

Emi MacLean: “Somalia? You’re Going to Be Here a Long Time.”

I am sitting on a patch of grass, one day after the inauguration of President Barack Obama. There is an airport beyond the barbed wire. On the other side, an ocean.

On the way back from the windward side of the base, where the prison is, we drove by the airport, and there it was. An airplane sitting on the tarmac. For one person, or two, or maybe a few or many more. At some moment in the middle of the night, some poor and yet still lucky soul or souls will be bound and tied and poked and pulled; transferred out of Guantánamo in much the way that they were transferred in.

One young released detainee I interviewed said that he was told he was going to leave, but he doubted it as soon as his departure started. How could he be leaving to freedom, he thought, if his hands and legs were cuffed and his head hooded, and he was being treated like a time bomb about to explode? Guns pointed at him on the plane. When they sent him walking, still hooded, at the airport in his home country, he felt like the executioner was behind him about to discard the evidence of the crime. It was only when the security officer told him to put his head down into the police car, in his own language, that he knew that his life was spared that time.

Why do we create the brutality of a transfer home as the last memory of being in U.S. custody? Why wouldn’t we recognize both the human impulse, and a national interest, in creating a different parting memory?

There is at least the knowledge that freedom is likely closer, and the brutality of Guantánamo is nearing its end. He will again have a name and not just an “internment serial number” (ISN). “I don’t want to know the names, ma’am,” a guard once told me when I asked him if he knew our client’s name or only his ISN. Why, I asked. “It’s all about attachment. It’s like when you’re a kid on a farm and you’re told not to name the animals that you’re going to eat in the future.”

So, seeing a plane at Guantánamo is bittersweet. If someone is getting prepared to depart this beautiful but soiled piece of earth right now, they are being brutalized. And the other side is not so easy either. But they are at least likely to be almost free.

That won’t be any of our clients. Their detention continues.

For many of those left in Guantánamo in 2009, the end point is uncertain. Their fate does not rest on a unilateral decision by the United States that they can be released. Instead their fate is tied up in geopolitics as much as it was in 2002: the single most important determinant of someone’s fate at Guantánamo is his country of nationality.

The men imprisoned at Guantánamo figured out long ago the key that unlocks the prison. They have said that their release decisions would not be about the law, but about politics. We would have to be naïve to ardently disagree.

A few examples prove the point.

The Europeans were all released relatively early on, upon the demands of their governments. Almost all of the Saudis were released soon after. Yet virtually all the Yemenis remain.

A military commission defendant from Australia reportedly had his plea agreement negotiated by the Australian Prime Minister and the U.S. Vice President. Sentence: detention for nine months, with a release coincidentally right before the Australian election; and a “gag order” for twelve months, coincidentally with silence guaranteed until right after that election.

Our Somali refugee client remains at Guantánamo with allegations against him that a journalist described as “baffling.” He is a refugee under the protection of the United Nations High Commissioner for Refugees, but the organization effectively abandoned him and others; the politics of Guantánamo is uninviting. We have tried to repatriate him to Somaliland, a self-declared independent republic with no official diplomatic relations with the United States. It is little surprise that such a transfer is not a diplomatic priority. When early on he told a guard his country of nationality, the guard said, “Somalia? You’re going to be here a long time.” The guard was not mistaken: our client remains.

And those from China, Libya, Syria, Tunisia, and Uzbekistan remain also; they have nowhere to go. In 2009, sixty men from these and other countries are in the unenviable position of fighting to *prevent* their forcible repatriation from Guantánamo to countries where they risk torture or persecution. It would violate domestic and international law to transfer these men to their home countries, but the United States has consistently refused to acknowledge that law applies at Guantánamo. The most that we have achieved is a statement that the United States does not transfer to torture as a matter of “policy.” So men are left uncharged—fearing a transfer to torture; fighting a transfer from Guantánamo; and forced to try to secure safe haven in some unknown country. Stranded, stigmatized, and forgotten.

