

**FRANK R. WOLF**

10TH DISTRICT, VIRGINIA



241 CANNON HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-4610  
(202) 225-6136

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

CHAIRMAN—COMMERCE—JUSTICE—SCIENCE

TRANSPORTATION—HUD

STATE AND FOREIGN OPERATIONS

CO-CHAIR—TOM LANTOS  
HUMAN RIGHTS COMMISSION

**Congress of the United States**  
**House of Representatives**

July 14, 2011

13873 PARK CENTER ROAD  
SUITE 130  
HERNDON, VA 20171  
(703) 709-5800  
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET  
WINCHESTER, VA 22601  
(540) 667-0990  
(800) 850-3463 (IN STATE)

wolf.house.gov

The Honorable Dianne Feinstein  
Chairman  
Senate Select Committee on Intelligence  
331 Hart Senate Office Building  
Washington DC 20510

Dear Senator Feinstein:

I write in opposition to Mr. Matthew Olsen's nomination to serve as director of the National Counterterrorism Center (NCTC), which is located in my congressional district. I believe Mr. Olsen exercised questionable judgment and made misleading statements while serving as the special counselor to the attorney general and executive director of the Obama Administration's Guantanamo Review Task Force, where he led the interagency process to implement the president's executive order that led to the release of a number of dangerous terrorist detainees held at the Guantanamo Bay Naval Base. Dozens of high risk terrorist detainees recommended for release by the task force led by Mr. Olsen were released abroad to dangerously unstable countries, including Yemen, Somalia and Afghanistan.

As then-ranking member and now chairman of the House Commerce-Justice-Science Appropriations subcommittee -- which funds the Justice Department, Federal Bureau of Investigations, Bureau of Prisons, U.S. Marshals Service and which helped fund the NCTC's predecessor, the Terrorist Threat Integration Center -- I was disturbed by decisions and statements made by Mr. Olsen in 2009 while he led the task force. These concerns have deepened based on new information that has come to light in recent articles from *Newsweek*, *The Washington Post*, *The National Journal* and *The Weekly Standard*. These reports have raised troubling questions about Mr. Olsen's leadership of the task force and his actions in response to White House influence.

Additionally, my personal interactions with Mr. Olsen, as well as these subsequent news reports, lead me to conclude that he was not forthright with the Congress and may have changed detainee assessments under political pressure from administration officials. I believe these are troubling concerns which deserve a thorough investigation and should give the Senate serious pause as it considers who should lead the NCTC. I have visited the NCTC on several occasions and have met with a number of its former directors, as well as the former and current directors of National Intelligence. I have seen firsthand the critical work that is done by the center and fully understand the need for an independent, capable and principled director to lead the operation.

The Honorable Dianne Feinstein

July 14, 2011

Page 2

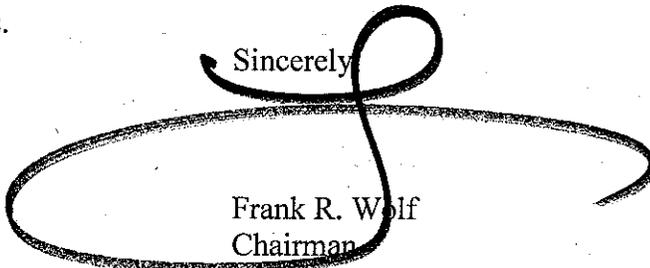
There are three concerns that have led me to oppose Mr. Olsen's nomination. First, it is clear to me that in order to achieve the president's promise to close Guantanamo Bay during his first year in office, Mr. Olsen may have been susceptible to the immense political pressure placed on the interagency task force to re-classify detainee threat levels. Second, it has become clear that Mr. Olsen's task force may have altered some detainee assessments -- overturning Department of Defense assessments -- in order to clear and expedite the release of a large number of detainees. Third, I have recently learned that Mr. Olsen was not forthright to me and my staff about the effort to release a number of Uighur detainees to northern Virginia in 2009. Attached is a white paper that addresses these concerns in greater detail.

Leading the NCTC is a serious responsibility and requires a director that is exceptionally experienced, forthcoming, trustworthy and has good judgment. The analyses and recommendations provided by the NCTC have direct bearing on the safety of the American people. The director must be able to withstand political pressure from all sides, facilitate the complete and straightforward sharing of information and ensure unbiased analysis. I do not question Mr. Olsen's professional qualifications for this position, but from my observations of his recent leadership positions, I believe that he lacks the judgment to lead the NCTC.

I am willing to testify about my concerns during your committee's upcoming confirmation hearing for Mr. Olsen. Please do not hesitate to contact me at 202-225-5136 to discuss any of this information.

Best wishes.

Sincerely

A large, stylized handwritten signature in black ink, appearing to read 'Frank R. Wolf', is written over the typed name and title.

Frank R. Wolf  
Chairman

Commerce-Justice-Science Subcommittee  
House Appropriations Committee

## Summary of concerns regarding Mr. Olsen's leadership and actions as executive director of the Obama Administration's Guantanamo Review Task Force

### 1. Questionable altering of Guantanamo Bay detainee assessments

I am concerned about new information reported by *The Weekly Standard* about the assessments of detainees who were transferred abroad in 2009. Throughout that year, I repeatedly wrote the president and attorney general expressing concern over the release of certain detainees believed to be threats by the Department of Defense (DOD). I was also deeply concerned that detainees were being released to dangerously unstable countries, such as Yemen, Somalia and Afghanistan. Despite my warnings in the fall of 2009, detainees continued to be released to these countries until the administration was forced to halt releases to Yemen following the attempted attack by the Christmas Day bomber, who trained in Yemen with al Qaeda in the Arabian Peninsula.

According to a July 13, 2011, article in *The Weekly Standard*, “[Olsen’s] task force approved most of the detainees remaining at Guantanamo for transfer, clearing the way for the Obama administration to empty most of the detention facility’s cells. But a review of leaked detainee threat assessments reveals that many of the detainees approved for transfer [by Olsen’s task force] were deemed “high” risks by Joint Task Force Guantanamo (JTF-GTMO), which oversees the detention and interrogation of detainees. Moreover, JTF-GTMO recommended that most of these detainees be retained in U.S. custody – precisely the opposite of the task force’s recommendations.”

The article continues, “In its final report, dated January 22, 2010, Olsen’s task force reported that 126 detainees, out of a total of 240, were ‘approved for transfer.’ Olsen’s task force approved roughly 2 out of every 3 (65 percent) Guantanamo detainees for transfer, JTF-GTMO recommended that approximately 1 out of every 4 (25 percent) be transferred.”

There is one case in particular that serves as a good example of the troubling discrepancy between Olsen’s recommend release of a detainee that JTF-GTMO considered to be “high” risk. In early 2010, I wrote White House counterterrorism adviser John Brennan about one detainee, Ayman Batarfi, whom the DOD believed to be closely connected to al Qaeda’s anthrax program. Brennan forcefully rejected my concerns about Batarfi. However, as a recent *Weekly Standard* article notes:

“A recently leaked threat assessment prepared at Guantanamo draws into question the Obama administration’s analysis of a detainee [Batarfi] who was transferred to Yemen shortly before all future transfers to the unstable nation were suspended.”

“Brennan decided to answer Wolf’s challenge by sending a letter on White House stationery to then-House speaker Nancy Pelosi on February 1, 2010. ABC News obtained a copy of the letter and published it online. Brennan wrote:

‘During the briefing on January 13, Representative Wolf made allegations that one detainee repatriated to Yemen had been involved in weapons of mass destruction. As it has done in every case, the task force thoroughly reviewed all information available to the government about this individual and concluded that there is no basis for the assertions Representative Wolf made during this session. I am attaching a classified addendum to this letter that addresses these concerns directly.’

“But a recently leaked April 29, 2008, threat assessment prepared by Joint Task Force Guantanamo (JTF-GTMO) contains numerous references to Batarfi’s ties to al Qaeda’s anthrax program. These connections were made through a known al Qaeda front named al Wafa, which employed Batarfi and provided cover for al Qaeda’s pre-9/11 pursuit of an anthrax capability...

“For all of these reasons, and more, Batarfi was deemed a ‘high risk’ who is ‘likely to pose a threat to the U.S., its interests, and allies’ by the JTF-GTMO team. Batarfi was also considered to be of ‘high intelligence value.’”

This newly leaked 2008 assessment raises serious questions about why t Olsen’s task force didn’t include the DOD’s information about Batarfi’s ties to the al Qaeda anthrax program as well as their judgment that Batarfi was, in fact, “likely to pose a threat to the US.” This information raises questions about the integrity of the task force’s review and whether undue political pressure to release more detainees led task force members to doctor detainee assessments.

*The Weekly Standard’s* Thomas Jocelyn succinctly posits in the July 13, 2011, article, “It is clear that the Guantanamo Review Task Force, headed by Matthew Olsen, approved a large number of ‘high’ risk transfers. The senators presiding over Olsen’s confirmation hearing may want to ask: Why?”

## **2. Political pressure on the Guantanamo Bay Detainee Task Force:**

I am concerned about political pressure placed on Olsen and the task force by administration officials. Although the administration asserts that the task force was independent, it is clear that the task force reported directly to the White House and participated in meetings led by White House chief of staff Rahm Emanuel. According to the April 23, 2011, *Washington Post* article:

“In late April [2009], Obama heard some jarring news during a Situation Room meeting with the interagency task force reviewing the case of every detainee at Guantanamo.

