agreed to remain silent about their sexual orientation and celibate while in the military. *See US: Obama Repeals "Don't Ask, Don't Tell,"* HUM. RTS. WATCH (Dec. 22, 2010), <http://www.hrw.org/en/news/2010/12/21/us-congress-repeals-don-t-ask-don-t-tell>. While the policy was intended to protect gays serving in the military, the number of gays discharged from the military due to this policy has been on the rise. *Id.*

121. Unemployment Compensation Extension Act of 2010, Pub. L. No. 111-205, 124 Stat. 2236 (2010); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010).

Executive orders are issued to instruct an executive branch agency on how to carry out legislation.¹²² Typically, executive orders “make ‘legally binding pronouncements’ in the fields of authority generally conceded to the President.”¹²³ One example is security classifications.¹²⁴ Practically speaking, executive orders are attractive because they are not subject to congressional debate and vote. They can be issued with ease to respond to national emergencies like terrorism or natural disasters when immediate action is necessary.¹²⁵ Also, they can be used to make broad policy pronouncements.¹²⁶ For President Obama, he was able to mandate the closure of Guantanamo Bay within days of taking office, thereby demonstrating his willingness to effectuate change swiftly and confidently. These orders signaled to the democratic base that Obama was committed to delivering on key campaign promises and was not afraid of using his inherent power as the President to make things happen.¹²⁷

Presidents have also “used executive orders to make law in areas in which Congress has been silent” and “to carry out orders of the Supreme Court.”¹²⁸ These uses by the President have often spurred debate about the constitutional separation and limitations of the three branches of government.¹²⁹

In certain instances, the judiciary will reign in excessive executive branch actions. During President Truman’s term, the Supreme Court, in *Youngstown Sheet & Tube Co. v. Sawyer*,¹³⁰ for the first

122. John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 344 (2010) (analyzing the history, use, authority, and limitations of executive orders).

123. *Id.* at 346 (quoting PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 21 (2002)).

124. *Id.*

125. *See id.* at 396.

126. *Id.* at 400 (discussing President Clinton’s liberal use of executive orders to advance his political objectives and overcome pushback from the Republican-controlled Congress).

127. *See id.* at 405 (arguing that President Obama’s early executive orders were typical for a successor President from an opposing party).

128. Duncan, Jr., *supra* note 122, at 345.

129. *See id.* The President’s power to issue executive orders is derived from Article II, Section 3 of the Constitution, inherent powers of the President, and, in some cases, statute. *See generally id.* at 366–372.

130. 343 U.S. 579 (1952).

time ever, overturned an executive order in its entirety.¹³¹ President Truman issued an executive order to take possession of the nation's steel mills during the Korean War because the unions had threatened to go on strike.¹³² Justice Black, writing for the majority, held that there was no authorization, not constitutionally or statutorily, for President Truman to issue his order, despite the fact that the country was at war.¹³³

The other check on excessive executive branch power is Congress. Congress can rewrite laws that override executive orders, it can withhold funding to the agency charged with carrying out the order, and it can challenge the order in court.¹³⁴ In the case of Guantanamo Bay, while there was no litigation challenging the President's authority to issue the orders, Congress refused to fund the agencies charged with implementing the orders, thereby rendering the orders obsolete.

President Obama, a constitutional scholar and a prior legislator equipped with knowledge about the legislative process,¹³⁵ still opted to use his executive branch authority to initiate closing Guantanamo Bay instead of legislating it. Yet, for his domestic priorities like the economy and healthcare, Obama turned to Congress to draft the architecture for his policy reforms. When he chose to enlist the aid of the legislative branch, he was successful. By the end of 2010, Obama had delivered on many key campaign promises and in some cases had done so in the lame duck session of Congress.

Overall, there are several advantages of using legislation to mobilize systemic change. First, by having Congress draft legislation, the members are invested in its outcome. Second, by allowing Congress to author the details, often times the parochial concerns of members can be accommodated with little contention. Finally, if Congress debates the merits of a plan and votes to support it, the members are more likely to fund its implementation.

131. *Id.* at 587.

132. *Id.* at 582–83.

133. *Id.* at 587.

134. Duncan, Jr., *supra* note 122, at 393.

135. See Janny Scott, *In Illinois, Obama Proved Pragmatic and Shrewd*, N.Y. TIMES, July 30, 2007, <http://www.nytimes.com/2007/07/30/us/politics/30obama.html> (discussing the President's professional background).

Congress had already begun to debate and discuss closing Guantanamo Bay.¹³⁶ Yet, instead of going to the leaders in the Senate and House who had introduced legislation or publicly spoke on their support for closing the detention facility, Obama acted unilaterally.

