

**Seth Farber's presentation on "Close Guantanamo or Move Guantanamo North" at Left Forum NYC on May 21, 2016.**

**Panel with Debra Sweet, Seth Farber and Omar Shakir.**

Our program is called "Close Guantanamo or Move Guantanamo North." We're discussing this, of course, because President Barack Obama (yes, I did go to college with him) originally ordered the closure of the detention camp at Guantanamo Bay in Cuba on his first or second day in office... but hasn't quite managed to do it, although recently he submitted a "plan to close Guantanamo" to Congress.

As a starting point, we need to know who is at Guantanamo now. At the moment, there are still 80 men held there, who fall into three categories I'll discuss in a moment. But what we need to ponder is that means around 90% of the approximately 780 men who have been cycled through Guantanamo at some point have been released - either to their home countries or to a third country (not to the United States, with one exception who was actually convicted of a crime in federal court and is now in federal prison). That's right: the worst of the worst, men who we were told had to be restrained in leg-irons and handcuffs and hoods and diapers and blackout goggles because they were so committed to terror that might chew through hydraulic lines on aircraft - men this bad they warranted "a new paradigm" - whatever that is - the worst of the worst have been released at the rate of 9 out of 10, and yet, over 14 years later, by the Dick Cheney standard that justified the torture of these very men (and lots of others), we haven't had another 9-11 type terror incident since, well, 9-11. In short, men were released from Guantanamo by the hundreds, and the world hasn't ended. That's nearly 700 out of 780 or so men cycled through Guantanamo (virtually all Muslim), men picked up not just in Afghanistan and nearby Pakistan, but from Europe, Africa, other parts of Asia... just about everywhere the so-called "war in terror" might be going on - and moved to Guantanamo.

But back to the matter at hand.

The eighty men held at Guantanamo fall into three categories, which I'll term "three c's": cleared, commissions, "can't."

Around 22 men - and this is a changing number - are now "cleared for transfer." Some of them have been in this category for a really long time - many since early in the Obama Administration, going on over seven years, some, I believe, even in the Bush era. Some have been recently cleared by something called "the Periodic Review Board" or PRB, which we will discuss shortly. But by the government's admission, that's at least 22 men out of 80 posing no particular threat to the United States who need to be released, and, I hope, and indeed, the government and I presume President Obama wants them released. Unfortunately for these men, many of them are Yemeni, a country that presents "security concerns", because our close ally Saudi Arabia is at war with Yemen, using primarily American made weaponry to carry that war out, and so, it has been deemed too unstable a place to send Guantanamo detainees home to. Further, you'll recall a few years ago that Yemen was unfortunately implicated in the "underpants bombing" incident, and all transfers to Yemen, and indeed, of Yemeni prisoners to anywhere at all, came to a screeching halt. Anyway, this is 22 men (a group that will hopefully increase, as I'll explain shortly). If we assume that these men actually do get released, 80 less 22 should be about 58.

Of that 58... around 10 are now designated for military commissions, the flawed adjudication system set up to try "war crimes", presumably acts of terrorism. Of those 10, three have been "convicted" by the commissions, though their convictions have been under assault, and the very conservative appeals court in Washington - the Circuit Court of Appeals for the District of Columbia Circuit - a court which has been extremely stingy in granting the habeas corpus petitions of Guantanamo prisoners (to the point of just about never granting them) has nonetheless been extremely critical of the commissions - perhaps there are limits to even what a very conservative court will tolerate, and the commissions are beyond those. That leaves seven men "to be tried" including five men supposedly responsible for being "the 9-11 planners" including the infamous Khalid Sheikh Mohammad. You'll recall that KSM attempted to confess to his crimes and plead guilty. The irony is that had he actually been in a regular federal court, his guilty plea (and perhaps those of other defendants) could have been accepted, and he'd probably be on death row if not already executed, but because the government (and this is, alas, a bipartisan determination) insisted on these commissions in a military context, the "court" could not just accept that plea, and on and on we go - with no particular end to proceedings that have been in pretrial stages for years and probably will be some more, even as, among other things, the defense claims that the prosecution is intercepting its attorney-client communications, or that translators previously involved in CIA torture are now translating for "courtroom" purposes, or other "irregularities" the sorting out of which... is time-consuming. I note that I have interviewed a number of defense attorneys, military and civilian, and two prosecutors, including the former chief prosecutor, and all to a man agree that the

commissions do not provide any semblance of fundamental fairness. Nonetheless, they are a "process" that we vaguely recognize as presenting "charges," some kind of "hearing" and the opportunity to address the "charges," in something vaguely recognizable as a "trial." For the men left - that's 58 less 10, or around 48 (again, this number is, thanks to the PRB's, decreasing)... they don't even have that.

