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Obama's Countdown to Failure on Guantánamo

by Andy Worthington

Barring some frankly unattainable miracle, this will be the week that President Obama's international credibility, regarding his promises to undo the Bush administration's "war on terror" detention policies, takes a nosedive.

The president began well, [freezing](#) the much-criticized military commissions trial system on his first day in office, and, on his second day, [issuing executive orders](#) requiring Guantánamo to be closed within a year, and upholding the absolute ban on torture that had been so cynically manipulated by the Bush administration.

Almost immediately, however, these bold plans hit a brick wall. The interagency Guantánamo Review Task Force, established in the executive orders, and charged with reviewing all the prisoners' cases to decide who should be charged and who should be released, discovered, as a senior official explained to the [Los Angeles Times](#) in February, that the process would "not be simple" because information on the prisoners was "scattered in multiple locations," and "there is not, and may never be, a single file for each detainee."

This should [not have been a surprise](#). In June 2007, Lt. Col. Stephen Abraham, a veteran of U.S. intelligence, who worked in 2004-05 on the tribunals at Guantánamo — the Combatant Status Review Tribunals — which were responsible for compiling the material that was used to establish that the prisoners were "enemy combatants," [explained, in a submission](#) that eventually made its way to the Supreme Court, that some material consisted of intelligence "of a generalized nature — often outdated, often 'generic,' rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status," and that "what purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."

[He added](#) that most of the unclassified evidence consisted of "information obtained during interrogations of other detainees" (and was often produced in circumstances that were not conducive to voluntary confessions), and that the classified evidence, which was particularly relied upon by the government, was no more coherent. In July 2007, he told the [New York Times](#)

that it “was stripped down, watered down, removed of context, incomplete, and missing essential information.” He also reiterated his complaints about evidence obtained from other prisoners, stating, “Many detainees implicated other detainees, and there was often no way to test whether they had provided false information to win favor with interrogators.”

In addition, as the Task Force convened, attorneys for the prisoners were asked to contribute, and although their submissions were not delivered publicly, it is obvious that they would have pointed out that [the majority of the prisoners](#) were seized not by the U.S. military but by their Afghan and Pakistani allies at a time when bounty payments for al-Qaeda and Taliban suspects were widespread.

They would also have [pointed out](#) that the prisoners were not given [Article 5 competent tribunals](#) under the Geneva Conventions, which are convened when those seized are not part of a regular army. Held close to the time and place of capture, and championed by the U.S. military in every war since Vietnam, these allow prisoners whose status is in doubt to call witnesses to verify whether they are combatants or civilians. [In the first Gulf War](#), following 1,196 tribunals, 886 men were subsequently released.

In Afghanistan, however, the military was prevented by Defense Secretary Donald Rumsfeld (on the advice of Vice President Dick Cheney) from holding Article 5 tribunals, with the result that those who ended up in Guantánamo were never adequately screened, a sorry state of affairs that persists to this day in the cases of many, if not most of the 198 prisoners still held.

Confronted with this disarray, the Task Force responded not with robust skepticism of the Bush administration’s claims, but with extreme caution. By September, [just 75 prisoners](#) had been cleared for release, even though as many as 36 of these men had previously been cleared for release by Bush-era military review boards, and another 18 had been cleared by the courts, after judges granted their habeas petitions. Moreover, in Obama’s first year in office, just 42 prisoners were released.

The habeas petitions actually represented the best hope for a just outcome at Guantánamo, as the District Court judges, [empowered by the Supreme Court](#) to examine the prisoners’ cases, proved [adept at perceiving](#) “generalized” and generic” material masquerading as evidence and [the extent](#) to which “detainees [had] implicated other detainees” (and, it should be noted, [themselves](#)), so that, by the end of the year, when the administration announced that [116 prisoners](#) had now been cleared for release by the Task Force, the prisoners had [won 32 out of 41](#) habeas petitions.

