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THE PRACTITIONER'S VIEW: CLIENTS AT GUANTÁNAMO

*Martha Rayner**

Many thanks to the students and faculty at CUNY School of Law for organizing this symposium—those of us who represent the men imprisoned at Guantánamo greatly appreciate the opportunity to be heard. This is a special pleasure for me because I am a member of the first graduating class of CUNY School of Law.

My students enrolled in Fordham University School of Law's International Justice Clinic represent four men indefinitely incarcerated at Guantánamo Bay Naval Station. Fordham has been tremendously supportive of this work, which is resource intensive in both time and money.

My goal during this session is to give you some sense of our clients and the broad range of lawyering in which we engage. The men who remain at Guantánamo, nearly 400,¹ now fall into three broad categories. First, there are those who will likely be charged by military commission.² The Department of Defense (DOD) maintains that sixty to eighty men will eventually be charged with war crimes. It is very doubtful the number will be close to that.³ Only ten men have been charged with war crimes since the camps of Guantánamo were opened in January of 2002—over five years ago—and those ten men were charged under a commission system created for the “war on terror” that was held to be unlawful by the Supreme Court in the summer of 2006.⁴ In response to the Su-

* Associate Clinical Professor of Law, Fordham University School of Law. In teaching the International Justice Clinic, I receive valuable assistance from Adjunct Professor Ramzi Kassem and Professor James A. Cohen. The clients mentioned in these remarks are represented by students: Christine Bustany, Kimberly DiLorenzo, Rene Hertzog, Shant Manoukian, Deborah Mantell, Scarlett Obadia, James Schmitz, Michael Siudzinski, and Alexis Teicher.

¹ Press Release, U.S. Dep't Def., Guantánamo Bay 2006 Admin. Review Bd. Results Announced (Mar. 6, 2007).

² Pursuant to the Military Commissions Act, Pub. L. No. 109–366, 120 Stat. 2600 (Oct. 17, 2006).

³ This category may include the fourteen men transferred to Guantánamo in September 2006 from CIA “black sites.” This includes Khalid Sheik Muhammad (KSM) who made headlines recently when the DOD released a heavily redacted transcript of his statements made during a Combat Status Review Tribunal (CSRT). This is not to be confused with a military commission trial—the CSRT is devoid of any semblance of due process.

⁴ *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

preme Court's rebuke, Congress passed the Military Commissions Act which established a new war crimes commission system. Since the passage of this law, only one man has been fully charged.⁵

Eighty-five men fall into the second category: those approved by the DOD for transfer from Guantánamo pending diplomatic arrangements.⁶ Many of those approvals have been in place for multiple years, yet the men continue to languish.

The third category is the 200-plus men who are not approved for transfer, who will never be charged with any war crime, and who face the ever-increasing establishment and institutionalization of indefinite detention. The temporary atmosphere of Guantánamo's prison camps has changed considerably over the past five years. Each passing year Guantánamo is made more permanent, though President Bush claims he wants to close it. There are now two new, multi-million-dollar facilities in full operation. There is a wide expanse of uncertainty for the majority of men imprisoned at Guantánamo.

Three of Fordham's clients fall into this wide expanse of uncertainty. Our fourth client is approved for transfer, but remains in prison for reasons that are kept secret from his lawyers. Two of our clients are from the Kingdom of Saudi Arabia and two are from Yemen. Three are very young, one of whom is married. He has a five-year-old daughter he has never met. One client is older with a wife and four children, who are desperate for information—some news as to what the future holds. We are in touch with the families of three of our clients. One client wants to go it alone and has steadfastly refused to allow us to contact his parents.

Each of the International Justice Clinic's clients represents the deep complexity of the factual and legal issues that our country's Guantánamo policy raises. One has been savagely tortured, one has not been physically abused at all. One was a Taliban soldier and fell classically within the protections of the Geneva Conven-

⁵ This is the Australian, David Hicks, who pleaded guilty to conspiracy, attempted murder, and aiding the enemy on March 26, 2007, and was ultimately sentenced to an additional nine months beyond the over five years he was held at Guantánamo. Two other men, Salim Ahmed Hamdan and Omar Khadr, have been designated for military commissions.

⁶ For the first time, in February 2007, the DOD sent habeas counsel notification if their client was approved to leave Guantánamo. Inexplicably, that notification includes the following language: "As you know, such a decision does not equate to a determination that your client is not an enemy combatant, nor is it a determination that he does not pose a threat to the United States or its allies." (on file with author). Before receipt of this notification, DOD strongly opposed all efforts by counsel to obtain information about our clients' status designations.

tions, yet was never accorded those protections. Another was taken into United States custody far away in time from the October 7, 2001 invasion of Afghanistan and far away in place from the battlefields of that war. One was a low-level employee of Osama Bin Laden, but is not an enemy of the United States. It is difficult to fathom the myriad reasons and motivations that carried Muslims to volunteer and work in Afghanistan before September 11, 2001. The men who were brought to Guantánamo were labeled the “worst of the worst” by then Secretary of Defense, Donald H. Rumsfeld, yet of the approximately 800 men who have passed through Guantánamo, over 400 have been released and we know that close to another 100 are approved for release. Of the 800 men, only one, in all these years, has been convicted of a crime. The government’s campaign to paint all the men at Guantánamo as terrorists is belied by the individual stories that have emerged.

