In the lead up to his election, now-President Trump promised to “load [Guantanamo] up with some bad dudes,” including American citizens who support ISIS. On January 3, he started tweeting at then-President Obama to stop transferring people out of Guantanamo, despite those individuals being cleared for transfer because they no longer posed a threat to our national security. In the week run up to the inauguration, ten additional detainees were transferred out of Guantanamo, bringing the total number of detainees there down to 45 (it was 242 at the beginning of Obama’s presidency). While Obama made his own campaign promise to close the detention facility, he was blocked by Congress, with the National Defense Authorization Act, from transferring any of the detainees into the US and into federal prisons or any other facility that the Department of Defense might construct to hold them.

Trump fundamentally misunderstands the legal basis under which individuals are detained in Guantanamo and also how the U.S. has been conducting counterterrorism operations in the past 8 years. There are two major issues with Trump’s campaign promise to “load up” the detention facility, particularly when it comes to sending Americans to the naval base detention center.

1. **Americans in Guantanamo** - The Authorization for Use of Military Force (AUMF) 2001, passed by Congress, authorizes the President to use force against those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Within this authorization to use force also comes the power to detain individuals in the fight against terrorism.

   Under both the Bush and Obama administrations, the AUMF has been used to justify efforts against al Qaeda, the Taliban, and other associated forces. Most recently, and perhaps more controversially (see below), ISIS is included in the “associated forces” under the AUMF. However, neither President Bush nor Obama used the AUMF to justify detaining an American, captured in the US, at Guantanamo. For example, José Padilla, an American, was apprehended in Chicago and deemed an “enemy combatant” by the Bush Administration, yet he was never held in Guantanamo. Instead, he was held in South Carolina, convicted in federal courts, and serving time in a federal prison in Colorado. Further, the Boston Marathon bomber, Dzhokhar Tsarnaev, was tried and convicted within the United States on charges of terrorism.

   Trump would be abandoning 15 years of national security practice, not to mention potentially violating the due process rights of U.S. citizens by merely “throwing” Americans into Guantanamo. Domestic criminal law efforts can and should be continued to thwart the threat of terrorism in the United States.

2. **ISIS as an “associated force” of Al Qaeda** – In order to justify attacks against ISIS in Iraq and Syria, the Obama administration has leaned heavily on the “associated forces”
The wording of the AUMF. The problem with lumping ISIS in with Al Qaeda is the fact that the two groups appear to be fighting each other. From the outside, the two groups might appear the same but, upon closer examination, they have different tactics and goals. Although ISIS has claimed responsibility for recent terror attacks in Europe, it is most focused on expanding its territory in Iraq and Syria, which also makes it different than Al Qaeda. While the topic of a new AUMF has been thrown around for the past few years, both the Obama administration and Congress appear quite satisfied with the 2001 AUMF to justify the President’s decision to carry out targeted strikes in Iraq and Syria against ISIS.

Despite the fact that Obama has relied on the AUMF for targeting purposes, he has not relied on the statute for indefinite detention purposes. For example, Irek Hamidullin, a Russian citizen captured in 2009 in Afghanistan and associated with the Taliban and the Haqqani network was tried and convicted in the U.S. federal court without ever being sent to Guantanamo. While this particular case is currently awaiting a decision in the Fourth Circuit Court of Appeals, it nevertheless shows that detention at Guantanamo is not necessary since we have a robust criminal law system to deal with charges of terrorism.

For all of Obama’s promises of closing Guantanamo, it became clear in the final days of his presidency that this would not be coming to fruition, particularly since the Military Commissions cases there have not moved past the pre-trial motions phase. The question remains as to what President Trump will do with Guantanamo. Will we see a reinvigorated Guantanamo and the return of torture and other “enhanced” interrogation techniques, as he promised on the campaign trail? Or, will Trump dial back these extreme views in favor of maintaining the status quo and focus on targeting ISIS in military strikes? Or will he use both avenues to combat global terrorism? Time will tell.

* The author represents Mr. Nashwan al-Tamir, currently detained in Guantanamo and who is being tried in the Military Commissions as Mr. Hadi al-Iraqi. The views expressed in this blog post do not represent the views of the Department of Defense, the Office of Military Commissions, or the Military Commissions Defense Organization. Please note that the appearance of external hyperlinks in the article does not constitute endorsement by the DoD of the linked websites, or the information, products or services contained therein.