

Getting Out of Jail Twice:

The Conundrum of Latter Day Afghan Repatriates

or

The Politics of Afghan Repatriation and Release

Friday, September 25, 2009

All Guantánamo Bay detainee habeas lawyers know that about 500 of the close to 770 men ever detained at Guantánamo transferred out, not one has been by court order. The route to repatriation and release is all politics. The pattern of the DOD transfers has been largely undecipherable to the hundreds of savvy outsiders seeking to decode the array of who gets repatriated and who does not.

Counsel for the Yemenis, the largest national contingent at Guantánamo (GTMO) felt that a visit to the home country, meetings with politicians and family and press there had moved the politics in the right direction. Upon their return they discussed their impressions at a June 2007 teleconference of GTMO habeas lawyers.

A plan was hatched to replicate the same kind of visit for the Afghans, the second largest national contingent as this is written. All counsel for Afghans were called and invited to participate. The response was mixed but a delegation was formed with a departure date of early December.

A month before the scheduled departure on November 6, 2007, a suicide bombing took place in Baghlan, an area north of Kabul which has been relatively free of conflict. Several members of Parliament and more than fifty children were killed. Though it had many earmarks of the Taliban, for once they did not take credit. In a nation at war for three decades, this is still a shock of a different order. Three days of national mourning were declared. We feared that the

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

tragedy would suck all the political oxygen out of Kabul, the political oxygen we needed to have any impact. A quick survey of a number of Afghan *cognoscenti* revealed a uniform opinion that we should wait.

Senlis – Afghanistan, a respected think tank, published a chilling report in November on the precipitous rise in violence in Afghanistan in 2007. The report, “Stumbling into Chaos: Afghanistan on the Brink,” states with regard to the Taliban’s boast to be in Kabul in 2008, “that the question appears to be not if the Taliban will return to Kabul, but when this will happen and in what form.”

The trip was put on hold. Over the coming weeks we conferred with our primary arranger of appointments as to the best time to reschedule. Arrival on Friday February 8 was selected. The work week in Afghanistan framed by the Islamic Sabbath of Friday is Saturday through mid-Thursday. Arrival on Friday would get us prepared for a full week of work.

The Scope of the Mission

a. *Governmental Visits to Push the Politics of Repatriation.*

Our arranger of appointments has remarkable access within the government. He counseled us on who to meet with and promised to provide access to essentially any governmental official we desired. He suggested a sequence of meetings. We planned to urge repatriation of all Afghans still at GTMO as the lawyers for the Yemenis had done. Further, we planned to urge a speedy process for those repatriated to Afghanistan but now incarcerated in the Afghan National Detention facility.

b. *Visiting Former GTMO Detainees in their New Prison*

We were mindful that those repatriated after April 2007 have not been freed but have been detained at the Afghan National Detention Facility (ANDF) built with U.S. dollars and standing on

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

the grounds of the most infamous prison in Afghanistan—Pul-e-Charkhi, roughly six kilometers east of the city on the Jalalabad Road.

Some of us have clients at ANDF. Our primary arranger of appointments promised that we would be afforded attorney-client visits. He noted that he had recently dined with the commander of the ANDF, yet another indication of his access to the system. We were impressed and excited at the opportunity. These would be the first GTMO attorney-client visits.

c. *Trying to Understand the Process of Getting Out of the ANDF*

Another wing of the mission was to try to decipher the rules of engagement for release from the ANDF and to see if GTMO habeas lawyers could be helpful to Afghan counsel. Though family visits are allowed, as of this time we understood that attorneys had been denied access.

d. *Assisting Other GTMO Counsel with Client Visits, Witness Interviews and Greeting Videos for Those Still at GTMO*

We also reached out to lawyers for Afghans not traveling and offered to interview witnesses and take video messages for delivery to GTMO. Several lawyers took us up on these offers. Videos were taken of witnesses and for greetings.

