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B6

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

**By Peter Finn and Anne E. Kornblut, Saturday, April 23, 9:40 PM**

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.