“The president asked Matthew G. Olsen, the Justice Department lawyer heading the task force, approximately how many Guantanamo detainees could be prosecuted, according to administration officials.

“Probably fewer than 20, Olsen said.

“The president seemed peeved that the number was so small, in contrast with the optimistic predictions during his election campaign that nearly all of the remaining detainees could face trial or be transferred. The number would eventually rise to 36.”

I am concerned that pressure from White House officials may have led Olsen and his task force to inflate the number of cases eligible for prosecution from “fewer than 20” to the 36 that were ultimately provided to the administration. The nearly 100 percent increase in the number of cases brought forward for prosecution following the president’s comment merits a serious review of whether political pressure led the task force to alter its independent assessment of detainees.

The recent *Weekly Standard* analysis notes, “[Olsen’s] task force approved only 35 percent of the detainees for indefinite detention or prosecution, whereas JTF-GTMO recommended that roughly 75 percent be retained in DoD custody.” This dramatic shift in the number of cases recommended by Mr. Olsen raise serious questions about whether pressure from the president and other administration officials led him to inflate the number of detainees recommended for trial.

### **3. Misleading Congress about the transfer of Uighur detainees to the United States.**

It has become clear that the administration was directing Mr. Olsen to intentionally withhold information from members of Congress and he willingly complied with their inappropriate direction. According to *Newsweek*, *The Washington Post* and *The National Journal*, the administration was planning a secret transfer and settlement of at least two Uighur detainees to northern Virginia in April 2009. Each of these reports indicates the degree to which the White House attempted to hide this effort from the Congress and the public.

According to a May 2009, article in *Newsweek*, White House officials are alleged to have been particularly concerned about Republican members of Congress being made aware of the secret transfer. *Newsweek* reported, “As part of their efforts to shut down the Guantánamo Bay detention center, Obama Administration officials were poised in late April to make a bold, stealthy move: they instructed the U.S. Marshals Service to prepare an aircraft and a Special Ops group to fly two Chinese Uighurs, and up to five more on subsequent flights, from Gitmo to northern Virginia for resettlement. In a conference call overseen by the National Security Council, Justice and Pentagon officials had been warned that any public statements about Gitmo transfers would inflame congressional Republicans, according to a law-enforcement official who asked not to be named discussing internal deliberations.” (This operation appears similar to the administration’s secret transfer of Somali terrorist Ahmed Abdulkadir Warsame to New York City for civilian trial on July 5 after spending two months on a U.S. Navy ship).

It has recently come to my attention that I was misled about the status of the transfer of the Uighur detainees in April 2009. This information confirms the *Newsweek* report that career federal employees were explicitly directed to hide this information from members of Congress, especially Republican members.

During an April 22, 2009, meeting in my office with members of the Guantanamo Bay Detainee Review Task Force, including Mr. Olsen, I inquired about the status of the potential transfer of Uighur detainees to the United States. Mr. Olsen indicated that a decision had not yet been reached on the transfer of the detainees. None of the other career or political officials in the meeting countered Mr. Olsen’s assertion.

That is why I was deeply concerned to learn in an April 2011, *Washington Post* article, that the final decision on the transfer of the Uighur detainees had been made during a White House meeting eight days before my meeting with Mr. Olsen. According to *The Washington Post* article, “The first concrete step toward closing the detention center was agreed upon during an April 14, 2009, session at the White House. It was to be a stealth move... They were going to show up here, and we were going to announce it,” said one senior official, describing the swift, secretive operation that was designed by the administration to preempt any political outcry that could prevent the transfer.”

Following the publication of this article in April, I personally called Mr. Olsen to ask whether he was aware at the time of my meeting with him on April 22, 2009, that a decision had already been made on the transfer of the detainees. He told me that he was aware of the decision prior to our meeting.

I believe that I was intentionally misled by Mr. Olsen and other administration officials during my April 22 meeting with the task force. I also am concerned that the attorney general did not acknowledge that a decision had been made when he appeared before the House Commerce-Justice-Science Appropriations subcommittee the following day. That is why I was surprised when my office was notified by a career federal employee that the administration was misleading the Congress and planned to secretly transfer the detainees around May 1, 2009.

As *Newsweek* reported, "Then on May 1, Virginia GOP Rep. Frank Wolf got tipped off. Furious, he fired off a public letter to President Obama, charging that the release of the Uighurs - Muslim separatists opposed to the Chinese government -- could 'directly threaten the security of the American people.' White House officials were not happy... The flight never took off."

## Questioning 'High' Risk Gitmo Detainee Transfers

Thomas Joscelyn

July 13, 2011 10:35 AM

On July 1, President Obama announced that he was nominating Matthew Olsen for the position of National Counterterrorism Center (NCTC) director. Olsen has served in a number of national security-related government positions, including as the head of Obama's Guantanamo Review Task Force.

As one of his first acts in office, Obama authorized the task force to review each Guantanamo detainee's case files as his administration prepared to close down the detention facility within one year – a goal that proved to be unattainable for a variety of reasons. The task force made recommendations as to which detainees should be prosecuted (either in military commission or federal court), held indefinitely, or transferred to another country. (No detainees were approved for outright release.)

The task force approved most of the detainees remaining at Guantanamo for transfer, clearing the way for the Obama administration to empty most of the detention facility's cells.

But a review of leaked detainee threat assessments reveals that many of the detainees approved for transfer by the task force were deemed "high" risks by Joint Task Force Guantanamo (JTF-GTMO), which oversees the detention and interrogation of detainees. Moreover, JTF-GTMO recommended that most of these detainees be retained in U.S. custody – precisely the opposite of the task force's recommendations.

The NCTC's director position requires Senate confirmation. So will senators question Olsen's role on the task force, and the task force's willingness to approve a large number of "high" risk detainees for transfer?

### Comparing the task force's decisions to JTF-GTMO's recommendations

In its final report, dated January 22, 2010, Olsen's task force reported that 126 detainees, out of a total of 240, were "approved for transfer." An additional 30 Yemeni detainees were "designated for 'conditional' detention based on the current security environment" in their home country. The 30 Yemenis were "not approved for repatriation to Yemen" at the time, "but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met." (Al Qaeda in the Arabian Peninsula attempted to blow up a Detroit-bound airliner on Christmas Day 2009, less than one month before the task force's report was finalized. The "moratorium on transfers to Yemen" was put in place only after the failed attack.)

Therefore, the task force approved a total of 156 Guantanamo detainees for transfer – or 65 percent of the total detainee population.

Compare the task force's results with JTF-GTMO's recommendations.

In late April, 765 JTF-GTMO detainee threat assessments were leaked online. THE WEEKLY STANDARD has been able to match 239 of these threat assessments to detainees that the *New York Times* has identified as being held at Guantanamo on Obama's inauguration day. The *Times*'s data is available online in its "[Guantanamo Docket](#)" – an online repository of declassified Guantanamo documents and other information. In all likelihood, the *Times*' list does not precisely match the detainees reviewed by the task force. But it is the best available list as the government does not publish a definitive list of detainees held at Guantanamo – and it is certainly a very close match.

JTF-GTMO determined that 179 of the 239 detainees (75 percent) were "high" security risks to the U.S. and its allies. JTF-GTMO also recommended that 173 of these detainees (72 percent) be retained in the Department of Defense's

custody.

The leaked JTF-GTMO documents do not contain a recommendation for an additional 9 detainees in our study. But in 8 of these 9 instances, JTF-GTMO identified the detainee as a "high" risk, making it likely that JTF-GTMO recommended these 8 detainees for continued detention. If we add these 8 detainees to the 173 detainees JTF-GTMO recommended for continued detention, then JTF-GTMO likely recommended a total of 181 detainees (76 percent) held at Guantanamo on Obama's first day in office be retained in DoD custody – and not transferred.

In sum, whereas Olsen's task force approved roughly 2 out of every 3 (65 percent) Guantanamo detainees for transfer, JTF-GTMO recommended that approximately 1 out of every 4 (25 percent) be transferred. The task force approved only 35 percent of the detainees for indefinite detention or prosecution, whereas JTF-GTMO recommended that roughly 75 percent be retained in DoD custody.

### **Guantanamo transfers are not risk free**

To his credit, Olsen has been more candid than most when it comes to the risks involved in transferring Guantanamo detainees. When the U.S. government transfers a detainee, it does not mean that he has been deemed innocent or risk-free. Olsen explained the risks involved during an interview with BBC News. "No decision about any of these detainees is without some risk," Olsen said. "We need to be clear about the fact that we're making predicted judgments at some level about whether somebody is going to pose a risk to us in the future if they are released."

The task force's final report underscores this point. "It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism," the task force noted. "Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country."

In other words, the U.S. government is relying on foreign governments to mitigate the risks of transferred detainees. The problem is that the more we've learned over time, the clearer it has become that foreign governments are frequently unable or unwilling to mitigate these risks.

The Bush administration itself transferred a large number of "high" risk detainees, including many of the Saudis held at Guantanamo. JTF-GTMO recommended that a large number of the detainees transferred by the Bush administration be retained in DoD custody as well. An increasing number of these transferred detainees have returned to the terror network, according to the Obama administration's own estimates.