Over the years, reams of paper have been spoiled with battling legal arguments and occasional judicial decisions. Lawyers trade in ideas, arguments, and heated rhetoric. In the Guantánamo litigation, none of those has ever been in short supply. Sometimes over the course of the last seven years it might have been possible to believe that the battling legal arguments were decisive. After some initial losses before lower courts, Supreme Court victories came by a slim margin, but they seemed almost guaranteed. *Rasul* in 2004. *Hamdan* in 2006. *Boumediene* in 2008. One might easily forget that the first detainees to be released as a result of a court order were three men released in December 2008 to Bosnia, nearly seven years after the opening of the prison. That these three releases remain in the middle of 2009 the only releases resulting from a court decision. That Lakhdar Boumediene, the “victor” in the last great Supreme Court victory, shares a communal living facility behind barbed wire in Guantánamo with Huzaifa Parhat, the “victor” in the last great D.C. circuit court victory.

It was politics that more often won (or lost) the day. For these men, the key to their release lay in getting a country to agree to take them in, and to demand their return. The families of the British detainees traveled around the United Kingdom and the United States; the British government would soon leverage their “special relationship” with the United States to demand the return of the British nationals. A lawyer for an Australian detainee got to know the capital of Australia as well as Guantánamo; the embarrassment of an Australian detained for years without charge would

eventually encourage the Australian government to intervene. A lawyer for the Bahraini nationals made the right allies and got the right media coverage. The Bahraini government would eventually take pride in becoming the first Arab country to repatriate all of their nationals from Guantánamo.

So, alongside the battling legal arguments, we embraced diplomatic channels. We honed the lawyer's other tool: directed banter.

Domestically, hordes of lawyers descended on the U.S. Capitol. We talked to anyone that would listen and praised the rule of law. We targeted the lawmakers' appreciation for "fair process," even if we could not get them to appreciate the humanity of the men locked up on the far side of Cuba. But directed banter has its limits. Our Congress stripped the right of these men to challenge their detention, and refused to reinstate this right; it had to be won (again) through litigation.

Internationally, diplomacy only worked inasmuch as a country had power that they could, and wanted to, wield against the United States in the service of these imprisoned men. A conference in impoverished Yemen brought out families of the imprisoned, the few released nationals, and religious and political leaders. Over tea afterwards, Yemeni government officials asked questions and made promises still waiting to be delivered. In European foreign ministries, government officials expressed gratitude for the work that we were doing, challenged the U.S. preventive detention regime and other aspects of U.S. government counter-terror policy, and hoped that a new president would repair some of the damage caused by the old. From the imprisonment of their own nationals, they learned that U.S. government assertions about prisoners at Guantánamo were fundamentally flawed. But still, they wanted to know, wasn't there some reason that these men were in Guantánamo? "What did they do?" And if these people had no ties to Europe, why should European governments act on their behalf? Effectively: "Why should we care?"

The change President Obama promised is coming, though none too quickly. Politics is still politics, and its players are still players.

The next day, I was on a fourteen-seater flying out of Guantánamo Bay. The plane I spied the night before was still there. On the tarmac. No further transfer was imminent.

President Obama's Executive Orders came promising an eventual closure and buying some time. The weeks and months passed. The new administration's lawyers embraced legal positions that did not substantially differ from the legal positions embraced by the old administration's lawyers: detention at Guantánamo could be legal; the conditions at Guantánamo satisfied international legal standards; and the U.S. decision to refuse to transfer detainees to torture was a question of policy rather than of law.

A single Guantánamo detainee left the prison in President Obama's first three months in office. That man was a British resident, released to the United Kingdom. The trend still holds: threat assessments are used for propaganda purposes; but in reality, country ties are the most important determinant of a detainee's fate.

The transition of presidents—from one whose administration epitomized expansive executive power to one who promised to curtail it—did not produce the change we needed in national

security policy. The executive has still asserted that he has the power to determine when detention ends. He set a deadline of one year more (after seven years of detention without charge), and the public cheered as if this were enough.

As a new president grapples with Guantánamo, and justifies its continued existence and the validity of a mere *promise* of its eventual closure, I find it hard to maintain faith in the relevance of the battling legal arguments or even the directed banter. Our role is both significant and limited. The role of the detainee is much grander: he has become a powerful political tool, a pawn in a global battle.