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## A toxic legacy

One of the first problems Barack Obama will have to address when he takes office is Guantánamo. What fate awaits its inmates - and how disastrous are the long-term effects of its very existence, asks Julian Borger

[In pictures: Inside Guantánamo Bay](#)

**Julian Borger**

The Guardian, Thursday December 4 2008



A detainee from Afghanistan is carried on a stretcher before being interrogated by military officials at Camp X-Ray. Photograph: Lynne Sladky/AP

Ever since January 11 2002, when the first 20 prisoners were flown in from Afghanistan in orange jumpsuits and shackles, the Guantánamo Bay detention camp has been a hefty burden around the Bush administration's neck.

The defence secretary at the time, Donald Rumsfeld, picked the Cuban enclave as the "least worst place" to hold captives accused of terrorism. But the effort to run a camp outside the reach of US or international law, so that "enemy combatants" could be held indefinitely without charge, steadily corroded America's standing in the world. The images of the inmates languishing in small metal cages in Camp X-Ray, the rudimentary first phase of the complex, and the steady stream of reports of human rights abuses, have taken a daily toll. The camp's existence has angered and embarrassed Washington's closest allies, and become a recruitment tool for its enemies.

Nearly six years on, there is no debate over whether "Gitmo" should be closed - only how. As it approaches the end of its term, the Bush administration is anxiously attempting to dispose of its own toxic legacy. John Bellinger, the state department's top lawyer, has been trying to persuade other governments to accept detainees cleared for release. More than 500 have already been sent back to their homelands or to third countries, but there are still 250 prisoners left who cannot go home for fear of persecution and who no one else will accept. They are now Barack Obama's problem.

The president-elect has frequently stated his intention to close Guantánamo. In an interview since the election, he repeated that pledge, saying it was "part and parcel of an effort to regain America's moral stature in the world". But the question of what to do

with the remaining inmates still divides his ideologically diverse national security and justice teams.

Obama's inaugural speech on January 20 will be closely scrutinised around the world for signs of how bold or cautious he decides to be. His policy on Guantánamo will be widely seen as a benchmark for his intentions as president.

A report by a non-partisan panel of US security and human rights experts, entitled *Closing Guantánamo: From Bumper Sticker to Blueprint*, estimates that the camp could be emptied within a year if the Obama administration decided on a clean break from Bush policies and devoted enough resources to the job. The report advocates the establishment of an independent commission to review the cases of all the detainees, to assess the evidence against them and order the immediate release of the innocent.

The first task will be to complete the Bush administration's effort to find homes for the 150-200 prisoners who, according to lawyers familiar with their stories, have no case to answer but who cannot be sent back to their native countries for fear they would be victimised, tortured or killed.

The clearest example of inmates stuck in this limbo are the 17 Uighurs, separatists from a Muslim minority in China who were seized in Pakistan during the Afghan war. They have all been cleared for release by the US authorities, most as long ago as 2003, but have so far not been accepted by any third countries. Albania agreed to take in five other Uighur detainees in 2006, but has refused to take any more.

Bellinger's efforts to find any other government to receive the Uighurs have been undermined by the adamant refusal of the US authorities to allow them to live in America because of the presumed threat they pose to the US, in part because of presumed animosity caused by six years of detention without charge. Obama's envoys may find they have better luck than Bellinger.

"I don't think anyone is inclined to do this administration any favours, but Obama will find he has a lot of goodwill to draw on," a European diplomat says. But that goodwill will be greatly enhanced if the new administration stops fighting the resettlement of inmates in the US.

A second category of prisoners will be referred for prosecution outside Guantánamo, but that raises the question of whether that prosecution should be conducted by military courts martial in the US or the civilian legal system. That will be a decision that goes to the philosophical heart of the issue - should the US approach terrorism as a military threat or as a criminal enterprise, or some hybrid of the two? Obama has refrained from using the phrase "war on terror", but he is said to be under pressure from the more conservative national security experts on his team to leave his options open and not bind himself with the procedural constraints of the civilian judiciary.

On the other side of the debate is a "rule of law" camp within the embryonic

administration which argues that anything short of a complete return to constitutional normality would rob Obama of the international goodwill he might otherwise gain by scrapping Guantánamo.

That debate underlies the toughest dilemma the new administration is likely to face on closing the offshore camp: whether there should be a third category of prisoners, deemed too dangerous to release but too difficult to prosecute. The evidence against them may be in the form of intelligence material that cannot be disclosed in court, or that falls short of legal proof. Confessions would also be ineligible if they were obtained under torture, as in the case of Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attacks who was "waterboarded" (subjected to simulated drowning) by the CIA. And few if any of the inmates of Guantánamo were reminded of their right not to incriminate themselves, which is standard police practice.

The Bush administration has been seeking international agreement for a new form of preventative detention that would allow inmates in this third category to be held in the US and abroad. "The problem is you've got 200-plus very dangerous people, and the question is what do you do with them. And these are people who say regularly: 'If I'm let out of here, I will go immediately and start killing Americans again,'" Condoleezza Rice, the outgoing secretary of state, said during a visit to London this week. She argued that "even though you know that this person is a future threat, we don't really have a legal framework for that, which is why it's been done within a war framework. But if you don't hold a person who you know is a future threat, then you risk the deaths of thousands of innocents. So I do think that this is something for the international community to take up."

There is little sign, however, that the international community has any appetite for such a departure from established human rights law. The decision on preventative detention will be Obama's alone. Several of his advisers and allies, liberals included, think that terrorism is such a pernicious threat, and the security risks of releasing suspects are so great, that new legislation allowing for preventative detention is unavoidable. The political risk of a released inmate carrying out an attack are also enormous. Such an event could prove crippling to a new administration.

On the other hand, any new system of preventative detention would be seen around the world as Guantánamo redux, human rights lawyers say. It would be every bit as effective as an al-Qaida recruiting tool, and would perpetuate the extremists' self-image as warriors rather than mere criminals. Within the internal debate under way in the transition team, liberal activists want foreign governments to lobby Obama against creating a new legal limbo.

It is one of the toughest decisions the new president has in his in-tray. What Obama decides will say a lot about his presidency. Sarah Mendelson, a senior fellow of the Centre for Strategic and International Studies and author of the Closing Guantánamo

report, says it is uncertain which way Obama would lean. But she adds: "My sense is the president-elect has taught courses in the constitution in one of the most reputable law schools in country. He ran on opting back into the international system. The idea of going for a new legal regime that will result in more years in litigation is not going to appeal. It will not be the clean break he needs to make."

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## A history of the prison camp

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- January 11 2002: First prisoners arrive
- February 27 2002: First hunger strike begins
- April 29 2002: The first prison, Camp X-Ray, closes, replaced by a more solid concrete construction, Camp Delta
- November 10 2003: US Supreme Court agrees to hear appeals from inmates that they are being held illegally
- February 13 2004: Bush administration agrees to establish review panels to establish whether inmates still pose a threat
- March 19 2004: Five British detainees freed
- February 16 2006: The UN calls for the closing of Camp Delta, arguing that the treatment of some inmates amounts to torture
- June 10 2006: Three inmates hang themselves
- June 21 2006: President Bush first expresses the wish to close the camp
- September 6 2006: Fourteen "high-value" detainees are transferred from secret CIA prisons around the world to Guantánamo, including Khaled Sheikh Mohamed, Abu Zubaydah and Ramzi Binalshibh, three alleged planners of the 9/11 attacks
- June 12 2008: US Supreme Court rules that inmates have the right to challenge their incarceration in the US courts

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