

OPINION

# Don't Act Unilaterally To Close Guantánamo

President Obama should root his legacy in the use of legal principles, not executive authority.

BY LOUIS FISHER

The current issue about closing Guantánamo Bay, Cuba, detention center will shed light on a choice for President Barack Obama: follow legal principles he announced as a candidate or decide to invoke some type of unilateral authority. On Dec. 20, 2007, in response to questions by then-Boston Globe reporter Charlie Savage, Obama criticized the George W. Bush administration for claiming broad presidential powers that could not be curbed by Congress. If elected president, Obama pledged to “follow existing law.” Asked if the Constitution empowered the president to disregard congressional statutes that limit the deployment of troops, he denied that the president possessed such power. As president, “I will not assert a constitutional authority to deploy troops in a manner contrary to an express limit imposed by Congress and adopted into law.” He emphasized that the president “is not above law,” America “is a nation of laws,” and as president “I will abide by statutory prohibitions.”



That understanding of the Constitution disappeared when Obama took office. In his second full day at the White House, on Jan. 22, 2009, he issued Executive Order 13492 to close the detention camp at Guantánamo “as soon as practicable, and no later than 1 year from the date of this order.” His advisers should have told him the obvious: Closure would require about \$100 million to build an

adequate facility in the United States to house the detainees, requiring an appropriation from Congress. Instead of trying to “settle” the matter unilaterally with an executive order, the two branches had to work jointly. His executive order provoked a rebuke from Democratic and Republican members of Congress.

In the following years, Obama used signing statements to say he

would not be bound by certain statutory provisions because they limited what he considered to be core executive powers. In deciding to release five Taliban detainees in exchange for Sergeant Bowe Bergdahl, his administration refused to comply with a statutory requirement to give Congress 30 days notice.

With regard to immigration policy, for several years he told the public he was “not a king” and “I can’t just make the laws up by myself.” He could not suspend deportation through executive order “because there are laws on the books that Congress has passed.”

That position changed in 2012 when the Obama administration granted deferred action for undocumented aliens who arrived in the United States as children (childhood arrivals, referred to as DACA). Following the November 2014 elections, Obama issued a major address to the nation on Nov. 20, setting forth a comprehensive immigration policy to cover about four million undocumented aliens, a program referred to as DAPA. As implemented by a Department of Homeland Security memo on that day, individuals with a son or daughter who is a U.S. citizen or lawful permanent resident were eligible to apply for background checks, receive work authorization and other benefits, and be granted deferred action from deportation for a period of three years, extending into the next administration.

Thus far the Obama administration has lost in district court and in two decisions by the Fifth Circuit. In the most recent ruling, issued on Nov. 9, the Fifth Circuit reject-

ed the Justice Department’s effort to describe DAPA in minimal terms as mere “guidance” that fits well within the bounds of prosecutorial discretion. Unimpressed by that argument, the Fifth Circuit noted two times in its Nov. 9 decision that Obama explained it was the failure of Congress to enact an immigration program that prompted him to “change the law.” On Nov. 20, the administration asked the U.S. Supreme Court to reverse the Fifth Circuit.

### CITING PRESIDENTIAL POWERS

Over the years, the Obama administration frequently claimed the right to decide various matters based solely on independent presidential powers, even in the face of restrictive statutory provisions. On Nov. 25, in signing the National Defense Authorization Act for Fiscal Year 2016, Obama referred to language that renewed the bar against using appropriated funds to construct or modify any facility in the United States to house Guantánamo detainees or to use appropriated funds to transfer these detainees into the United States for any purpose. He then warned: “Under certain circumstances, the provisions in this bill concerning detainee transfers would violate constitutional separation of powers principles.” He did not discuss those circumstances or identify the constitutional principles.

Given this pattern of claiming presidential authority that cannot be restricted by statute, it is quite remarkable to listen to testimony by Attorney General Loretta Lynch on Nov. 17 before the House Judiciary Committee. When asked about the

prospect of transferring detainees from Guantánamo Bay to U.S. prisons, Lynch said it was not possible to transfer detainees to U.S. soil because “the law currently does not allow for that and that is not, as I am aware of, going to be contemplated, given the legal prescriptions.” With respect to existing law, “the Department of Justice is committed to fully following that and the closure of Guantánamo Bay is being carried out in compliance with that law.” The department “would certainly observe the laws as passed by Congress and signed by the president.” It is the position of the department “that we would follow the law of the land in regard to that issue.”

There should be little doubt that President Obama would like as his “legacy” the closure of Guantánamo. We will see if his larger legacy on this particular issue is to follow the law.

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