One of our Yemeni clients, imprisoned for over five years and barely eighteen when he was turned over to the United States military, has been approved for release. This approval happened over two years ago, yet our client was not informed of this critical news until a year later, in May of 2006, when he was “processed” for transfer. Believing he was going home, it was not until the last minute he learned that the DOD had designated him a Saudi and he was destined for Saudi Arabia. Since this young man is neither a Saudi citizen nor a resident, the Saudi government refused to accept him. On May 18, 2006, sixteen men were slated to leave Guantánamo—only fifteen made the flight to Riyadh—our client remains at Guantánamo yet another year later.

Our client is a Yemeni citizen. He was born, however, in Saudi Arabia. The military designated our client a Saudi based on his place of birth. The military imposed our way of doing things: citizenship is conferred by place of birth. The designation of citizenship, however, works quite differently in the Gulf States. Though our client was born in the Kingdom of Saudi Arabia, he was born to Yemeni parents, moved to Yemen as a child, and has lived there ever since. Under the customs and laws of Saudi Arabia and Yemen, he is Yemeni.

This young man left home at eighteen to explore Afghanistan. He spent time in a military training camp and worked as a cook in a Taliban military unit. When the United States invaded in October 2001, he immediately laid down his arms and sought to return home. He was captured by Pakistanis who turned him over to the United States military. He never fought the Northern Alliance, the

United States, or allied forces once the United States commenced its war against the Taliban. He was never our enemy—he answered a call to volunteer, a tradition that has deep roots in Afghanistan’s history. And, as much as our national ego wants to make the world about us, this young man’s conduct simply was not about us. He was transferred to Guantánamo when it first opened in January of 2002 and has been in United States military custody for over five and a half years.

Though the International Justice Clinic took on representation of this young Yemeni in March of last year, it was not until nine months later that I was able to meet him. DOD insisted that they had no one by his name at Guantánamo even though we provided an identification number assigned by the military. After litigation and time-consuming wrangling with the Department of Justice (DOJ), which represents the DOD in the habeas matters before the D.C. District Court, I was allowed to meet with my client. In all our communication with DOJ fighting for and then arranging for a client meeting, we were never informed that he was approved to be released from Guantánamo. It was from my client, during our first meeting in November of last year, that I learned the U.S. Military had long ago decided they had no need to keep this young man locked up.

Upon my return from meeting our young client, my students plunged into the work of correcting this mistake. We did not expect a simple resolution because nothing is ever simple when it comes to Guantánamo, but we did expect that this concrete, contained problem could be resolved within a reasonable period of time. Over four months later, our client is still at Guantánamo and still designated a Saudi by the DOD. In fact, he was transferred from one of the more forgiving camps at Guantánamo to the new, permanent Camp 6, modeled after the harshest super-maximum prisons in the United States.

My students attempted to work with the Department of State (DOS), the agency in charge of diplomatic negotiations that precede transfers. We wanted to be sure that DOS knew of the mistake and was actively seeking to correct it. DOS, however, quickly clammed up and referred us back to DOJ, which had already implemented a steadfast policy not to discuss with habeas counsel⁷

⁷ Ironically, since the DoD takes the position that our clients have no right to invoke habeas corpus and the courts have no jurisdiction to hear their habeas cases, both DoD and DoJ refer to the lawyers representing men detained at Guantánamo as “habeas counsel.”

why this young man (or any of the many others approved to leave, but languishing) remains locked up two years after the jailer has determined there is no need for continued imprisonment.

Today, Robert Gates, our Secretary of Defense, was quoted as saying in reference to the men imprisoned without trial indefinitely at Guantánamo, “we would like to turn [them] back to their home countries, but their home countries don’t want them.”⁸ That is not accurate as to our young client. We have met with a diplomat at the Yemeni Embassy on two separate occasions. Yemen will accept the transfer of any man at Guantánamo who is one of its nationals—it is as simple as that. When Yemen is notified that the United States wishes to transfer a Yemeni and the Yemenis confirm that he is a citizen, the Yemenis do not stand in the way of transfer.

There are approximately 100 Yemenis locked up at Guantánamo—only eight have been sent home. Up until recently—just this past December—when a group of six Yemenis were transferred home, the United States and Yemen were at a diplomatic standstill over repatriation because they could not come to an agreement regarding the conditions of transfer. One point of conflict was painfully ironic: the United States requested assurances that those transferred to Yemen would not be tortured. Yemen would not give assurances over and above its law and constitution that prohibit torture. With the release of six Yemenis several months ago, apparently the diplomatic logjam has been resolved. The Yemeni Embassy has told us quite clearly that if the United States asserts that our client is a Yemeni and they confirm he is one of theirs, they will accept his repatriation.

Why is this young man still in a prison thousands of miles away from home, cut off from the world for nearly six years? This is one of hundreds of troubling stories that emerge when a government establishes a detention facility—a prison—purposely situated to be beyond regulation, oversight and law.

⁸ Thom Shanker and David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantánamo Prison*, N.Y. TIMES, Mar. 23, 2007, at A1.