The bottom line is that the transfer of Guantanamo detainees entails, in many cases, "high" risks. The Guantanamo task force set up by President Obama was willing to accept far more of these risks than JTF-GTMO. It was also willing to accept more risk than the Bush administration with respect to the detainees remaining at Guantanamo in late January 2009. (The task force's final report notes that only 59 of the 240 detainees, or 25 percent, "were approved for transfer or release by the prior administration but remained at Guantanamo by the time the Executive Order was issued." Compare this to the 65 percent approved for transfer by the task force.)

It is clear that the Guantanamo Review Task Force, headed by Matthew Olsen, approved a large number of "high" risk transfers. The senators presiding over Olsen's confirmation hearing may want to ask: Why?

*Thomas Joscelyn is a senior fellow at the Foundation for Defense of Democracies.*

---

[Subscribe now to The Weekly Standard!](#)

**Get more from The Weekly Standard:** [Follow WeeklyStandard.com on RSS](#) and [sign-up for our free Newsletter](#).

Copyright 2010 Weekly Standard LLC.

---

**Source URL:** [http://www.weeklystandard.com/blogs/questioning-high-risk-gitmo-detainee-transfers\\_576806.html](http://www.weeklystandard.com/blogs/questioning-high-risk-gitmo-detainee-transfers_576806.html)

**WeeklyStandard.com**Published on *The Weekly Standard* (<http://www.weeklystandard.com>)

## John Brennan Is Still Wrong on Gitmo Detainee

**Thomas Joscelyn**

May 13, 2011 8:12 AM

A recently leaked threat assessment prepared at Guantanamo draws into question the Obama administration's analysis of a detainee who was transferred to Yemen shortly before all future transfers to the unstable nation were suspended.

On December 19, 2009, the Obama administration transferred six Guantanamo detainees to Yemen. One of them was a longtime confidante of Osama bin Laden named Ayman Batarfi. The decision to transfer Batarfi proved to be controversial.

Less than one month after the transfer, during a congressional briefing on January 13, 2010, Congressman Frank Wolf questioned President Obama's chief counterterrorism advisor, John Brennan, about the decision to transfer Batarfi. Wolf was especially perplexed since military and intelligence officials had concluded that in addition to being a longtime, committed jihadist with ties to the most senior al Qaeda leaders, including Osama bin Laden, Batarfi also had knowledge of al Qaeda's anthrax program.

Brennan decided to answer Wolf's challenge by sending a letter on White House stationary to then-House speaker Nancy Pelosi on February 1, 2010. ABC News obtained a copy of the letter and published it online. Brennan wrote:

During the briefing on January 13, Representative Wolf made allegations that one detainee repatriated to Yemen had been involved in weapons of mass destruction. As it has done in every case, the task force thoroughly reviewed all information available to the government about this individual and concluded that there is no basis for the assertions Representative Wolf made during this session. I am attaching a classified addendum to this letter that addresses these concerns directly.

But a recently leaked April 29, 2008 threat assessment prepared by Joint Task Force Guantanamo (JTF-GTMO) contains numerous references to Batarfi's ties to al Qaeda's anthrax program. These connections were made through a known al Qaeda front named al Wafa, which employed Batarfi and provided cover for al Qaeda's pre-9/11 pursuit of an anthrax capability.

The leaked assessment contains these lines in its executive summary (note: "Detainee" refers to Batarfi):

Detainee acknowledged associations with numerous senior al-Qaida members including Usama Bin Laden (UBL) and provided assistance to Yazid Sufaat, one of al-Qaida's anthrax researchers in Afghanistan who also has ties to the 11 September 2001 attack.

Yazid Sufaat was, in fact, al Qaeda's chief anthrax scientist. Another passage reads (emphasis added):

Detainee was the chief medical advisor for the al-Wafa NGO. Detainee and al-Wafa **provided assistance to al-Qaida including assistance to personnel tied to the anthrax research program.** Detainee is associated with UBL and other senior al-Qaida leadership, and is listed on al-Qaida documents.

In still another passage, intelligence officials explained (emphasis added):

Detainee and al-Wafa **provided support to al-Qaida including its anthrax research program.** ...While serving as al-Wafa's chief medical advisor, **detainee offered al-Wafa's services to one of**

**al-Qaida's key anthrax researchers, Yazid Sufaat, aka (Abu Malik). Detainee met Yazid Sufaat in August 2001, at the Hajji Habash Guesthouse in Kandahar. They proceeded to the al-Wafa office where they discussed Yazid Sufaat's request for assistance in purchasing laboratory equipment. Detainee told Yazid Sufaat when he traveled to Karachi to contact the al-Wafa office there for assistance in purchasing these items. Detainee also stated he instructed Jamil Qasim in the Karachi office to allocate \$4,000 to \$5,000 US to assist Yazid Sufaat in purchasing these items.**

Batarfi "denied any knowledge al Wafa's involvement with biological weapons" during questioning at Guantanamo. But on at least one occasion, according to the leaked file, he slipped up. "I am not the only one who knows these things," Batarfi said, in reference to al Qaeda's anthrax program and other biological and chemical weapons efforts. (An astute analyst remarked in the file: "Detainee's statement that he is 'not the only one' who knows about the biological weapons is a contradiction to his statement that he had no knowledge of them.")

Other detainees at Guantanamo tied Batarfi to al Qaeda's anthrax scientist, Yazid Sufaat, as well. One told authorities that Batarfi gave Sufaat the telephone number of a "microbiology student" in Pakistan who Sufaat "was to contact for funding assistance."

Then there is Batarfi's mentor, Doctor Amer Aziz, who is said to have "personally treated" Osama bin Laden. (Batarfi himself was close to bin Laden during the battle of Tora Bora and attended to the wounded there.) Analysts at Guantanamo wrote:

Doctor Aziz also stated that he and detainee attended a luncheon with UBL hosted by al Qaida military commander Abu Hafs al-Masri. Doctor Aziz is suspected of having connections to the al-Qaida chemical, biological, radiological, and nuclear (CBRN) programs.

The recently leaked assessment of Batarfi was written less than one year prior to President Obama's creation of the Guantanamo Review Task Force. It is this task force that Brennan said "concluded there is no basis" for Wolf's "allegations."

But even before the leaked April 29, 2008 threat assessment came to light, Brennan's response was curious, to say the least.

As [explained here](#) last year, three declassified memos prepared for Batarfi's case at Guantanamo – dated October 31, 2005, November 28, 2006, and December 28, 2007 – all contained allegations involving Batarfi's involvement with al Qaeda's anthrax operation. For example, the December 28, 2007 memo contains this sentence: "The detainee was identified as being a past participant in Al Qaeda's anthrax program and as having ties to al Qaeda."

During hearings at Guantanamo, Batarfi attempted to downplay these suspicious connections but nonetheless admitted he met with a "Malaysian microbiologist," who was in fact Yazid Sufaat. During one hearing at Gitmo, Batarfi admitted:

...I told the Malaysian microbiologist, if you want to purchase the \$5000 worth of items for the lab it is better to purchase it through al Wafa and you give the money to Afghanistan to me and then send it to Pakistan because it is unsafe.

Returning to the leaked threat assessment we find that intelligence officials concluded Batarfi "interacted with individuals tied to the al-Qaida CBRN program." While providing a "vast amount of information about himself and others," JTF-GTMO's analysts and interrogators found, Batarfi "still has information yet to be exploited about himself, the individuals he has already reported on, and probably many others."

U.S. intelligence analysts suspected that Batarfi was withholding information about his contacts with 9/11 mastermind Khalid Sheikh Mohammed, his mentor Amer Aziz (who was suspected of ties to al Qaeda's chemical and biological weapons program), and "his involvement with the Ayman al Zawahiri directed anthrax program."

For all of these reasons, and more, Batarfi was deemed a "high risk" who is "likely to pose a threat to the US, its interests, and allies" by the JTF-GTMO team. Batarfi was also considered to be of "high intelligence value."

Regardless, Batarfi was transferred to Yemen just before the Christmas Day 2009 terror attack on Flight 253. Subsequently, the Obama administration suspended all transfers to Yemen, which is home to the most dangerous al Qaeda affiliate on the planet: al Qaeda in the Arabian Peninsula.

In justifying the transfer, John Brennan claimed that President Obama's Guantanamo Review Task Force "thoroughly reviewed all information available" on Batarfi and found no ties to al Qaeda's anthrax program. Four memos prepared at Guantanamo and Batarfi's own indicate otherwise.

Congressman Wolf was right to challenge Brennan on the intelligence surrounding Batarfi. We are left to ask: Did the Guantanamo Review Task Force rewrite the threat assessment on Batarfi such that it excluded the provocative details of his ties to al Qaeda's anthrax program? And if so, why?

*Thomas Joscelyn is a senior fellow at the Foundation for Defense of Democracies.*

---

[Subscribe now to The Weekly Standard!](#)

**Get more from The Weekly Standard:** [Follow WeeklyStandard.com on RSS](#) and [sign-up for our free Newsletter](#).

Copyright 2010 Weekly Standard LLC.

---

**Source URL:** [http://www.weeklystandard.com/blogs/john-brennan-still-wrong-gitmo-detainee\\_560982.html](http://www.weeklystandard.com/blogs/john-brennan-still-wrong-gitmo-detainee_560982.html)

The Newsweek logo is displayed in white, bold, sans-serif font against a solid black rectangular background.