The Countdown and a Chilling Development

We contracted with a security company for security advice and transportation. With a delegation of ten, they could provide no more than three rooms. Seven of us were to stay at the Serena Hotel, centrally located, the epicenter of Western visitors and events. It enjoyed a reputation for impenetrable security.

On January 14 four Taliban conducted a frontal assault on the hotel killing eight and wounding more. In the hours that followed those in the know said it must have been an inside job because of the breach of security. As time passed it appeared that it was not necessarily an inside

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

job but was merely very daring. The Danish Foreign Minister who was staying there at the time was unharmed. In retrospect the question is why only seven were killed by the two of the four attackers who breached the security and had free reign of the hotel, while its guests relaxed in the knowledge that security breaches had no precedent. The next day the word came from the Taliban. Now in addition to the NATO forces and the Afghan military and police, all Western civilians were be targeted. The Western restaurants, segregated in substantial measure from the Afghan culture because they serve liquor, experienced a devastating drastic drop in patronage. As one Westerner said, “We are hunkered down.”

Security experts in Kabul later told us that internal security operatives were known to use the gym at the Serena at that time of day. The two who breached the security barrier had headed straight for the gym. This raised a question as to whom the original targets had been. In the coming week our group had a period of research and discernment. The group dropped to six and then five.

Of the five, four were to arrive on Friday. Two of the four arriving on Friday would stay five days rather than seven and had to work on witness statements for their client at GTMO. The fifth member was to arrive on Saturday and had to work on asylum issues for a client which would take her away from the group most of the time. Thus, the group of five had disparate agendas.

Our more diminutive group decided not to stay at the Serena Hotel. We were small enough for four of us to have our lodging in the security company’s compound. The fifth stayed with an NGO. We figured we would sleep soundly at night.

We had made arrangements with a “fixer” known to three GTMO lawyers from previous visits. He is exceedingly astute at evaluating security, negotiating troublesome obstacles, finding

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

people, translating and generally a fun guy to work with. We had a teleconference with him and felt good that he was going to be our nanny, though we didn't use that term.

Transfer in Dubai

Four of flew directly from Atlanta to Dubai, the preferred transfer point for Kabul. Dubai is arguably the most remarkable aggregation of architecture assembled in the past two centuries. One wag describes it as "Las Vegas on steroids." It is that and more. It is surreal.

Dubai International Airport Terminal One is as glitzy as any in the world. As we passed through the terminal, a musical group with two stringed instruments and a chorus of a dozen male voices greeted the passengers. All of the male attendants and helpers throughout the airport wear identical white gowns and head pieces (*gutra*) with a black ring (*igal*) holding the gutea in place. They are very organized and helpful. An ethos of service pervades.

We awoke to catch the shuttle at 5:00 am. I noted in passing to a cognoscente that were flying out of terminal two. He responded with an ominous aside, "Oh that's where all the flights depart to dangerous locations." When we arrived, terminal two bore little resemblance terminal one the night before. It resembled a mix of a third world terminal and a shipping and receiving warehouse. The facilities were shabby and the passenger mix was dramatically different.

People were sleeping on the floor. Many were shabbily dressed when compared to those we had seen the night before. Some of the five departure gates didn't even have a flight number posted, and as it turns out, we boarded from a gate other than that assigned or announced.

While waiting we grabbed a bite to eat and I note the departure scheduled. Just as promised it reads—"Baghdad, Basra, Kabul, Tehran," and the like. We boarded our plane for a short two and a half hour hop to Kabul. I chatted with a very engaging Afghan business man on the flight. We exchanged ideas about saving Afghanistan from a resurgence of the Taliban.

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

Though well read on the subject, I mostly listened, wanting to learn from those who live with the reality every day.

Kabul Landing

The Kabul Airport baggage pickup rivals the bedlam experienced in the worst third world airports. One can scarcely move in the baggage reception area. Large packages come off the ramp with the bags. They come much faster than they are retrieved. Soon the whole area is virtual gridlock.

