

FROM THE PRESIDENT

JOHN WESLEY HALL

Time to Close Gitmo's Camp 'Injustice'

The NACDL Board of Directors unanimously approved a resolution at our Tampa meeting on October 26 that the government should close the Guantánamo Bay detention facility, something the government was already considering.¹ Two weeks later, the Obama Transition Team leaked and then backtracked on closing the prison, which includes Camp Justice, the name given to the part of the detention facility where the courtrooms and sleeping quarters for journalists and observers are located.

I decided to write this column about getting on with finally closing this jail and this ugly chapter of American history. Just as I began to write in late November, Judge Richard J. Leon of the U.S. District Court for the District of Columbia, the trial judge in *Boumediene v. Bush*, finally ordered the release of five native Algerians, formerly lawful residents or citizens of Bosnia, from Guantánamo. The judge's November 20 order is the latest installment of the Supreme Court's *Boumediene* opinion handed down June 12, 2008.²

The Supreme Court, in a 5-4 decision, cleared the way for Judge Leon's release order when it held that Lakhdar Boumediene and five of his colleagues had a right to have their detentions reviewed by a federal court under the Great Writ. In deciding that five of them should finally be released, Leon wrote that "the government relies exclusively on the information contained in a [single] classified document from an unnamed source," without evidence to corroborate or assess the source's reliability.³ "To allow enemy combatancy to rest on so *thin* a reed would be inconsistent with this court's obligation under the Supreme Court's deci-



Michael Price, NACDL's national security coordinator, traveled to Guantánamo Bay to observe the detainee pretrial hearings.

sion in *Hamdi* to protect petitioners from the risk of erroneous detention."⁴

It took seven years of litigation just to get this first release order, which the Bush administration will likely appeal to the D.C. Circuit, leaving it to the Obama administration to decide if, and when, and to where, Boumediene and his four colleagues should go and whether the appeal should be dismissed. The courts alone cannot empty Guantánamo because of the glacial pace at which individual cases would be decided. I keep asking: Why do we even have to litigate this? Why can't the government just make the decisions instead of forcing the inmates to litigate them one at a time?

It is a sad fact, ignored or overlooked by many, that most of these detainees will never be prosecuted for any crime. So, we jailed those innocent people for their purported "information." How we extracted that information is another story previously discussed here.⁵

If possible, they should be repatriated to their home countries as soon as possible. But some, like the Uighurs of western China, cannot be sent to their homelands in the foreseeable future because of the risk that they would be imprisoned, tortured, or even executed for political or religious reasons. What have we done to them?

Fervent advocates of preventive detention and secret "national security" courts have forgotten that the right not to be held without charges or conviction is in the very foundation of our form of constitutional democracy. Such abuses by the King's representatives in the Colonies were a primary reason for the American Revolution, the drafting of the Constitution and the Bill of Rights, and the establishment of a representative democracy unlike the world had ever seen. How can we, over 232 years later, forsake our history?

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The biggest challenge is the Yemeni population in Guantánamo. Mohammed Albasha, a spokesman for the Yemeni Embassy in Washington, told the *Washington Post*, “If you solve the Yemeni issue, you solve the Guantánamo issue.”⁶ Is the answer that obvious? It may be. After all, his country is involved in this too. We all know that the Bush administration couldn’t care less what any other country thinks. The Obama administration, however, will undoubtedly consider their views.⁷

Of the 250 remaining Guantánamo prisoners, 101 — 40 percent — are Yemeni. Two have been convicted of criminal charges, with one, “terrorist” truck driver Yassar Hamdan, sentenced essentially to time served and sent home. Two others are among the “high value detainees” currently on trial and represented by attorneys from the ACLU-NACDL John Adams Project. According to an article in the November issue of *CTC Sentinel*, a publication of the Combating Terrorism Center at the U.S. Military Academy at West Point, “The remaining 97 are an eclectic group of intentional, unrepentant combatants and accidental warriors.”⁸ The authors, Gregory Johnsen, a journalist and Ph.D. candidate in Near Eastern Studies at Princeton, and Dr. Christopher Boucek, a Middle East Program Associate at the Carnegie Endowment for International Peace, argue for a Yemeni repatriation program similar to Saudi Arabia’s, which has been fairly successful at rehabilitating Saudis already released from Guantánamo.