In the U.S. Senate, Obama had some strong potential advocates. Since the Senate is a more deliberative body that often requires bipartisan support for legislation to pass, Obama needs bipartisan support for his agenda. Senator Feinstein (D-CA), a senior senator with a reputation for working with Republicans to pass legislation and Chair of the Senate Intelligence Committee, would have been a powerful ally.¹³⁷ In addition, Senator Durbin (D-IL), the President's colleague from Illinois and chair of the Senate Judiciary Subcommittee on Human Rights, could have been mobilized to secure caucus-wide support in his role as majority whip had Obama secured a commitment from leadership that this was a congressional priority. Furthermore, Lindsey Graham (R-SC), a Republican Senator and a former Navy JAG Officer, was an outspoken supporter of closing Guantanamo Bay.¹³⁸ He could have been used strategically to convince Republican members to support legislation phasing out the use of the detention facility.

In the House, Speaker Nancy Pelosi had a fierce reputation for whipping Democrats into line and delivering key votes on democratic priorities.¹³⁹ She exhibited an extraordinary talent for herding a fractured democratic caucus, many who were from conservative states, to secure the necessary votes needed to pass contentious legislation in the House of Representatives.¹⁴⁰ But Obama sent his requests through the House Appropriations Committee in the form of

136. See, e.g., *supra* notes 77–80 and accompanying text.

137. See *Senator Dianne Feinstein*, CENTER FOR AM. PROGRESS ACTION FUND, <http://www.americanprogressaction.org/events/2009/11/inf/FeinsteinSenatorDiann.html> (last visited Feb. 20, 2011) (discussing Sen. Feinstein's professional accomplishments).

138. See Robert Draper, *Lindsey Graham, This Year's Maverick*, N.Y. TIMES, July 1, 2010, at MM22.

139. See, e.g., Sheryl Gay Stolberg, Jeff Zeleny & Carl Hulse, *President Obama, Speaker Pelosi Used Resolve, Arm-Twisting to Get to Sunday's Health-Care Vote*, CLEVELAND.COM (Mar. 10, 2010), http://www.cleveland.com/nation/index.ssf/2010/03/president_obama_speaker_pelosi_1.html.

140. See *id.*

budget requests instead of through the leader's office, choosing to leave its fate in the hands of the maverick Representative David Obey (D-WI). As appropriations chair, Representative Obey was known for acting out and bucking the party line when he deemed appropriate.¹⁴¹ He decided to ignore the President's request, and the House appropriations bills never included any funding for the President to begin implementing his executive orders. The House Appropriations Committee would have been in a much different posture if the House had first passed legislation authorizing the closure of Guantanamo Bay, contemplated a comprehensive plan, and been provided a detailed assessment of the estimated costs.

Overall, instead of using a Democrat-controlled Congress to enact President Obama's priorities through legislation, the Administration's unilateral assertion of executive power has resulted in political inertia.

VI. THE TAKE AWAY: WHAT ARE THE LESSONS LEARNED FROM OBAMA'S DEBACLE?

The final part of this essay analyzes the lessons that can be learned from the Obama Administration's debacle in attempting to close Guantanamo Bay. In part, this section attempts to provide insight to human rights advocates as well as other public policy advocates on pitfalls to avoid in attempting to advance substantial policy changes and on what works in promoting change.

First, there is a difference between the public supporting an idea and the public viewing the idea as a priority. The polls indicated that when Obama initially took office, the majority of Americans supported closing Guantanamo Bay.¹⁴² Yet, another poll taken around the same time found that closing Guantanamo Bay was not a priority

141. See David Libit, *The Insider*, MILWAUKEE MAG. (Feb. 1, 2008), http://www.milwaukeeemagazine.com/currentissue/full_feature_story.asp?newmess_ageid=18353.

142. Fifty-three percent of Americans supported closing Guantanamo Bay in January 2009. Jost, *supra* note 61, at 183 (citing 2007 and 2009 Gallup Poll results asking "Do you think the United States should close the prison at Guantanamo Bay?").

of the American people.¹⁴³ The difference between these two polls is telling. A person who views an idea as a priority issue has a greater stake in its outcome than a person who simply supports an idea or issue in the abstract. While Obama had most likely assessed general public support of closing Guantanamo Bay by reviewing polling data, it appears that he paid less attention to whether the public viewed it as a priority. In part, Obama was most concerned about placating his base—the progressive left—who clearly and loudly indicated that closing Guantanamo Bay was important to them. In addition, when Obama took office, the economy was in a tailspin,¹⁴⁴ and Americans were losing their jobs and fearing for their futures.¹⁴⁵ Arguably, Americans became more concerned about their own livelihoods and less concerned about the morality of detaining suspected terrorists. In general, public support largely depends on how much the issue affects day-to-day lives. Closing Guantanamo Bay was an abstract proposition; the economy and jobs were on the forefront of most American's minds, and certainly the voters, when they went to the polls in November 2010 for midterm elections.¹⁴⁶ The lesson learned here is that public support may be ephemeral—the best indicator of entrenched support is self-interest, not international perceptions or morality.