My bag was not there. I figured three out of four may not be bad for our little group. Our fixer found us, and we ascertained that my bag would hopefully be on the next flight twenty-four hours hence.

We start to our new home in the city. Kabul is war torn. Thirty years of almost constant fighting have taken its toll. Many blocks are empty ruins. In several areas old houses have been converted to secured compounds. The consistent signs of compounds are sand bag bunkers, guard houses, and guards with automatic weapons.

The traffic is not unlike Oaxaca and countless third world cities. There are rarely markings on the pavement, no lanes, and cowboy driving is the norm. Not to worry. Our cowboys were among the best.

Not *every* person is carrying an AK-47 as is often said of Kabul.

The street scenes are both stark and lively.

Boys running between vehicles hawk everything.

Boys on Chicken Street offer to be one's body-guard.

Men with one leg and crutches beg.

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

We settled into our new home at the secure compound. Meanwhile our arranger of appointments had scheduled a dinner at the Intercontinental Hotel with some distinguished persons. As we left for dinner, someone noted in passing that Afghans often invite more people than first indicated.

True to the suggestion after we arrived at dinner, the other guests trickled in. Members of Parliament, Professor Gulrahman Qazi, President of the Lawyers Union of Afghanistan (the national bar association), and a very interesting mix of others who work on human rights issues. Our numbers grew to about twenty. Professor Qazi was given a seat at the head of the table. He gave us a most cordial welcome. He spoke of broader themes of the importance of exchange between countries and the development of long lasting friendships. We were his guests, and he was a wonderful host.

In the coming days, it became clear that our arranger had taken it upon himself to be a host to much of our evening activity. One fete was a dinner in a home attended by half a dozen members and Parliament dressed in the regalia typical of the region from which each came. Another evening was spent in another home hosted by an interesting entrepreneur. He was later identified as “probably the richest person in the country.”

We planned the next few days with our arranger. It was finally clear that we will be visiting the ANDF at Pul-e-Charkhi. Three of us had clients in country. We had authorizations from three other GTMO lawyers visit their clients.

The Politics of Repatriation—Hawks and Doves

What is striking about most of the government officials with whom we met is that they have strongly held points of view on repatriation from Guantánamo and treatment of those detained at the ANDF. As the appointments with a broad array of government officials unfolded,

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

most tended to articulate positions that can be characterized as hawk and dove. The First Vice President Massoud is the younger brother of Ahmad Shah Massoud, the famous “Lion of Panjshir,” probably the greatest national hero of the past generation. Ahmad Shah Massoud was as a brilliant and relentless mujahedeen leader against the Soviets and then against the Taliban. The younger brother is known to be an extreme hawk. After consultation with our arranger, a meeting with him was no longer pursued. We did meet with Second Vice President Kahlili but he was slow to disclose his point of view.

The Doves

Dr. Najibullah Mojadidi is one of the great compassionate spirits. He holds several important government positions. He is a Special Advisor to the President. He is also a member of the President’s Security Council. Human rights is a passion for him. We had a long meeting which ran well beyond what was planned. He asked lots of questions. The more we talked about the evils of GTMO and the importance of a speedy process for those at the ANDF, the more engaged and excited he got. At one point he turned to Professor Qazi and said, “President Karzai needs to hear what they are saying.” Unlike anyone we met, he held out hope for reconciliation with/conversion of the Taliban. He said the he had “converted” 5000 Taliban to the government. He said that he had secured the release of 600 persons, implicitly from Bagram and GTMO.

Dr. A. Yusuf Nuristani is the First Deputy Minister of Defence. He took the meeting in place of Abdul Rahim Wardak, the Minister of Defence. He was adamant saying things such as, “When these men came back home they, should have been allowed to be free to go back to their families.” He was visibly angry that repatriates were still detained. He stated that there is no reason to hold them. He said that holding them put the Karzai government “in conflict with [its] own people.” He stated that the Ministry of Defense was in charge of the custody at the ANDF but

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

was clearly not pleased that his ministry is the jailer. Somewhat similar to Dr. Mojadidi, he expressed the opinion that some of those opposing the government could be brought into the fold with a little effort.