## Next Stop Nowhere

by [Michael Isikoff \(/authors/michael-isikoff.html\)](/authors/michael-isikoff.html) **May 23, 2009**

As part of their efforts to shut down the Guantánamo Bay detention center, Obama Administration officials were poised in late April to make a bold, stealthy move: they instructed the U.S. Marshals Service to prepare an aircraft and a Special Ops group to fly two Chinese Uighurs, and up to five more on subsequent flights, from Gitmo to northern Virginia for resettlement. In a conference call overseen by the National Security Council, Justice and Pentagon officials had been warned that any public statements about Gitmo transfers would inflame congressional Republicans, according to a law-enforcement official who asked not to be named discussing internal deliberations. Then on May 1, -Virginia GOP Rep. Frank Wolf got tipped off. Furious, he fired off a public letter to President Obama, charging that the release of the Uighurs—Muslim separatists opposed to the Chinese government—could "directly threaten the security of the American people." White House officials were not happy. One called Wolf's chief of staff and accused his boss of playing politics. "Now we know how you're going to play this," Jim Papa, chief Obama liaison to the House, said during the conversation, according to Wolf staffer Dan Scandling. (Papa did not comment; a White House official said there were multiple briefings for Wolf's office.) The flight never took off.

The blowup illustrates the challenge Obama faces to meet his goal of shuttering Gitmo—a problem that grew last week when the Senate voted 90-6 to strip money for the closure from a funding bill. "This may be harder than health care," said one senior official, who also requested anonymity. A federal court has ordered the release of Gitmo's 17 remaining Uighurs. But they can't be returned to China because they would likely be tortured or executed. Sending them to northern Virginia seemed to make sense: a -Uighur community is located there, and Wolf has been a critic of China's human-rights record and has championed the Uighur cause. But Wolf told NEWSWEEK he fears the detainees might attack Chinese diplomats in D.C. "Let them go to some other country," he said.

So far, there are no takers. Since Albania accepted five in 2006, the Pentagon has been rebuffed repeatedly by other countries. Last week the State Department asked Germany to resettle nine Uighurs. But its government is expected to stall until after a September election, if not longer, according to a European diplomat who asked not to be identified. The Germans, the official said, "want the U.S. to take Gitmo detainees first." That could be a long time coming.

# The Washington Post

[Back to previous page](#)

---

## Guantanamo Bay: Why Obama hasn't fulfilled his promise to close the facility

By Peter Finn and Anne E. Kornblut,  
Published: April 23

The sputtering end of the Obama administration's plans to prosecute Khalid Sheik Mohammed in federal court came one day late last month in a conversation between the president and one of his top Cabinet members.

Attorney General Eric H. Holder Jr. had called President Obama to inform him that he would be returning the case to the Defense Department, a decision that would mark the effective abandonment of the president's promise to close the military detention center at Guantanamo Bay, Cuba.

During the call, Obama did not press Holder to find a way to resurrect the federal prosecution of Mohammed and four co-defendants, according to senior administration officials familiar with the conversation. He did not object. Instead, he called it a pragmatic decision.

It was a fittingly quiet coda to the effort to close the military detention center. For more than two years, the White House's plans had been undermined by political miscalculations, confusion and timidity in the face of mounting congressional opposition, according to some inside the administration as well as on Capitol Hill. Indeed, the failed effort to close Guantanamo was reflective of the aspects of Obama's leadership style that continue to distress his liberal base — a willingness to allow room for compromise and a passivity that at times permits opponents to set the agenda.

The president answered questions about his Guantanamo policy when asked, but only once in two years, other than in a major speech at the National Archives, did he raise the issue on his own. Guantanamo was competing with other legislative priorities, particularly health care, that consumed most of the administration's attention.

"During 2009 and early 2010, he is totally engaged in the struggle to get health-care reform," a White House participant said when asked about the president's engagement with the effort to close Guantanamo. "That occupies his mind, and his time."

Obama has conceded that Guantanamo will not close anytime soon. "Obviously I haven't been able to

make the case right now, and without Congress's cooperation, we can't do it," he said this month in an interview with the Associated Press. "That doesn't mean I stop making the case."

Administration officials lay blame for the failed initiative on Congress, including Democrats who deserted the president, sometimes in droves. The debate, they said, became suffused with fear — fear that transferring detainees to American soil would create a genuine security threat, fear that closing Guantanamo would be electoral suicide. Some Democratic lawmakers pleaded with the White House not to press too hard, according to administration officials.

The White House asserts it was fully engaged in the effort to close Guantanamo.

"Any claim that the White House didn't fight to close Guantanamo is just flat wrong," spokesman Tommy Vietor said.

This account of the unraveling of Obama's pledge to close Guantanamo is based on interviews with more than 30 current and former administration officials, as well as members of Congress and their staff, members of the George W. Bush administration, and activists. Many of them would speak about internal or sensitive deliberations only on the condition of anonymity.

The one theme that repeatedly emerged in interviews was a belief that the White House never pressed hard enough on what was supposed to be a signature goal. Although the closure of Guantanamo Bay was announced in an executive order, which Obama signed on Jan. 22, 2009, the fanfare never translated into the kind of political push necessary to sustain the policy.

"Vulnerable senators weren't going out on a limb and risk being Willie Hortonized on Gitmo when the White House, with the most to lose, wasn't even twisting arms," said a senior Democratic aide whose boss was one of 50 Democrats to vote in 2009 against funding to close Guantanamo. "They weren't breathing down our necks pushing the vote or demanding unified action."

"The one thing we could never figure out is who was in charge of it," said a senior Republican staffer on Capitol Hill, whose boss, a senator, was initially supportive of the goal of closing Guantanamo. "Everybody seemed to have a piece of it, but nobody was in charge of it."

It was often assumed on the Hill and elsewhere that White House counsel Gregory B. Craig was in charge, but he rejected that characterization in an interview and said he was pushing the boundaries of his office to be as involved as he was.

"There was a real serious problem of coordination in this whole thing," Craig said. "No one was coordinating."

The White House, often without much internal deliberation, retreated time and again in the face of political opposition.

"At each turn, when faced with congressional opposition, the instinct was to back off, and the result was not what the White House hoped," said a senior U.S. official involved in Guantanamo policy. "We kept retreating, and the result was more pressure to retreat more."

**Executive order: One year till closure**

On Obama's inauguration night, when the new administration instructed military prosecutors to seek the suspension of all proceedings at Guantanamo Bay, defense lawyers at the base formed a boisterous conga line.

"Rule of law, baby!" they shouted.

The celebrations, though, were short-lived.

While the Pentagon had plans to close the detention center on the books for several years, the logistics of finding a replacement facility were difficult, to say nothing of the politics. Additionally, the legal process by which Guantanamo would be emptied presented formidable challenges.

The executive order signed by Obama established a task force to review the case of every detainee — there were 241 when he took office — and recommend what should happen to them. But the issue proved highly controversial.

The president's liberal base, as well as civil liberties groups, had long pressed for a system by which detainees would be prosecuted or transferred out, ending indefinite military detention and jettisoning military commissions in favor of federal courts, also called Article III courts.

But the executive order did not rule out military commissions.

Anthony Romero, executive director of the American Civil Liberties Union, immediately wondered about "ambiguities . . . regarding the treatment of certain detainees that could either be the result of the swiftness with which these orders were issued or ambivalence within the Obama administration."

Indeed, within the administration, which had held extensive discussions during the transition with Bush administration officials about Guantanamo, there was uncertainty about the possible need for continued use of military detention or military commissions.

But what the administration took as something of a certainty was that there was bipartisan support to close Guantanamo.

Bush, after all, had expressed a desire to close Guantanamo. And Sen. John McCain (Ariz.), the Republican candidate for president, spoke during the 2008 campaign about closing the detention center in Cuba and moving the detainees to Fort Leavenworth in Kansas.

Just before Obama's inauguration, Craig briefed senior congressional leaders, including then-House Minority Leader John A. Boehner (R-Ohio), on the incoming president's plans.

"There were good questions, and I thought I answered the questions pretty well," Craig said. "I felt comfortable."

Under Obama's executive order, the administration had one year to close Guantanamo.

### **Hitting a roadblock in Northern Virginia**

The first concrete step toward closing the detention center was agreed upon during an April 14, 2009, session at the White House. It was to be a stealth move.

With chief of staff Rahm Emanuel at the helm of the meeting, senior national security officials agreed that eight of the 17 Uighurs being held at the off-shore facility would be resettled in the United States, most in Virginia. The Chinese Muslims would be brought in two at a time; the first two to come were chosen, in part, because they could speak reasonably good English and were likely to make a good impression given the intense media attention they probably would draw.

The transfer seemed like an uncontroversial move. The Bush administration had concluded that the Uighurs, although accused of separatist activities by Beijing, were not enemies of the United States, and a federal judge had ordered their release the previous October. The FBI and the Department of Homeland Security had expressed some qualms about being able to monitor them fully in the United States, but those were quickly overcome.

Within the administration, the transfer was seen as critical to efforts to persuade European and other governments to resettle Guantanamo detainees. Indeed, some European governments, including Germany, said they wanted to see at least a symbolic resettlement in the United States before they would accept detainees.

“They were going to show up here, and we were going to announce it,” said one senior official, describing the swift, secretive operation that was designed by the administration to preempt any political outcry that could prevent the transfer.

But before the plane could leave Cuba, word leaked to Rep. Frank R. Wolf that Guantanamo detainees were on their way to his district in Northern Virginia. Wolf, a Republican, had not been briefed on the matter by the White House, despite his history of defending the Uighur community in his district, and was infuriated by the move.

