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## Obama's Guantánamo Mistake

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# Obama's Guantánamo Mistake: He's Not Closing Gitmo the Right Way

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President Obama is shutting down Guantánamo, but he's doing it the wrong way. I am not talking about the practical matters involved: where to put the detainees, how to prosecute them, whether to send some to other countries, and so forth. Those are all thorny questions, and they must be answered. But there is another dimension to putting an end to Guantánamo that doesn't seem to be getting the attention it deserves, and that is the legal dimension. Obama has issued an executive order — a directive from the president — to shut down the prison. That alone is not enough. What Obama must do now is work with Congress to enact a federal statute that outlaws forever the use of Guantánamo as a detention facility.

The problem with an executive order is that it can be changed — easily. President Obama himself could reverse his new order tomorrow. That's almost certainly not going to happen, of course. But if Obama's out in four years, or eight, and a new president — say, Mitt Romney — wanted to reopen Guantanamo as a detention facility, he could do so the

moment he takes office. (Recall that Romney said he wanted to double the size of Guantánamo.)

History provides a warning here. Guantánamo was a detention camp once before, in the early 1990s. The first President Bush used it to warehouse about 300 innocent Haitian political activists who'd fled their homeland after a military coup. The Haitians' crime? They were HIV-positive, and at the tail end of an era of fear and ignorance about AIDS, the White House didn't want the Haitians in the United States. The Justice Department cooked up the legal defense for the camp: The Constitution doesn't apply at Guantánamo, nor does any federal statute that might protect the Haitians. As a result, said Justice, *we can do whatever we want to them*. Not surprisingly, the camp was a disaster. Innocent people got hurt, and we were the target of international criticism. (Any of this sound familiar?)

On the campaign trail in 1992, Bill Clinton said in so many words that he would close the camp if elected. After becoming president, Clinton flip-flopped on the issue, but finally released the last of the Haitians in June 1993, in response to a federal court ruling. That ruling held that constitutional due process applies at Guantánamo, meaning the government could not simply imprison someone there indefinitely with no explanation. The Clinton Justice Department didn't like the idea of a court order that limited the uses of Guantánamo, so Justice lawyers appealed the case, and ultimately negotiated a settlement with the Haitians' lawyers. Part of the settlement was the lower court decision was vacated — that is, erased from the books.

Jump to late 2001. With no legal limitations in place, the Bush administration reopened Guantánamo as a detention camp, this time to hold terrorist suspects rounded up from Afghanistan and Pakistan. We all know what happened next. Lies. Torture. Kangaroo courts. International condemnation. And so on. Guantánamo didn't make us safer. It represented a betrayal of our deepest values and gave al-Qaeda a ready-made recruiting video.

So twice in recent times, the temptation to use Guantánamo as an offshore, extralegal prison camp has mired a presidential administration in legal and moral muck. It's high time we cut off Guantánamo as an option for this sort of mess — forever. An executive order won't do that. And while the Supreme Court finally ruled last summer that foreign detainees at Guantánamo have the right to challenge their detention in court, that still might

not be enough to persuade a Mitt Romney sort to leave well enough alone. We have to go another route.

The answer is a federal statute prohibiting forever the use of Guantánamo as a detention facility. If Congress passes such legislation, and Obama signs it into law, then not only will he be bound by its prohibitions, but future presidents will be bound by it as well. The political will is there to deal with this issue. Now is the time to do it.

Some conservative policy scholars won't like this idea. They'll wring their hands about closing off options regarding situations we cannot foresee. The answer to that is simple: Some options *should* be off the table, and experience indicates that using Guantánamo as a prison camp is one of them. Of course, if a future president believes that new circumstances make it truly necessary to use Guantánamo as a detention facility, that future president can go to Capitol Hill and try to convince the House and Senate to change their minds on the matter.

Certain conservative legal academics also won't like the No Detention at Guantánamo Law. The president, they'll argue, is commander-in-chief and the "sole organ" of power in foreign affairs; a statute of the sort I'm suggesting might improperly impinge on his authority. But that view ignores the checks and balances of our constitutional structure. And the last eight years have been a disastrous demonstration of what happens when we try to convert our system of government into a one-branch entity when it comes to foreign affairs. The wiser, better view was expressed by Justice Robert Jackson, who in 1952 wrote that the president's powers are at their lowest ebb when Congress has exercised its own constitutional power and passed valid legislation in a particular area.

There's nothing wrong with an executive order that finally begins to undo the mess that President Bush created down on the southern tip of Cuba. But it's only the start of the job. Congress now has to join President Obama and lock up Gitmo for good.