The President of the Parliament was very impressive. He listened very intently for an hour. While he expressed fewer opinions than Dr. Mojadidi and Dr. Nuristani, it was pretty clear that he was strongly supportive of our messages. He was very intent in following what was said and asked probing thoughtful questions.

The Hawks

The hawks were interesting. Collectively they ask fewer questions and were more intent on articulating their view, no doubt being mindful that it runs counter to ours.

The Internal Security Committee of the Parliament is made up of members of both the upper and lower houses. After a brief opening presentation, few questions are asked. In turn each of the eleven members gave a speech which seemed to be both for our benefit and that of the other MPs on the Committee. The dominant position is hawkish. I wondered if the composition of the Committee was by self-selection, i.e., that the hawk sought such an appointment. Some of the opinions expressed are interesting, some moving.

One MP stated that he had to drive an armored vehicle because of his safety concerns and hastens to add that he could not afford such a vehicle. For him repatriation was personal. He stated essentially that if the remaining thirty-five Afghans were left at GTMO, that's thirty-five Afghans he wouldn't have to worry about. He even acknowledged that some at GTMO are innocent, but no matter. He wanted fewer problems. For a person who lived his whole adult life in a series of wars, one cannot easily dismiss his concerns, although we do not agree with it.

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

Another hawkish MP states a theme that we heard several times from various persons. Afghanistan is not ready for democracy. It is sad, but this position cannot be dismissed based on the litany of stories about failures in economic development, corruption, and bribery in government. For him this translates to lack of belief that the Afghans can properly administer the ANDF (if in fact they do) and a consequent point of view that he is not seeking repatriation of those Afghans still at GTMO.

We also met with Dr. Mohammad Qasim Hashimzai, Deputy Minister of Justice for Legal Affairs. He is an attorney and fluent in English. Early in his discourse he talked about the prisoners being “captured on the battlefield,” the kind of statement repeatedly made by high administration officials in the U.S., though not the generals at Guantánamo. He added that they were “serious criminals” perhaps alluding to both those from Bagram and GTMO. Most GTMO lawyers feel as an article of faith that the Seton Hall Law School study seems to have been right in finding that about five percent were battlefield captures and that the vast majority were caught in as part of the bounty program. He talked about those released as having returned to the battlefield and the fact that others are a “potential threat.” This characterization of the detainees is a red flag as to his point of view about repatriation from Guantánamo and a speedy process for those at the ANDF.

He believed that when Afghans are repatriated from GTMO, the government would be faced with blackmail, strongly implying that he would prefer to leave GTMO Afghan detainees in Cuba. He seemed to have little faith in the ability of the legal system to separate out the enemies of the government from those who were not. Curiously, considering that he is an attorney, he acknowledged that he had no knowledge whether any of the GTMO detainees had passed through the legal process at the ANDF.

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

He went into some detail about inadequate financing of the guards and the low salaries leading to demoralization and corruption. He said that Pul-e-Charkhi, of which the ANDF is only a small part, does not meet UN standards. He said that it's understaffed.

Postscript

The original idea of the mission had been to replicate the success of the lawyers for Yemeni detainees who felt they had influenced the media and political climate with their large delegation of twelve GTMO counsel and many family members. When our small band shrank from eleven to five, it seemed that this was less probable.

After the visits to the various government officials, my strong sense is that even if we had been a larger group GTMO lawyers, we would not have changed the political climate. The hawks and doves are entrenched.

Jail #2: The Afghan National Detention Facility at Pul-e-Charkhi

The United States constructed a new block of Pul-e-Charkhi Prison in Kabul with U.S. dollars. Pul-e-Charkhi is infamous, in part because of atrocities committed during the time of Soviet occupation. The new block is said to be built up to U.S. standards. Completed in 2007 its function is to receive transfers from the Bagram AFB detention facility and GTMO. The former constitutes the preponderant majority of the inmates at roughly a ratio of five detainees from Bagram to one detainee from GTMO.