He faxed a letter to the Obama administration and released it to the news media, declaring that the “American people cannot afford to simply take your word that these detainees, who were captured training in terrorist camps, are not a threat if released into our communities.”

The outrage from a single congressman was enough to spook the Obama administration, which quickly shelved its Uighur plan. Craig as well as a current senior official and a former senior official said they don't know who stopped the transfer.

“They did not reconvene the principals,” Craig said. “They did not have a meeting in the Oval Office to discuss this and change the direction. It just happened: ‘We’re not doing it.’”

In fact, the transfer was stopped by Emanuel, according to officials familiar with Emanuel's thinking. They said he and other senior West Wing aides did not think they could overcome congressional opposition after hearing Wolf's outcry.

Others argued that the White House was simply not prepared to wage full battle with Congress over Guantanamo. Obama had been in office only four months, and he had too much else to do.

### **A definitive vote against funding**

In late April, Obama heard some jarring news during a Situation Room meeting with the interagency task force reviewing the case of every detainee at Guantanamo.

The president asked Matthew G. Olsen, the Justice Department lawyer heading the task force, approximately how many Guantanamo detainees could be prosecuted, according to administration officials.

Probably fewer than 20, Olsen said.

The president seemed peeved that the number was so small, in contrast with the optimistic predictions during his election campaign that nearly all of the remaining detainees could face trial or be transferred. The number would eventually rise to 36, but even that low figure came as a shock to Obama aides who had been counting on a cleaner sweep.

White House officials were in such disbelief that they asked Justice Department participants to write up a memo explaining exactly why they couldn't bring more of the men to trial. In many cases, the intelligence gathered on the men was not court-worthy evidence.

But a bigger surprise was yet to come.

On May 20, 2009, as part of a war-funding request, the Senate voted 90 to 6 against appropriating \$80 million to close Guantanamo. "Americans don't want some of the most dangerous men alive coming here," Senate Minority Leader Mitch McConnell (R-Ky.) said on the floor of the chamber, adding that he commended Senate Democrats for "fulfilling their oversight responsibilities."

Senior administration officials said they were stunned by the vote. In hindsight, officials said, they should have taken the budding Republican narrative more seriously. "We weren't very effective at rebutting it," one senior official said.

"I got calls all the time: 'Where are you guys?' 'Why aren't you up here working the issue?'" Craig said.

Obama had already been preparing to deliver a major address on Guantanamo the next day at the National Archives.

Inside the administration, there was some expectation that the speech could help change the story line away from the Senate vote — and put Obama on the offensive again. "We thought we could draft off of that," said one official, who hoped the momentum from the Archives address would help drive a strategy toward closing the facility in the months ahead.

But the Archives speech reflected the difficulty of the issue. In it, the president described a five-pronged approach to handle detainees and close Guantanamo: federal prosecutions, military commissions, court-ordered releases, transfers home or to third countries, and prolonged detention for those who could not be prosecuted but were too dangerous to release.

The embrace of military commissions irritated Obama's Democratic liberal base, and the acceptance of some indefinite detentions without trial was anathema to large sections of the human rights and civil liberties community.

On top of it all, the speech was quickly overshadowed.

Shortly after Obama finished speaking, former vice president Dick Cheney addressed the American

Enterprise Institute and launched a blistering attack on the administration's national security policies, blunting Obama's message.

"I think the president will find, upon reflection," Cheney said, "that to bring the worst of the worst terrorists inside the United States would be cause for great danger and regret in the years to come."

### **'The plan' never gets off the ground**

Doubts were beginning to creep into the White House. In June 2009, Congress, as part of a supplemental war-funding bill, banned the transfer of Guantanamo detainees into the United States except for prosecution.

Without funding, and without the ability to immediately start the process of acquiring and refurbishing a prison, the one-year deadline was looking unachievable. "By the time he spoke at the National Archives, the prospect of getting it done by the end of the year was very slim," Craig said.

Moreover, the polling on Guantanamo was worrying some of Obama's political advisers. Public disapproval of Obama's decision to close the facility was creeping steadily up, and by June had reached 50 percent, up from 39 percent when he took office.

"They told Obama, 'You can fight this, and you'll lose, and it'll spill over into everything else,'" one administration official said, referring to the president's political advisers.

With Congress demanding a blueprint in order to release funds to close Guantanamo, the White House set about preparing what became known internally as "the plan."

The goal was not only to create a set of documents detailing the closure sequence but to roll out the effort with national security heavyweights such as Gen. David H. Petraeus, then commander of the U.S. Central Command.

"I am working seriously on it with folks," Craig said. "We thought there would be a moment some time in the fall where we could say: Here is how many people we are going to bring in, here's how many people we are going to try, here's where we think the military tribunals will be and here's how much money we need to do it."

The administration also worked with Congress to reform military commissions, and provide more due process to detainees, an effort that led to the passage of 2009 Military Commissions Act in October. Officials also zeroed in on a state prison in Illinois to hold the detainees.

In the end, however, the plan never emerged, lost in uncertainty about when and how to release it.

"It's as if the wind just dies away," an administration official said.

### **Efforts to bring a 9/11 figure to trial**

There were still glimmers of fight. When the ability to use federal courts to try Guantanamo detainees was threatened by Congress, the White House political machine kicked into gear.

In fall 2009, Sen. Lindsey O. Graham (R-S.C.) led an effort designed to bar the administration from

putting Khalid Sheik Mohammed and four co-defendants on trial in federal court. With Holder on the brink of announcing just such a prosecution, the White House fought to kill the measure, and the Senate rejected it in a 55 to 45 vote.

“The administration engaged hard,” said Chris Anders, senior legislative counsel for the ACLU, which opposed the Graham measure.

A second crippling amendment, proposed by Sen. James M. Inhofe (R-Okla.), was also defeated. “We thought we were darn close to closing Guantanamo,” a senior administration official said.

On Nov. 13, Holder announced at the Justice Department that Mohammed and his co-conspirators would be tried in a Manhattan federal courthouse less than a mile from Ground Zero. It was the boldest act yet by the Obama administration. “Our nation has had no higher priority than bringing those who planned and plotted the attacks to justice,” the attorney general said.

In New York, the decision was initially welcomed by the city’s leadership. “It is fitting that 9/11 suspects face justice near the World Trade Center site where so many New Yorkers were murdered,” Mayor Michael R. Bloomberg said.

But within just two months, the prosecution collapsed. At the Justice Department, officials thought they had been sandbagged by inflated security estimates made by the New York Police Department, and exaggerated concerns about disruption to the life of the city. NYPD Commissioner Ray Kelly spoke about creating security rings around the courthouse at an annual cost of approximately \$200 million.

In New York, there was anger that when Bloomberg was facing increased local opposition to the trial, the administration was silent and did nothing to help him, despite pleas from City Hall that someone in Washington should speak up to ameliorate public concerns.

By the end of January 2010, the sense of dismay inside the administration was profound.

Emanuel turned to Graham to help resurrect the Guantanamo policy. In exchange, the senator — who supported closing Guantanamo and had met with Obama about it even before the inauguration — insisted on legislation creating an overarching detention framework for future captures.

Bob Bauer, brought in to replace Craig as White House counsel, led the negotiations alongside Emanuel, conducting a series of meetings at the White House and on Capitol Hill through the first part of 2010. Both sides talked about a “grand bargain”— a comprehensive piece of legislation that would close Guantanamo, give new legislative backing to law-of-war detention, allow some federal trials of Guantanamo detainees but send the prosecution of Mohammed back to a military commission.

“We negotiated very strongly and heavily about the pathway forward,” said Graham, adding that he met with the president two or three times on the subject.

“I think what the president misunderstood is there was an anxiousness about these defendants in America,” Graham continued. “Polls would ask, ‘Should we close Guantanamo Bay?’ and [support] got up to 60 percent. But underneath that, people still wanted to be reassured they would be safe.”

The only way to fix that, Graham thought, was to create a framework in which terrorism suspects like

Mohammed would be tried by military commissions, something the administration would not sanction.

From the administration's perspective, negotiating with Graham was a long shot. Some Democrats were furious that the administration was now contemplating what they saw as an about-face.

And so, like so many previous efforts, the negotiations simply withered. By May, the discussions with Graham were over. "I was never told why," Graham said. "I guess it got to be too hard a sell."

### **Military commissions are revisited**

In August 2010, the Defense Department began to advocate forcefully for a full resumption of military commissions. A handful of cases that had been charged and referred under the Bush administration had proceeded at Guantanamo, but Defense Secretary Robert M. Gates had put a hold on the swearing of new charges. Senior defense officials argued that unless commissions resumed, and quickly, the Pentagon would start to lose key military prosecutors who in some cases had devoted years to building cases that were now in limbo.

At an Aug. 10 meeting of the National Security Council, defense officials made their case. Secretary of State Hillary Rodham Clinton responded with what one official called a "fairly elaborate speech" arguing forcefully against any piecemeal return to military commissions. The Guantanamo policy, she said, needed a comprehensive approach that followed the road map set down by the president in the National Archives speech.

Any resumption of military commissions, she said, must be accompanied by federal trials. Otherwise, she said, it's going to look like "we're not closing Gitmo," one participant said.