Because these 48 men are the so-called "forever" prisoners. The government tells us that they "cannot be tried, but are too dangerous to be released," or as I like to say, they are "too dangerous to try, and too Muslim to be released." There is the unfortunate whiff of torture in their prior handling that undermines any so-called "evidence" against them, or they are held for reasons that would be too dubious for anyone (except, of course, the courts). For the most part, the government fought the habeas corpus petitions of these men tooth and nail. Nonetheless, the PRB has been granting "cleared status" to these "truly worst of the worst" at the rate of about 75%. A bit about the PRBs. President Obama first proposed the PRBs in 2011 by executive order. Unfortunately, the first PRB hearing did not take place until 2013 - and that, albeit shortly after Obama's reelection, was largely the result of actions by the prisoners themselves, notably a massive hunger strike in which nearly all the prisoners participated at some point,,, as a result of the embarrassment of the hunger strike, the President got the PRB process in motion, and, as noted, so far at least, something like 21 out of 28 men to have PRBs have been "cleared"" because of them. 21 men, I should note, who, for the most part, the government previously fought tooth and nail to prevent their habeas petitions from being granted, arguing that they were the worst kind of terrorists, of course, too dangerous to be release (though, of course... they couldn't be tried). Who are these men?

I can give you one example, a man whose story I know. His name is Saeed Bakhouché, an Algerian national who is represented by my good friend, the civil rights attorney Candace Gorman. For many years, I knew Bakhouché as "Razak Ali", the name he adopted after his apprehension in Pakistan, erroneously assigned to him, but he was urged to keep it, because even correcting his name might be something that would get him in more "trouble." Saeed was a teenager in Algeria, when he went on what we could consider the equivalent of a Mormon mission - he went with a religious group to train and perhaps proselytize Islam in Pakistan. He intended to take a side trip to India to see if he could find a wife - but let's just say he never got there. And so he took his first plane ride with this religious group to Pakistan. Unfortunately, things happened. He lost his passport, he found he couldn't talk to anyone in Pakistan. it was suggested he go to a guesthouse where Arabic was spoken so that he could be understood. And so, he stayed in this public guesthouse - a hotel if you like - for a week or two, until it was raided by a cohort of Pakistani

and American forces, and he found himself in custody. Unfortunately for Saeed, one of the other guests in the guesthouse was someone known as "Abu Zubaydah," who ran something called "the Khaldan training camp," and the government, at the time at least, believed that Zubaydah was a really big man in al Qaeda... over the course of time, the government has never actually charged Zubaydah, and, after torturing him in unimaginable ways, has largely concluded that he wasn't a big al Qaeda guy after all, and is probably just an unfortunate mentally disturbed man (now much more so after the extensive torture he suffered). But for Saeed, his "association" with Abu Zubaydah was enough to justify his detention, according to the United States government as duly ratified by its courts. Mind you, the courts themselves found that Zaeed never carried a weapon, never fired a weapon, indeed, never took a single hostile act toward the United States or its allies ever - but being in the wrong guesthouse at the wrong time is an entirely adequate basis to hold Mr. Bakhouché until either the day the United States government, decides in its sole discretion and beneficence, to release him, or the day he dies.

A word about the court proceedings. I sat in the courtrooms in Washington, D.C. while Candace argued both his habeas petition and the eventual appeal of its denial. And I was struck by two things. First was the handling of the case by the United States Department of Justice, the agency in which I began my own career in the 1980's (yes, during the Reagan Administration). And what I noted was the staffing-- at least five attorneys at counsel table... vastly more than I ever remember appearing on a case (which would usually consist of, oh, one).