A legal dispute has arisen as to the dominion and control of the ANDF. The *Ruzatullah* suit was brought in U.S. district court for the District of Columbia challenging the legality of detention of two persons at Bagram. When one of the two *Ruzatullah* plaintiffs was transferred to the ANDF, the DOD suggested mootness, arguing that he was now under the sole dominion and control of the Islamic Republic of Afghanistan. This allegation was challenged by the declaration

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

of Ahadullah Azimi, a human rights lawyer for the International Legal Foundation, who tried unsuccessfully to see Ruzatullah and concluded after a number of attempts that the detainees were being treated differently and in violation of the Afghan Constitution because of “the involvement of the American military.”

The U.S. government’s position was articulated in the declaration of Colonel Anthony Zabek who stated that the ANDF was “entirely controlled by the IROA Ministry of Defense” and that his role and that of other U.S. personnel was merely one of “mentoring to coach, teach, and train the Afghan National Guard Force about detention operations consistent with international standards.”

Since April 2007 we believed that all Afghans repatriated from GTMO were sent to the ANDF. Three of us wanted to see our clients there and had co-counsel agreements from other GTMO habeas lawyers whose clients were believed to be there. We were promised attorney-client visits by our arranger for many months. Shortly before departing for Afghanistan, I received emails from Colonel Zabek challenging our right to visit.

True to his promise, our arranger took us into the ANDF where we met Commander Sufi, who was in charge of the ANDF. He called to the cell block to bring our clients to a nearby interview area.

Much to our surprise, as we were waiting for the clients to be brought down, an U.S. officer put his head in the Commander’s door and asked if this was a private meeting. Curious, we said it was not. In walked two men in U.S. uniforms. One approached me and shook my hand. The name on his uniform was “Zabek.” Before I had identified myself, he said, “You’re Spriggs, aren’t you?” I answered in the affirmative and responded, “You’re Col. Zabek. You’re famous,”

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

recounting that he was well-known to GTMO habeas counsel because of his declaration in *Ruzatullah*.

The Colonel seemed displeased at our presence and a bit taken aback but was very loquacious, asking about our mission and telling us about his. At one point he volunteered that the U.S. role was one that advocated “transparency.” This is scarcely a word which GTMO habeas counsel had come to associate with the DOD. Seizing the opportunity, I said that what we would really like is a complete roster of all GTMO detainees repatriated to the ANDF and all dispositions, if any, facts previously unknown to us. He said that he could get that for us.

We went to visit our clients. We entered a non-contact (glass barrier) visiting room, but were led through that room into a smaller one. There were our clients and Afghan guards. My client Omar seemed shocked to see me nine time zones away from GTMO but very gratified. While at GTMO, he had expressed an interest in adding English to his existing repertoire of four languages. I had been unable to bring him books at GTMO for that purpose. I had brought him a book to learn English through pictures and a Holy Quran with the English next to the Arabic.

We had two interpreters for six clients so we divided into two groups of three. The visit was all too brief. The men talked about their displeasure at still being incarcerated after liberation from GTMO. One said that it was “just like” GTMO. I inquired how so. He said that all the hands-on guarding was by U.S. personnel, something we had never heard about. When asked what the Afghan guards did, the response was that they essentially stayed out of the way of the U.S. personnel. I had imagined that there would be a serious U.S. presence in the general process at the ANDF. I had not thought that day to day guard activities were conducted by U.S. personnel, if such turned out to be the case.

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

As the interviews progressed, I noted that the Afghan guards listened very intently and seemed very sympathetic to the plight of the detainees, on occasion nodding knowingly when some negative thing was mentioned. One produced a paper which purported to be his permission for release. He asked why he was still incarcerated, a question to which we had no answer. The interpreter said that the paper looked very official. I promised to contact their Afghan counsel and pose this question.