To the surprise of some in the Situation Room, Gates seemed to relent, saying that commissions and federal trials should operate in tandem, like "two wheels on a bicycle."

But, Gates said, he wanted to be able to lift the hold on commissions in 90 days. What was needed, he said, was a plan.

Holder said he was working on a fresh one. The attorney general continued to study the possibility of bringing Mohammed to trial in the Southern District of New York, even if not in New York City. Surreptitiously, he sent his then chief of staff, Kevin Ohlson, to see if a federal prison in Otisville might work as a venue. Under the guise of a visit to his family in the area, Ohlson dropped by the prison as if it were a routine check on behalf of the Justice Department.

Ultimately, Holder and other Justice officials concluded that the politics of moving to Upstate New York would probably be no better than they were in Manhattan.

The administration began to consider what some called the "no name strategy." A number of detainees, through their lawyers, had expressed an interest in reaching plea agreements with the government. Of the six cases prosecuted in military commissions at Guantanamo, four had ended in pleas with relatively mild sentences.

Some in the administration began to advocate doing a series of deals in federal court in which detainees would be brought into New York or Virginia with a plea agreement already in hand.

“The idea was you could do five or six successful Article III cases, and then go to KSM,” said an administration official, using the common abbreviation for Mohammed.

But the Justice Department was reluctant to start moving on other cases until the trial of the one Guantanamo Bay detainee who had already been brought into the United States was over.

Ahmed Ghailani, a former high-value detainee at Guantanamo Bay, was charged with multiple counts of murder and attempted murder for his alleged role in the 1998 bombings of U.S. embassies in East Africa. Ghailani was first moved to Manhattan in June 2009, and his trial began in October 2010.

“We were watching the trial like hawks,” the administration official said. Prosecutors assured nervous officials in the administration that despite some setbacks in rulings by the judge, they would secure a conviction.

On Nov. 17, a jury found Ghailani guilty of conspiracy to damage or destroy U.S. property, but acquitted him of 284 other counts, including all the murder charges. Although Ghailani ended up getting a life sentence in January, the optics for the administration were terrible. Critics seized on the number of acquittals and said an al-Qaeda terrorist almost got off.

The only plan that remained viable was doomed.

### **Avoiding a showdown with Congress**

In December, in the provisions of a major defense bill, Congress imposed the tightest restrictions yet on the handling of Guantanamo detainees, barring the administration from bringing any into the United States even for prosecution.

To some in the administration, by attempting to dictate prosecution decisions, Congress had clearly stepped on an executive prerogative, and they wanted the president to declare the provision unconstitutional in a signing statement in which he would indicate that he was not bound by certain provisions.

Another lively internal administration debate arose about the degree to which the administration should challenge Congress. Some officials were skittish about employing a maneuver — the signing statement — that the president had criticized the Bush administration for using to disregard the parts of laws it didn't like. Others argued that Congress's action was so clearly unconstitutional it had to be challenged, according to administration officials.

In the end, Obama called the restrictions a “dangerous and unprecedented challenge” to the executive branch, but he stopped short of saying he could lawfully ignore them.

There would be no standoff with Congress.

In March, Obama signed an executive order creating review procedures for detainees whom it planned to hold indefinitely and without trial.

Administration officials insisted that the president was still committed to closing the detention center, although Obama made no mention of that goal in a short statement. But he did endorse federal trials. “I strongly believe that the American system of justice is a key part of our arsenal in the war against

al-Qaeda and its affiliates, and we will continue to draw on all aspects of our justice system — including Article III courts,” he said.

Inside the administration, there was much less confidence. Over several weeks in March, Holder informed Cabinet officials of his conclusion that congressional restrictions on bringing Guantanamo Bay detainees into the United States made a federal trial all but impossible for the 9/11 defendants. Holder decided that after years of delay, it would be politically untenable to wait any longer before bringing Mohammed to justice, especially with the 10th anniversary of the Sept. 11 attacks approaching.

Less than a month later, on the the day Obama announced that he would seek reelection, a clearly crestfallen Holder took to the lectern at the Justice Department to scuttle the federal prosecution of Mohammed, which he once expected would be the “defining event” of his time at the helm of the department.

Mohammed is to be tried at Guantanamo in a purpose-built courthouse, just a few miles from the camps that continue to hold 172 detainees.

Staff researcher Julie Tate contributed to this report.

#### **Sponsored Links**

##### **UTOG Oil Bursting its Seams**

Fracking tech to unlock vast treasure of 7,000-acre Montana patch. Get in now.  
[www.AmericanEnergyReport.com](http://www.AmericanEnergyReport.com)

##### **Refinance Rates at 2.65%**

\$160,000 Mortgage \$659/mo. No Hidden Points/Fees. 3.0% apr Get Quote!  
[LendGo.com/mortgage](http://LendGo.com/mortgage)

##### **Penny Stock to Watch - RMGX**

Save the planet AND make money! Consider investing today.  
[www.GreenGainers.com](http://www.GreenGainers.com)

[Buy a link here](#)

© The Washington Post Company

# NationalJournalMember

COVER STORY

## The Prisoners' Dilemma

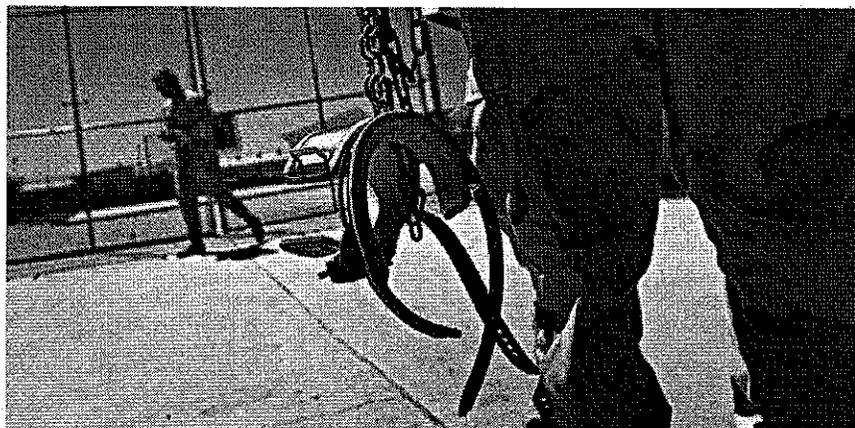
**Bowing to political reality, the Obama administration has abandoned its plans to close the detention facility at Guantanamo Bay. Surprisingly, many legal experts think that's a very good decision.**

by Yochi J. Dreazen

Updated: March 7, 2011 | 3:21 p.m.

March 3, 2011 | 5:30 p.m.

ADVERTISEMENT



JOHN MOORE/GETTY IMAGES

Never mind: Guantanamo is open for business two years after President Obama said it would be closed within a year.

GUANTANAMO BAY NAVAL BASE, Cuba—On a rainy morning in late February, Navy personnel escorted Noor Uthman Muhammed, accused of terrorism, into a heavily fortified military courtroom here. Muhammed's civilian defense attorney, a prominent corporate lawyer named Howard Cabot, walked over to his client to say hello. A few minutes later, Navy Capt. Moira Modzelewski, the judge hearing Muhammed's case, strode into the courtroom. Everyone stood, including Muhammed, a slight Sudanese man who has been held at Guantanamo Bay since he was captured in Pakistan nine years ago. "Good morning, everyone," Modzelewski said from the dais at the front of the windowless one-story building. "This military commission is called to order."

Those are seven words that the Obama administration once hoped would never be spoken again. Then-Sen. Barack Obama voted against the Military Commissions Act of 2006, which was designed to give formal sanction to such proceedings. During the 2008 election campaign, candidate Obama regularly denounced the existence of this detention facility and vowed to close it if elected president. Shortly after taking office, President Obama issued executive orders requiring an immediate case review for each of the detainees still held at Guantanamo Bay and formally

declaring that the camp would "be closed as soon as practicable, and no later than one year from the date of this order."

More than two years later, the Guantanamo Bay prison remains open for business, and administration officials have publicly conceded that the government will continue to use the facility well into the future. Speaking to the *Senate Intelligence Committee* in February, CIA Director Leon Panetta said that fugitive Qaida leaders Osama bin Laden and Ayman al-Zawahiri would be taken "to Guantanamo" if they were captured alive. Defense Secretary Robert Gates separately told lawmakers, "The prospects for closing Guantanamo, as best I can tell, are very, very low."

In fact, the pace of activity at Guantanamo will sharply accelerate in the months ahead.

Gates issued a formal directive in early 2009 barring new military commission proceedings for any detainees except Muhammed and a handful of other "legacy cases." Senior Defense officials told *National Journal*, however, that the secretary will lift the ban in coming days, paving the way for military prosecutors to proceed with cases against dozens of Guantanamo detainees. The government could bring initial charges against a handful of high-profile inmates within weeks, according to Navy Capt. David Iglesias, one of the lead prosecutors in the Pentagon's Office of Military Commissions.

"We're moving ahead and would be prepared to open new commission proceedings quickly if the stand-down order is lifted," Iglesias said in an interview. "There wouldn't be much lag time."

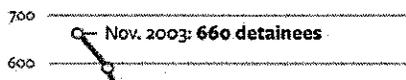
#### "THE LEAST-WORST PLACE"

Perhaps the only thing more surprising than the Obama administration's growing acceptance of Guantanamo Bay is the emerging consensus in legal circles that keeping the facility open—and holding new trials here—may well be the best available option for dealing with detainees from the ongoing war on terrorism.