Second, an advocate should never underestimate the power of “Not In My Backyard” syndrome, often referred to as NIMBY.¹⁴⁷

143. In a Washington Post-ABC poll taken in December 2008, closing Guantanamo Bay was the last priority on a list of eight items that President Obama should do when taking office. Cohen & Agiesta, *supra* note 3, at A6. In fact, only eighteen percent of those polled thought that closing the base was something Obama should do immediately. *Id.*

144. See Daniel Trotta, *Obama Takes Office with World Economy in Crisis*, REUTERS (Jan. 20, 2009), <http://www.reuters.com/article/idUSTRE4B70ME20090120?pageNumber=1>.

145. The week Obama took office unemployment claims hit a twenty-six year high, while home building starts fell to their lowest rate since 1959. Jacki Lyden, *Obama Takes Office Under Economic Cloud*, NPR (Jan. 24, 2009), <http://www.npr.org/templates/story/story.php?storyId=99844560>.

146. See Reed Abelson, *Poll: The Economy Trumps Health Care*, N.Y. TIMES, Nov. 9, 2010, <http://prescriptions.blogs.nytimes.com/2010/11/09/poll-the-economy-trumps-health-care/?ref=healthcarereform>.

147. *NIMBY*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/nimby> (last visited Feb. 20, 2011).

Many people support strict criminal penalties for repeat or violent offenders, yet most communities shun building a prison next to their schools or hospitals. Republicans capitalized on the NIMBY phenomenon. Republican Senators marched to the Senate floor decrying Obama's efforts to close Guantanamo Bay and argued that his efforts put their constituents' safety at grave risk.¹⁴⁸ They asked, where were remaining detainees going to be held? Fear began to surface, and the public began to equate the closing of Guantanamo Bay with a terrorist moving into their neighborhood. Never mind that the Federal Bureau of Prisons has successfully held hundreds of convicted terrorists in remote, secure facilities in the United States, and none of these terrorists have escaped federal custody.¹⁴⁹ The public was apoplectic. No one wanted a terrorist living next door. The take-away point here is that the public may support an idea in the abstract, but if the solution dramatically alters someone's life or neighborhood, the public is not usually willing to put idealism over its own backyard.

Finally, this example highlights that issuing unilateral executive orders, and then asking Congress to fund those decisions, is much less effective than having Congress help create the framework for significant policy changes. Congress is an independent branch of government regardless of whether the members' party affiliation is the same as the President's. Since members of the House are elected every two years, they are particularly sensitive to the idiosyncratic whims of the constituents in their district. For the President, it is often easier to support sweeping change on a policy level. Although Senators are elected every six years, they are still bound to protect parochial concerns of their constituents. Congress members go home every weekend to their respective districts and must explain their votes, decisions, and legislative priorities to the voters often at supermarkets, churches, and bingo halls.

Often times, when members of Congress can control the message or create the narrative addressing the problem, they can show their

148. *See* 155 CONG. REC. S5589 (daily ed. May 19, 2009) (statement of Sen. McConnell); 155 CONG. REC. S5653–54, S5658–59 (daily ed. May 20, 2009) (statements of Sen. Thune & Sen. Chambliss).

149. *See* 155 CONG. REC. 5654–57 (daily ed. May 20, 2009) (statement of Sen. Durbin).

constituents how their votes are in line with constituent priorities and concerns. In contrast, when Congress is told to do what the President wants and fund a controversial proposal, the members are in less control of the message and less invested in the outcome.

Furthermore, in the Senate, particularly in the Appropriations Committee, members work across the aisle. Until recently, appropriators tended to vote as a block regardless of party affiliation, protecting their funding prerogatives and funding for their home districts. For example, the Senate Supplemental Appropriations mark included funding to close Guantanamo Bay. Yet, during the Senate floor debate about closing Guantanamo Bay, ultimately it was the Chair of the Appropriations Committee who filed the amendment on the floor to strip funding out of the supplemental bill.¹⁵⁰ The Chair's action provided cover to other appropriators to vote in support of stripping the funding. Since the Chair authored the amendment, there was no longer any obligation to support the appropriations bill as it was marked up out of committee. Generally, appropriators vote together to protect funding when other senators attempt to strip funding out of appropriations bills or move funds from one account to fund a priority not accommodated by the appropriators. Since these members value collegiality, compromise, and consultation, it is no surprise that Obama's efforts to fund Guantanamo Bay closure was thwarted. If the Senate had been charged with crafting legislation, the members would have been committed to making sure they had the votes to pass it.

Overall, if the Obama Administration wants to close Guantanamo Bay, it must get Congress to lead the charge. This is going to be extremely difficult now with a Republican House of Representatives and Democrat Senate that holds the majority by the narrowest of margins. At this point, it seems as if the Administration has abandoned its campaign to close Guantanamo Bay. The only silver lining is that the Administration hopefully has learned important lessons on what works and what is a non-starter and can use this knowledge when advancing the President's future controversial policy changes.

150. 155 CONG. REC. S5591 (daily ed. May 19, 2009) (text of S. Amend. 1133).