

NETROOTS NATION: CLOSE GITMO AND USE THE LEGAL SYSTEM

I'm going to be liveblogging today's panel discussion, Close Gitmo and Use the Legal System at Netroots Nation 2010. Panelists featured are Adam Serwer, Matthew Alexander, Rep. Jerry Nadler, Vince Warren, and your very own emptywheel, Marcy Wheeler. (Video of this panel may be available later, technology permitting.) This is a rough paraphrase, not a word-for-word transcript.

Wheeler: Lists good news and bad news about the topic of detention and Gitmo; we have seen some positive changes but over the big picture, no real change.

Nadler: Very frustrated as not much has happened this year. Notes that the administration has not behaved as anticipated prior to taking office. Congress has enacted bills to restrict transfers of detainees; although it's possible to try detainees in court, nothing has happened.

Gitmo used as a tool of political fear. 192 detainees remain at Gitmo; 35 have been identified as those who could be charged with offenses, the majority could be released.

President has outlined procedures which are different, but outcomes are the same. Detainees may be charged, tried in civilian court, tribunals, or detained indefinitely – simply because we say a detainee is dangerous. Habeas corpus has not been recognized. We still have people who have been cleared altogether who have been detained because we can't release them. The refusal to take some of these people into the U.S. has made it difficult to negotiate with other countries to take some of the same. If they are not dangerous, there's no good reason why they cannot be released into the U.S.

Gitmo is not under writ of habeas corpus; also a

question as to whether Bagram airport is also under writ of habeas corpus. Also in contention whether black sites are as well. May be maintained that battlefield sites may not be covered by habeas corpus, but what about detaining individuals seized in Sweden? Or case of individuals who were taken into detention by locals and turned over for bounties.

Prisoner of war is used as an excuse for indefinite detention, but it's the war is not clear. No uniform, taken away from battlefield, no change over the year on this issue. Not an optimistic assessment.

Server: Not one of the happier panels here at NN10 because so little has happened. One of the places where uniformity of Republican opposition has been affected has been on issue of Gitmo; even Bush said Gitmo should be closed, Republicans agreed, and yet the resolve has changed. The lack of urgency now gives impression that Gitmo is not as bad as it is.

Alexander: Aware that al Qaeda uses Gitmo as a recruiting tool, showing our hypocrisy in detaining people, making this a key reason why Gitmo should be closed. We compromised our principles in using and keeping Gitmo open, partly out of fear, partly out of prejudice against Muslims and Arabs. One of the fundamental reasons Gitmo should be closed is one the left doesn't use – it should be closed for patriotic reasons. It should be closed to remove it as a recruiting tool for terrorism.

Warren: Points out that Nadler is his congressman; Nadler had fought the defunding of ACORN as an unconstitutional bill of attainder. Believes Alexander's point about Gitmo as a recruiting tool is important, but brings a couple other perspectives to the table. This is Obama's Guantanamo. Previously fought against the Bush administration on the Boumediene case, but now this is the current administration.

Roughly 177 men in Gitmo, some have been cleared. The underwear bomber incident stopped

the release of the 60 men cleared, brought process to a halt.

Obama's story is about what we hear as well as what we don't hear. Chinese Uighurs were ordered released as they were no threat; Bush administration fought the order. Now the Obama administration maintains that the Uighurs should not be released because China might detain and torture these individuals. Yet Obama administration has vigorously opposed release Uighurs into the U.S. as it was in conflict with immigration laws. Abdul Aziz Naji has been injured, poorly treated, could be released to Algeria, but could be tortured or killed by one of two factions – Algerian government or fundamentalists, which Naji described as being caught between two fires. His case went to Supreme Court, was released to Algeria but “disappeared” as no record of his arrival in Algeria has been recorded. A source has said Naji has been taken into custody for “routine interrogation” but the Algerian government itself has not acknowledged. This is a situation which Obama administration claimed it was trying to get away from.

Obama administration is now itself caught between two fires.

(cont'd.)

Wheeler: one difference between Bush and Obama administration was that Bush said the president can do whatever he wants. Obama says that AUMF provides authorization. The courts have made decisions which go in either direction, but more often in favor of the AUMF. There are 50 al Qaeda members in Afghanistan. Kagan agreed in questioning that there is a continuing war. What about the AUMF, when does this war end?

Warren: We have failed to get a court decision about the war. Bush hedged his bets with the AUMF (which received congressional supports to If we can say we've exceeded the authority of the AUMF, then we can make a case for the release of detainees. But a new AUMF is likely

to be worse. Obama admin appears to want a new AUMF as well as legislation on Gitmo and detention.

Nadler: Question went a different direction. Courts are likely to favor president and refrain from limitations due to war.

Wheeler: If they withdraw from Afghanistan (ending the war) they will lose their "super powers" and aren't likely to do so.

Warren: *(sorry, I missed this brief comment)*

Audience: What has John Brennan been telling congress?