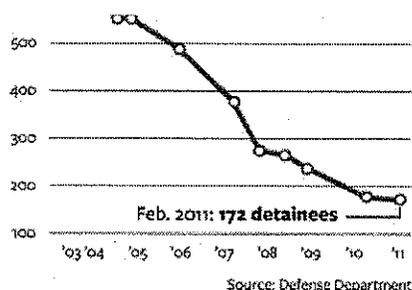
A growing number of legal experts, including many who once advocated shuttering the facility, argue that procedural changes have made the military-tribunal process much fairer; it is now harder for prosecutors to introduce hearsay or evidence gathered from the brutal interrogation of other detainees. Analysts and advocates also point to a pivotal Supreme Court ruling in 2008 that gave Guantanamo detainees the right to challenge their continued incarceration before civilian judges.

#### Guantanamo Detainees Decline

Of the 172 remaining detainees, 58 are approved for transfer.



Politically speaking, legal experts say, the administration has almost no chance of persuading lawmakers to provide the necessary funding for closing



Guantanamo. Legislation authorizing that spending failed to make it through Congress when the Democrats controlled both chambers, and the new Republican majority in the House is almost universally opposed to bringing Guantanamo's 172 detainees to the U.S.

mainland. Earlier this month, House Republicans also pushed through a bill that would specifically eliminate the salary of Daniel Fried, the career diplomat who is traveling the world trying to find countries willing to accept freed Guantanamo detainees.

"Guantanamo Bay circa 2011 is not remotely the same as Guantanamo Bay circa 2002-2004," said Robert Chesney, a law professor at the University of Texas who has written extensively about the detention facility. "In an ideal world, we'd close Guantanamo down because of all of the baggage associated with our prior mistakes there. But this isn't an ideal world, and it's not at all clear that there are any better solutions out there which have a realistic chance of being put into effect."

*"We won't be getting out of the detention business anytime soon." —Benjamin Wittes, Brookings Institution*

Benjamin Wittes, a senior fellow at the Brookings Institution and the author of *Detention and Denial: The Case for Candor After Guantanamo*, noted that the U.S. will probably need to hold about 120 of Guantanamo's detainees for the indefinite future, either because they are hardened militants who can't be safely released or because—as is the case with the facility's large population of Yemenis—they can't be returned to their home countries for logistical or security reasons.

"When you're talking about those kinds of numbers, a place like Guantanamo starts to look a lot better," Wittes said in an interview. "It's stable. It's very professionally run at this point. And the truth is that we won't be getting out of the detention business anytime soon."

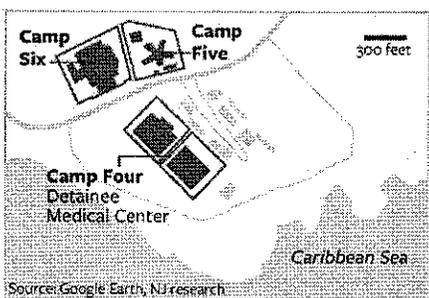
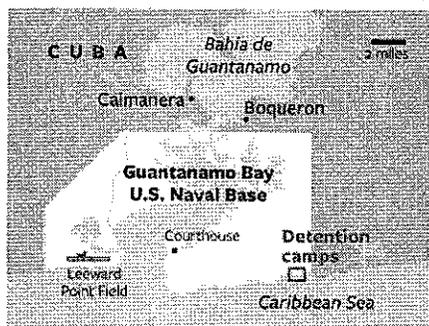
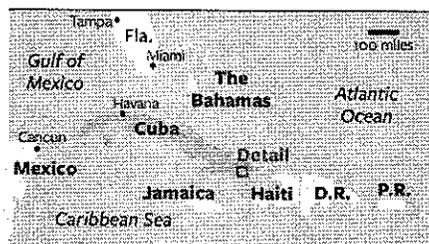
Wittes noted that former Defense Secretary Donald Rumsfeld once referred to Guantanamo as "the least-worst place" to hold detainees. "There was a lot of truth to that then," Wittes says, "and there's even more truth to it now."

#### A LITTLE BIT OF SUBURBIA

The United States has maintained a naval base at Guantanamo Bay, on Cuba's southeastern coast, since the early 1900s. The Navy leases the enormous facility—which extends over 45 square miles of land and water—for \$4,085 a year. Washington has been dutifully writing a check in that amount, payable to the Cuban government, since 1934. But Cuban dictator Fidel Castro, who

argues that the lease is illegal under international law, has cashed only one of the checks and keeps the rest stashed in a drawer in his Havana office.

### Prison Camp



The detention facilities and courtrooms take up only a small portion of the sprawling base, which resembles an American suburb eerily transported to the middle of nowhere. A McDonald's restaurant, complete with drive-through window, sits barely a mile from the courtroom where Muhammed's trial was held. Guantanamo Bay has a golf course and an outdoor movie theater that shows films such as *Tron: Legacy*. The base, which houses about 2,600 troops and their families, also has O'Kelly's, which bills itself as the only Irish pub on Cuban soil.

The U.S. began to send captured Qaida and Taliban militants to Guantanamo Bay in early 2002, shortly after President Bush announced his global war on terrorism. With no place to incarcerate

prisoners in Afghanistan, where American forces had dislodged the Taliban, the White House decided that Guantanamo Bay's remote location made it ideal for holding and interrogating detainees about possible future attacks. The base's uncertain legal status was also a plus: Many Bush administration officials believed that the United States could hold detainees there indefinitely without giving them the right to challenge their confinement or even to know what crimes they were accused of committing.

The rest of the world, of course, came to see Gitmo very differently. Photographs of shackled detainees in black-out goggles and orange jumpsuits stunned many foreign leaders and prompted waves of calls to close the facility.

In 2004, the International Committee of the Red Cross sent to the Bush administration a confidential report concluding that the physical and psychological treatment of detainees at the hands of their military interrogators was "tantamount to torture." At least five Guantanamo Bay detainees have killed themselves since 2002, and dozens of others have gone on hunger strikes. The prison's medical facility stockpiles cans of the nutritional supplement

Ensure—in chocolate, strawberry, and butter pecan—so that military doctors can forcibly feed detainees who refuse to eat.

By 2007, Bush and senior members of his administration were routinely speaking of their desire to close Guantanamo, which military and intelligence officials had come to acknowledge was a leading cause of anti-American sentiment throughout the Islamic world and one of al-Qaida's most effective recruiting tools. During the 2008 campaign, Obama's vow to shut the prison attracted virtually no Republican opposition for a very simple reason: The GOP nominee, Sen. John McCain of Arizona, had made the same promise.

After Obama's election, a team led by the Pentagon's top detainee official, Sandra Hodgkinson, was tasked with determining whether it would be possible to close Gitmo and move all detainees to military prisons in the U.S. A person familiar with the team's work said that it examined four possible locations: the Navy brig in Charleston, S.C.; the Army prison at Fort Leavenworth, Kan.; the Marine Corps Base at Camp Pendleton, Calif.; and the Marine Corps Air Station at Miramar, Calif. The team concluded that the incoming administration could meet its 12-month deadline for closing the facility if work got started immediately. The Pentagon conveyed the findings to Obama and his national-security team. Shortly after taking office, the president issued the executive order officially promising to close the prison within a year.

A person who has read the Hodgkinson team's report said, however, that it failed to adequately take into account the political and logistical challenges of closing the Guantanamo Bay detention facility. The group didn't consider whether Congress was likely to provide the necessary funding to build a new prison, and it didn't examine the sheer bureaucratic challenges of doing major construction on domestic military bases, a lengthy process that involves environmental-impact studies and other hurdles, this person said.

By the spring of 2009, the Obama administration was deeply involved in planning a secret effort to resettle a small number of Uighur detainees from Guantanamo in Northern Virginia. The Pentagon had concluded almost six years earlier that the Uighurs, Chinese Muslims locked in a fierce political dispute with Beijing, had no terrorist ties and could be released. But because they could not safely return home, they had been languishing at the detention facility ever since, a situation that the administration decided was unacceptable.

In late April of that year, Obama's national-security team told the U.S. Marshals Service and the Homeland Security Department that the military would soon fly several of the Uighurs to the U.S. The plan was supposed to be kept secret, but Republican Rep. Frank Wolf, whose district is in Northern Virginia, heard about it and went ballistic. In a letter to Obama, Wolf argued that releasing the Uighurs would "directly threaten the security of the American people." His letter was quickly picked up by Fox News and other

conservative media outlets, which used it to argue that Obama was soft on terrorism. The planned flight never left Guantanamo, and the Uighurs are still here.

#### BOWING TO REALITY

The firestorm over the Uighurs marked the beginning of the end of the White House's hopes of shuttering Guantanamo Bay.

Opposition to Obama's plan to move detainees to the U.S. grew steadily in the weeks after Wolf's letter became public. On May 20, 2009, the Senate voted 90-6 to eliminate \$80 million that had been budgeted for closing the detention facility. The House had stripped the funding from its own version of the spending bill less than a week earlier.

The Uighur controversy was a "turning point," Wittes said.

"Until the Uighurs, the administration had the wind to its back. The executive orders were well received, and there was a sense of momentum behind the idea of closing Guantanamo," he said. "But suddenly, you began to see Democratic opposition because of 'not-in-my-backyard' concerns and Republican opposition on ideological grounds. The administration started getting asked why they wanted to close down Guantanamo so badly, and they didn't have a compelling answer."