Follow-up Visit to Camp Eggers

I called Colonel Zabek to confirm his kind offer of the list of all GTMO repatriates who had been detained at the ANDF. He was unclear as to whether could give it to me. When asked what would determine whether he could, he stated that he had to clear it with legal counsel. I figured that was the end of the offer. To my surprise he called the next day to say that legal counsel had no objection. We discussed setting a meeting at Camp Eggers. I suggested we meet right away and he agreed.

Camp Eggers appears to be an immense compound. It houses both U.S. military and troops of other coalition partners. It is in downtown Kabul not far from the U.S. Embassy and the Palace. To the first time visitor, it is a gigantic maze of walls with no long vistas. A U.S. Passport gets one through the first few checkpoints. At the first checkpoint for U.S. nationals, one deposits one's cell phone and the battery is taken out. Evidently, battery compartments are potentially filled with explosive devices.

A friendly minder was sent to escort me to Colonel Zabek. When we arrived at the colonel's office, there was a group welcome. In addition to the Colonel, there was an official from the U.S. Embassy with whom I had communicated and Colonel Hogan, with whom I had also spoken.

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

After a little general chat, I asked about “the list.” Colonel Zabek said that he thought I had only sought the dispositions. I reiterated that I had been very clear twice about the list and the dispositions but figured that he had thought better of his offer. I figured that was the end of the list. After several minutes of discussion of the previous offer, much to my surprise, he relented, went in the adjoining room and reappeared with the list which appeared to be a subset of an Excel spreadsheet. Colonel Hogan orally added the three dispositions to date: one acquittal and two guilty with “time served,” i.e., the “time served” at GTMO. I thanked them.

Then commenced what I had anticipated – a “soft deposition” of the visiting GTMO habeas lawyer. I tried to be forthcoming and friendly, but basically limited my answers to things that were public record.

The exception to the public record was our interest in the piece of paper which one detainee had shown us that purported to authorize his immediate release. I asked what this might be. Colonel Zabek said it sounded like a forgery, despite the fact that our interpreter had said it looked very official. He said that perhaps the guards should dump his cell and take away the document. For a second I feared I had put the prisoner in harm’s way. Then I responded, “Well, Colonel it would probably not be a very good idea to dump the prisoner’s cell, because the document was seen by our arranger and he feels it is authentic. Since he works out of the Office of the Secretary to the President, if the cell is dumped and the document taken, the next thing he is going to do is walk into President Karzai’s office and complain.” The idea of dumping the cell seemed to fade from the conversation.

I thanked them again for the list and departed.

Trying to Craft a Role for GTMO Habeas Counsel in the ANDF Proceedings – Hands Across the Sea

Kent Spriggs: The Conundrum of Latter Day Afghan Repatriates or The Politics of Afghan Repatriation and Release

To the collective credit of the GTMO habeas counsel, of the first twenty-two Afghans repatriated and detained at the ANDF, counsel for twenty maintained an attorney-client relationship. The trials are held at the ANDF, not in a normal Kabul courtroom. Those observed by a human rights advocate were around thirty to forty-five minutes in length, and no witnesses were called by either side.

To date, all legal defense in proceedings for those at the ANDF has been provided by lawyers for the International Legal Foundation. They are overworked. The sequence of proceedings favors the prosecution as they have materially earlier access to the U.S. file than the defense. A human rights observer of trials of Bagram transferees inferred that the prosecution seemed to be working from a U.S. script. If the same pattern holds true for trials of GTMO transferees, that script would probably be reflective of the CSRT and ARB allegations.

If this is the case, it would give the Afghan defense lawyers a good head start for GTMO habeas counsel to summarize the CSRT/ARB allegations. Counsel could point out which allegations are inconsistent. Further, cleared client testimony and testimony of known witnesses could be summarized showing that in most instances the allegations are false. The International Legal Foundation Executive Director feels that this would be of value. Some GTMO counsel have already commenced such a summary for their Afghan counterparts. This idea has been circulated to habeas counsel for Afghans.