Nadler: Doesn't know what Brennan has told congress.

Wheeler: Current admin looks like Bush in part because people like Brennan continue to shape the intel for administration.

Serwer: Brennan is an interesting character as he has tried to improve relationship with Muslim community. Courts pushing back at military commissions because of use of non-war arguments/charges like material support. Others has said this would happen, like Jack Goldsmith. Military Commission unsustainable.

Nadler: Military Commissions untested, material support not considered a war crime, not typically used before commissions. Argument made that detainees "do not deserve" a civilian trial, that trying them in civilian trial is "giving them something." Everyone is entitled to a civilian trial if they are not war criminals but terrorists.

Warren: Everyone knows this is a straw system. Obama administration can be quickly put into a charade position in which it adheres to military commissions.

Serwer: Bush tried most terrorists in civilian courts. This is most relevant piece of information which never appears in media reports. Wants to discuss the "liquor store"

argument used by Lindsey Graham (“these guys didn’t rob a liquor store”). Bellinger said that DOJ was sending down personnel to train military commission personnel to try terrorism cases, which should tell us plenty, that military commission is not suited to trying terrorism.

Wheeler: Do you want to talk about Marc Thiessen’s argument that detainees don’t deserve civilian trials?

Alexander: Malcolm Nance talked about about al Qaeda as a post-Islam cult; in trying these individuals as warriors – holy warriors – we elevate their position, should simply try them as criminals.

Wheeler: The discussion on this topic has been depressing, with Cheney making it into an industry. The messaging asks, “don’t you want to kill Khalid Sheikh Mohammad?” Don’t want to kill KSM, wants to try him.

Nadler: Right to want to try this on the merits, but the Republicans aren’t going to support this.

Wheeler: Polling shows that the Dems do better when we try detainees in civilian court.

Alexander: Can go after the efficacy argument, but we can also go for patriotism as an argument by adhering to American ethics.

Audience (Daphne Eviatar): What might work, how to we change the conversation?

Nadler: Arguments will not win the day on this, Obama should try KSM in civilian court and KSM gets a stiff sentence out of this. They simply have to do the right thing, people need to see this and this will change the conversation.

Eviatar: Do you see this happening, maybe after the election?

Nadler: Holder wants to. Tremendous push back, police commissioner in NYC said security measures to be taken would shut down Manhattan. Could certainly hold a civilian trial in

Southern District of New York, same venue as where crime occurred, crime occurred in several places, could look at Newark, Boston, where planes were hijacked. Important point that civilian trial held, and in constitutional venue.

Serwer: Once you do something like this, you take away the boogeyman factor. This administration, when faced with this problem, has instead retreated.

Audience (Jason Leopold): Can you shed light on the politicization? Republicans aren't calling for this, it was Democrats who largely supported defunding ACORN, it appears to be Dems supporting the military commissions.

Nadler: Doesn't know more about the politicization beyond what's been written. Decision to prosecute KSM and terrorism should be made in the DOJ, not by White House or other entity. In re: ACORN was one of the most shameful situations; there may have been challenges of growth and management of this useful organization, but this was about a smear. Democrats in general didn't push back but joined the smear.

There is a problem obviously to get anything on the floor of the House that will be interpreted by 30-second television ads that could be construed as "Congressman so-and-so supported terrorism." There is an effort to protect the marginals.

Wheeler: The numbers so far have kept a Lindsey Graham-John McCain nutso amendment from passing; the Dems threatened have been blue dogs (good riddance). but the numbers are getting closer.

Nadler: Was commenting

Audience (Rachel Meyers, ACLU): Is Article 3 trials in Guantanamo the best we can hope for?

Nadler: Not constitutional, trial in that case doesn't happen where crime occurred.

Wheeler: The government has been trying to

prevent the facts about the interrogator who threatened Omar Khadr with rape and death – facts that show the interrogator was involved in detainee deaths – from being disclosed. Civilian courts typically have more access.

Nadler: Concur on access.

Wheeler: Is Ghailani's trial, Abdulmuttalab's trial going to remove the boogeyman factor?

Serwer: Aside the ability of al Qaeda to claim legitimacy under Islam, these are whackos, some of which are recent converts to al Awakism. It's like Branch Davidians being called Christians.

Warren: What is the real fear? the radicalization is a red herring. It's used as leverage. In a pre-9/11 world we knew there were many small groups who were radicalized on their own who'd light their underwear on fire. Other attempts have been labeled subsequent waves of attacks instead of independent events. We conceded defeat to this thinking which will affect us for years to come.

Serwer: Republicans are fighting hard against KSM's trial in NYC because they lose their fear chip if KSM successfully tried and humiliated in court.

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That's a wrap, folks. Again, this is a rough paraphrase and not an exact transcript. There are several comments which were not captured (and in some cases were quite funny) that video will reveal once we have video processed and loaded.