At the end of that year, the Democratic-controlled House effectively killed the administration's last-ditch plan for a Guantanamo replacement. After months of scouting nonmilitary facilities, officials had settled on the nearly vacant Thomson Correctional Center in rural Illinois. The administration wanted to buy the maximum-security prison and upgrade its defenses so it could safely house Guantanamo's detainees. But when the White House asked the House Appropriations Committee for \$200 million to fund the project, the panel summarily rejected the request.

---

*Military tribunals "are an affront to the Geneva Conventions." —Raha Wala, Human Rights First*

Opposition to closing Guantanamo has continued to build, in part because of other administration missteps. In November 2009, Attorney General Eric Holder announced that the U.S. would try Khalid Shaikh Mohammed, accused of masterminding the September 11 terrorist attacks, in federal District Court in New York City. Republicans cried foul, arguing that the extensive security measures required would paralyze the city and cost as much as to \$1 billion. With public opinion running strongly against the idea, Obama aides have indicated that the president is virtually certain to eventually order that Mohammed be tried before a military tribunal.

#### DISSENTING VOICES

Still, the legal community is not unanimous in thinking that Guantanamo is the best place for trying suspected terrorists. Raha

Wala is an expert with Human Rights First who has observed multiple commission hearings at Guantanamo. He believes that the military-tribunal system is "fundamentally flawed" and that federal criminal court would be a far better—and more effective—venue. Wala points out that civilian prosecutors can charge suspected militants with conspiracy, material support for terrorism, and a range of other related offenses. Military tribunals, by contrast, are typically reserved for serious violations of the laws of armed conflict. Conspiracy and material support for terrorism have never been considered war crimes, Wala says.

"Attempts to rewrite the laws of war now are not only an affront to the Geneva Conventions but also constitute ex post facto punishment (creating a crime to fit acts already committed), which is prohibited under international law and the U.S. Constitution," he wrote in an e-mail.

Wala noted that civilian prosecutors have won more than 400 convictions for terrorism-related offenses since the September 11 attacks; the military-tribunal system at Guantanamo has convicted only six detainees, including Muhammed.

"The numbers speak for themselves," Wala said while visiting Guantanamo last month.

Other legal experts say that the government should maintain Guantanamo Bay, just not in its current form. Eugene Sullivan, a former chief judge for the U.S. Court of Appeals for the Armed Forces, and former FBI Director Louis Freeh believe that the best solution would be for Congress to approve the creation of a new federal criminal court at Guantanamo; the government would fly civilian jurors in from the mainland for trials. Such a system, they contend, would give detainees access to the legal protections enshrined in the American judicial system while avoiding the disruptions and expenses that would come from holding terrorism trials in urban areas.

"You could give the detainees the benefit of a jury trial but do it in a safe, secure, and remote environment," Sullivan said in an interview. "There's no need to invent a new system of justice; the one we have can easily be adjusted to accommodate these kinds of cases."

But some Guantanamo critics do want to invent an entirely new way of trying terrorism suspects. In 2008, Neal Katyal, then a Harvard law professor best known for winning the Supreme Court case that struck down the military-commission system, and Jack Goldsmith, an assistant attorney general in the George W. Bush administration, proposed creating a "national-security court" in which federal judges with lifetime tenure would rule on whether the government could detain a suspected terrorist without a formal conviction.

Detainees would have defense lawyers with top-level security clearances and would be able to periodically challenge their

incarceration. But prosecutors would have more power than in existing civilian courts, including the ability to use some hearsay evidence and material gathered from interrogations that took place before a suspect was given a Miranda warning.

Katyal now serves as the Obama administration's acting solicitor general, the government's top lawyer. It's not clear what his Justice Department and White House bosses think of the Katyal-Goldsmith proposal. Many close observers of the military-commission process doubt that such a court is likely.

Sullivan said he received "several calls from people connected to the White House." He declined to detail whom he spoke to or how they responded to his proposal, however, and he acknowledged that the government shows no signs of moving toward creating a criminal court at Guantanamo.

Matthew Waxman, a Columbia law professor who was the first deputy assistant secretary of Defense for detainee affairs in 2004-05, said that the government probably won't close or substantially alter Guantanamo in the near term. He noted that the Supreme Court decision giving detainees the right to challenge their incarceration effectively blessed the continued operation of the military-tribunal system; Congress has blocked all efforts to close the prison; and even the White House has been steadily backing away from the idea.

"One could say that we've reached a point where all three branches of the U.S. government have now essentially signed off on Guantanamo, despite the continuing public controversy about the camp and the massive political opposition to it," Waxman said in an interview. "It's easy to say, 'Let's close Guantanamo.' It's hard to come up with a good, viable alternative."

#### **GUILTY, GUILTY, GUILTY**

For now, Guantanamo's detention system remains largely unchanged. The U.S. has spent nearly \$2 billion since 2002 on the detention system here. Most detainees live in communal housing where they have access to PlayStation 3 video-game systems and Arabic translations of the Harry Potter books and *Don Quixote*. On a recent visit, a reporter witnessed a pair of thick-bearded detainees watching a large flat-screen TV with their feet up on the table. Both men wore wireless headsets. The camp's military physicians say that the most common injuries they see result from the detainees' spirited soccer games.

Noor Uthman Muhammed is in fairly poor health, and it seems unlikely that he takes part in the marathon soccer matches. In mid-February, rights activist Wala was among a large contingent of journalists and advocates who flew to Guantanamo Bay aboard a military plane to observe what was expected to be a full military trial for the Sudanese inmate. Shortly after, however, military officials said that Muhammed had decided to plead guilty to a pair

of terrorism-related charges, effectively short-circuiting the trial.

In the courtroom, Modzelewski asked Muhammed, frail in a loose-fitting white jumpsuit, if he understood the charges against him and was comfortable waiving his right to a full trial. Muhammed, whose leg was twitching beneath the wooden desk, quietly answered "na'am"—Arabic for "yes"—in response to each question.

"Your pleas of guilty are provident, and I accept them," Modzelewski said.

The following morning, Modzelewski summoned a 15-person pool of officers from the Army, Navy, Air Force, and Marine Corps who had been summoned to decide how much longer Muhammed would remain in prison. Their backgrounds offered thumbnail sketches of the past decade of war. An Army officer who served in the violent Iraqi city of Samarra talked about how his roommate was severely burned while trying to pull a wounded soldier out of a burning vehicle. An officer who served in South Korea spoke about a close friend who had been killed in the Pentagon on September 11. In a halting voice, he said he remained in contact with his friend's daughter. "I still send her the occasional Christmas card, just to check in," he said.

Muhammed's military defense attorney asked Modzelewski to strike both officers from the jury, arguing that they had "implied bias" because each had close comrades who had been hurt or killed by al-Qaida, the organization that Muhammed had pleaded guilty to supporting. She did strike them. After a few hours of legal wrangling, nine jurors remained, and Muhammed's military prosecutors began presenting their case.

Navy Lt. Cmdr. Arthur Gaston, one of the lead military prosecutors, said that Muhammed helped create a generation of terrorists during his four years at the Khalder training camp in eastern Afghanistan. Muhammed served as the camp's deputy commander, Gaston said, teaching aspiring terrorists how to select targets and how to use weapons and explosives. He noted that Khalder produced prominent militants such as Ahmed Ressam, the so-called millennium bomber, who was convicted of trying to blow up Los Angeles International Airport on New Year's Eve 1999; Zacarias Moussaoui, who was supposed to be the 20th hijacker on September 11; and Mohamed Rashad Daoud al-Owhali, a terrorist connected to al-Qaida's 1998 attack on the U.S. Embassy in Kenya.

"Terrorists are not born—they are made," Gaston told the jury. "And the accused in this case, Noor Uthman Muhammed, has made hundreds of them."

Cabot, who has been working on the case pro bono for several years, began his defense by showing the courtroom an undated family photo of Muhammed as a young man in Sudan shortly before the deaths of his parents. Muhammed grew up as a destitute orphan, Cabot said, whose primary comfort came from

his deepening Islamic faith. He acknowledged that Muhammed spent several years at Khalder but described him as a "low-level functionary" whose main duties were cooking, cleaning, and running errands. He stressed that Muhammed had never joined the Taliban or al-Qaida and was on his way home to Sudan when a joint team of Pakistani and CIA operatives captured him in a safe house in Pakistan.

"He's not Osama bin Laden," Cabot said. "He's not the living embodiment of al-Qaida."

Cabot's defense did not sway the military jury. On February 19, they sentenced Muhammed, whose beard is flecked with gray and who is believed to be in his mid-40s, to 14 years of additional confinement at the prison. Fortunately for Muhammed, he won't end up serving nearly that much time. His plea deal with the military prosecutors calls for him to spend only 34 more months at Guantanamo Bay, provided that he cooperates with the government when it brings charges against higher-ranking militants such as Abu Zubaydah, who is accused of providing direct operational support to al-Qaida.

After the trial, Cabot told reporters that Muhammed finally had "some certainty in his life" about when he would be able to leave Guantanamo Bay. If everything goes according to plan, the militant will be released in December 2013, more than 11 years after he was first brought to Cuba. The Guantanamo Bay prison will almost certainly remain long after Muhammed returns home to Sudan.

ADVERTISEMENT