But that said, it seemed that Bakhouché's case must be extremely important and carefully handled, and hence, I was surprised when the government's arguments consisted of platitudes about the danger we all faced since 9-11 (danger, I might add, that I faced from a block away from the World Trade Center in lower Manhattan, I'm guessing as close as anyone to 9-11 events in the courtroom unless DOD employees in the Pentagon were there). but I digress-- the Justice Department presented phoned in rote platitudes. As for phoning in, I note that Saeed Bakhouché himself was listening in by telephone at Guantanamo (a translator in the courtroom provided the Arabic for him). And then, I noted that shortly into the argument, the court decided to go into "executive session" and discuss "classified material". The courtroom was cleared of all but court personnel, Candace and the government attorneys, apparently the courtroom was soundproofed and black crepe placed over its windows. And then perhaps a year or two later as I listened to the appeal, something similar happened: .Only this time, they did one better-- they cleared the whole floor. I was with Candace's husband, who asked if he could get Candace a message that we were going to the court cafeteria, but the court officer said he'd love to, but he didn't have an adequate

security clearance and even he had to leave the floor! And so, on the basis of this classified "evidence" - whatever it was - which we have no reason to believe amplified anything beyond Saeed's being "guilty by guesthouse"-- so much for habeas (and that, by the way, implies that even if a habeas petition were granted, it ensures the prisoner's release, which, thanks to the D.C. Circuit once again, it does not-- it is merely "highly advisory" for the government to "use its best efforts" to "resettle" the detainee. Anyway, Saeed is one of around 48 (and hopefully a declining number) of men in this unfortunate "forever prisoner" category.

Of course, one of the supposed legal underpinnings of how we can "legally" hold these men is the equivalent of "prisoner of war" - that is, we can hold them for the "duration of hostilities." Interesting that, as President Barack Obama has just set a record: he is the President who has presided over war longer than any of his 43 (42 counting Cleveland twice) predecessors - longer than Lincoln, longer than FDR, longer than even Johnson or Nixon or Dubya. And so we have "forever prisoners" in a seemingly "forever war." We'll be back to that soon enough.

Which takes us to our "plan." Well, President "Longest War President Ever" Obama's plan to "close Guantanamo," and deal with its 80 men. Ready? First, we will transfer the cleared men-- that's the first 22 (hopefully soon more) men, I described above, either to their home countries or to third countries (never the United States). Then we'll step up the PRBs to review all men who haven't been reviewed yet-- around 4 dozen... let's say that things bog down and the 75% rate slows down to between 50% and 75% cleared, meaning that between an additional two to three dozen men move into the "cleared" category... we can be optimistic, right? That will leave, let's say, between two and three dozen men either in the "commissions" category (and as noted, as flawed a process as the commissions are-- and it is almost universally agreed on that point-- at least its a superficially recognizable process, and admittedly, a few prisoners have used the commissions to enter plea bargains and have since been released)... so, ten in commissions, and let's say, 20 or 30 still "can't be tried but too dangerous to release"... and... here's the plan... wait for it.. we'll mothball the prison at Guantanamo, and move these men to the United States proper, most likely one or more of the civilian super-max at Florence, Colorado, or the military prisons at Charleston, South Carolina or Leavenworth, Kansas. And so, the plan to "close Guantanamo" is actually intended to be a slick public relations move to change the nomenclature - as if the problem were the venue in Cuba and the orange jumpsuits... now, the "problem" will be dispersed in the vast federal system, where, hopefully, its adverse public relations issues will evaporate. Or so goes the plan.

There are some who think that the prisoners might benefit from being moved onto American soil, in the sense of perhaps they will receive more favorable legal treatment than they have from the conservative judges of the D.C. Circuit. I for one, am doubtful of this, for a couple of reasons. For one, the Charleston, S.C. naval brig lies within the jurisdiction of the 4th Circuit Court of Appeals in Richmond, Virginia, considered a very conservative court in its own right, but more importantly, a court that has already sustained the practice of domestic indefinite detention in a case called *al-Marri*. And the other two proposed GTMO prisoner dumping grounds-- Florence and Leavenworth - lie in the jurisdiction of the 10th Circuit Court in Denver, Colorado, which is also regarded as a conservative leaning court. So... from a "legal improvement" standard, I'm not optimistic.