Sadly, the judges made their rulings in spite of [obstruction from Justice Department lawyers](#), who behaved as though George W. Bush was still in power, and were severely criticized by a number of the judges. The reasons for this obstruction have never been adequately explained, but it has always seemed to me that senior officials were more interested in their own executive

review (involving the Task Force's slow and careful deliberations) than they were with the District Courts' objective and authoritative findings.

This was a great shame, of course, because however much senior officials may have intended to clear up the shame of Guantánamo through their own review process, they actually proved overly sensitive to political maneuvering in a manner that did not affect the courts. In April, after bowing to pressure from the White House counsel, Greg Craig (the architect of the executive orders), President Obama accepted a court order to [release the notorious memos](#) issued in 2002 and 2005 by lawyers in the Justice Department's Office of Legal Counsel, which purported to redefine torture, but caved in when critics savaged him for doing so.

Rapidly backpedaling, he [refused another court order](#) to release photos of the abuse of prisoners in U.S. custody in Afghanistan and Iraq, and followed up by quashing Craig's plan to re-house a number of cleared Guantánamo prisoners on the U.S. mainland, who could not be repatriated because of fears that they would be tortured on their return. These men, the Uighurs, were Muslims from Xinjiang province, whose only enemy was the Chinese government, and their release into the U.S. had been [ordered by a judge](#) in October 2008, even though the Court of Appeals, supported by both the Bush administration and the incoming Obama administration, had [stayed that ruling](#) later in the month and [overturned it](#) in February 2009.

By refusing to act on the Uighurs' behalf, Obama not only allowed opportunistic lawmakers to exploit his weakness ([passing a law](#) preventing any cleared prisoner being re-housed in the United States), but also made it [difficult for America's allies in Europe](#) to take any of the dozens of cleared men — from Algeria, Libya, Syria, Tunisia and Uzbekistan, as well as China — when the United States had so blatantly refused to help clear up its own mess.

Spiraling into compromises that betrayed the bold promises with which he had come into office, President Obama followed up by [reinstating the military commissions \(slightly re-jigged](#) by Congress), as a second tier of justice to accompany [federal court trials](#) for some of the men accused of terrorism, and announcing that he would also [hold others indefinitely](#) without charge or trial. This, he said in [a major national security speech](#) in May, was because the men in question “cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States.”

By choosing to accept “tainted” material — in other words, information that was obtained through torture — as a basis for signing up to the very policy of “indefinite detention” that had been established by George W. Bush, and that was forever associated with Guantánamo, Obama conceded the moral high ground that he had promised to regain, and, moreover, demonstrated that his justification for not prosecuting senior Bush administration officials for implementing torture was nothing more than a convenient pose.

Even before he took office, [Obama explained](#), in response to calls to appoint a special prosecutor to investigate the Bush administration's crimes, that “we need to look forward as

opposed to looking backwards.” By May, therefore, he appeared to overlook the fact that, by seeking to use the torture of prisoners at Guantánamo as a reason to hold them indefinitely, he was resolutely looking back, but was choosing to side with Bush and Cheney rather than remaining dedicated to the thorough repudiation of their policies.

From then, it was all downhill. Having refused to challenge his critics head-on, Obama [narrowly avoided a vote](#) by lawmakers in October preventing any prisoner being moved to the U.S. mainland (even those facing trials), and also met resistance when he sought funds to [move prisoners](#) to the Thomson Correctional Center in Illinois.

The final climb-down took place just two weeks ago, when, having finally found the courage to [release six cleared Yemenis](#), Obama faced an onslaught of largely misplaced criticism following claims that Omar Farouk Abdulmutallab, the failed Christmas plane bomber, had connections with an al-Qaeda-inspired group in Yemen. Ironically, this group apparently contained two Saudi prisoners who had been released from Guantánamo by George W. Bush — against the advice of the intelligence services — but instead of playing on this, Obama [caved in again](#), suspending the release of any more cleared Yemenis for an unspecified amount of time, and casting a dark shadow over the deadline for the closure of Guantánamo this Friday, which will be marked not with international praise, but with fears that this vile blot on America’s reputation will still be open a year from now.

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This article was originally published in January 2010.