The Saudi program rehabilitates repatriated citizens with intensive religious training, housing, employment, and even assistance in finding wives, to prevent recidivism or the desire to return to battle.⁹ As of early 2008, according to the Defense Department, and bought into by Justice Scalia dissenting in *Boumediene*, about 30 of 480 former Guantánamo detainees of all nationalities resumed what the Pentagon calls “terrorist activities,” an overall recidivism rate of just six percent.¹⁰ Even

that number, however, is seriously disputed as overstated or just plain false and maybe none of them have.¹¹

Aside from the accuracy of the Defense Department figures, every day in this country, persons whom authorities consider dangerous are released back into society on bail, probation, parole, supervised release, or having fully completed a sentence of imprisonment, with just a bus ticket and the few dollars they may have saved from their canteen account. The Guantánamo reoffender rate, even in the worst case and unproven scenario, looks pretty good held up against our own domestic recidivism rate.

Guantánamo can be closed in a matter of weeks, not years. Existing legal procedures and principles will suffice. Those detainees who are, or will be, charged with crimes against the United States or against the Law of Nations can be tried in federal or military courts, consistent with the protections of the Constitution we must uphold. Prisoners accused as unlawful combatants deserve the protections of the Uniform Code of Military Justice and the Geneva Conventions. Just give them a fair trial. What can be wrong with that?

If there are some who have committed no provable crime, but who are accused of being “too dangerous” to release, the U.S. Supreme Court has upheld temporary confinement of dangerous individuals, but only after a judge or jury, weighing competent evidence and expert testimony in open court, the fundamentals of due process, has found that the person poses a clear and convincing danger to others (or himself).¹²

Finally, those prisoners who committed no provable crime, who have been detained in error and are deemed releasable, should be sent home to their families with our deepest apologies. If repatriation to their home countries remains impossible, then negotiations with third countries must continue. But for those innocent souls no one will take, we must take them in ourselves because we owe them a special duty under the law. Having made these unlucky, and perhaps completely innocent, persons homeless and stateless, we must face up to our national mistakes and provide them with shelter and security. This is the legal and moral consequence we face for capturing and imprisoning innocent men and causing them to lose their national identities.

Closing Guantánamo shows we are committed to remediating this sad period in our history, and it will start the Obama administration toward regaining the international credibility we have lost

over the past seven years.

Notes

1. President Obama apparently first mentioned closing Guantánamo in June 2007. Elizabeth White, *Obama Says Gitmo Facility Should Close*, WASH. POST June 24, 2007 (“Barack Obama told a Texas crowd on Sunday that he wants the Guantánamo Bay, Cuba, detainee facility closed — a step the Bush administration is considering.”). Now that the Bush administration is lame ducking along, it is Obama’s problem.

2. *Boumediene* in the D.C. District Court is case number 04-1166 (RJL). The redacted judge’s order is available on the opinions public page of the court’s Web site as Doc. 276. It is also at 2008 WL 4949128 (D. D.C. Nov. 20, 2008). See also *Boumediene v. Bush*, 128 S. Ct. 2229 (June 12, 2008).

3. *Boumediene*, Doc. 276, slip op. at 9-10.

4. *Id.* at 11 (emphasis in original), citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (holding that a “citizen detainee seeking to challenge his classification as an enemy combatant must receive notices of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision maker”).

5. John Wesley Hall, *Torturing the Geneva Convention*, THE CHAMPION 5 (Sept. 2008).

6. Peter Finn, *Guantánamo’s Yemeni Detainees Epitomize a U.S. Security Concern*, WASH. POST, Nov. 19, 2008, at A16.

7. President Obama at least recognizes that there are other countries in this world that have valid views about foreign affairs and we should no longer be an isolationist society.

8. Gregory D. Johnsen & Christopher Boucek, *The Dilemma of the Yemeni Detainees at Guantánamo Bay*, CTC SENTINEL 1:12 p. 1 (Nov. 2008). How interesting that the U.S. Army uses “eclectic” to describe prisoners.

9. The Saudi theory is that re-education as to the personal meaning of “jihad” (struggle) and help with re-establishing family connections and a stable niche in society will all but eliminate recidivism.

10. Justice Scalia, dissenting in *Boumediene*, 128 S. Ct. at 2294-95, credited this admitted “minority report” in claiming that the Court’s opinion was “devastating.”

11. See Seton Hall University press release of June 17, 2008, in response to Justice Scalia’s citation of this discredited Defense Department report: “Seton Hall Law Report: Dept. of Defense Data Reveals No Released Guantánamo Detainee Ever Attacked Any Americans / Dept. of Defense’s own data rebuts Justice Scalia’s claim that 30 former GTMO detainees ‘returned to the battlefield.’”

12. See, e.g., *Addington v. Texas*, 441 U.S. 418 (1979). ■

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