But even if there were actually some marginal benefit to the men of moving them stateside (short of a prompt release, of course)... I still have serious, serious reservations about "Obama's plan." You see, Guantanamo right now is an ongoing public relations sore thumb for the United States government; it was for Bush, it is for Obama. It will presumably be for our next President, regardless of whether that President is named Clinton, Trump or even Sanders. And so, "closing GTMO" by simply moving its hapless occupants to a larger prison in which they can disappear does not strike me as the least bit desirable. You see, we are talking about it. Because Guantanamo is the most visible portion of a largely submerged archipelago-- the American gulag archipelago that consists of Guantanamo itself, its larger relatives Bagram and Kandahar in Afghanistan (and other "war zone" detention facilities in Iraq, and wherever else the United States deems itself as war, which is a whole lot of places), not to mention unnamed military detention facilities everywhere else (including on naval vessels), CIA ghost prisons (supposedly all closed by Obama's orders... but who knows, right?), and of course, our "largest in the history of the universe" domestic penal system, which incarcerates 700 per 100,000 of us at any given moment, that is nearly 1% of our population in federal state and local custody at any given moment... and in that system are, at least hundreds that we know of, of terrorism suspects, many of whom are under "special administrative measures" or "communication management" whereby neither they, their families nor advocates can publicly talk about well, just about any aspect of their cases... a sort of domestic Guantanamo like regime... and even though these suspects have the appearance of "due process," they are often held in solitary confinement and incommunicado... very GTMO like conditions here, already! Many feel compelled to plead guilty-- just to end these practices.

All that said, Guantanamo is a sore thumb conveniently located where it is, and I believe it is in all our interest to keep it that way, because it is a focal point to discuss the bigger issue, and that is that "indefinite detention"-- without charge or trial-- has now become "normal." Most Americans - Lord knows, our

politicians and the courts - take it completely for granted now. Notwithstanding that prior to 9-11, it was unthinkable. And that's a problem in its own right. We have a generation of children who have grown up entirely in a world where the United States has always been at war, where Guantanamo - and indefinite detention - have been the norm. A world where all our activities must be monitored "to keep us safe." Even though, as far as my 53 year old self is concerned, none of this is "normal." And yet...

So we have to talk about it-- and Guantanamo is a useful focal point, that I don't want to see given up-- unless it is properly and justly closed-- that is, by the unconditional release of the cleared men-- the prompt clearance or charging-with-crimes of the "can't" men, and the prompt trial in proper federal courts-- as flawed as that process is, by the way-- for the "commissions" men. And that... would be a good start. A word on that, by the way. It was to my utter shame and disappointment that, when asked by what I recall to be a conservative senator, then Attorney General Eric Holder was asked what would happen if KSM were acquitted after trial, suggested "there is no chance of that." NO! Hell no! the correct, and indeed, the only permissible answer, is that no matter how reviled a defendant is, if the prosecutors cannot obtain a conviction and KSM-- or anyone else-- is acquitted in American courtroom, then they leave the courthouse a free man, period. And there are no exceptions to that. Otherwise, this is not the country that we thought we were living in (which, of course... raises yet other questions).

But back to our story... The "closing of Guantanamo" on those just and proper terms would be necessary but not sufficient to address our larger concern. And that is that this country is at war with the rest of the planet, and our culture is at war with "the Other" anywhere and everywhere. And it should not be lost on anyone that President Obama, now in consultation with his Jesuit trained national security adviser John Brennan, supposedly meets every Tuesday-- or "terrorist Tuesday"-- to draw up a "kill list" of supposed individual terrorists to be targeted by American drones, whether or not they are located in established "war zones"... we know that among the targets have been a number of American citizens to date. This sort of "hit list" would seem to be the stuff of organized crime figures rather than an American President. But it certainly reduces the number of eventually embarrassing prisoners.

So the broader question that keeping Guantanamo-the-sore-thumb open lets us keep asking is "What's with the perpetual wars?" It would seem that our vast empire-- and no nation ever-- not Rome, not Britain at its height, no one-- has ever had its

military forces engaged in more foreign countries than the United States does right now-- our vast empire is fraying from all sides-- it is fraying morally, of course, environmentally, financially, even geo-politically, and it is doing so at incredible cost to all of us. And so the ultimate question posed by the question our program asks-- close Guantanamo or move to Guantanamo North?-- is whether we can go on as a nation in this perpetual war state? Because that perpetual war is costing us, and eating away at the underpinnings of everything we have as a nation, and as it goes on, win or lose... we lose.