THE NEW GITMO MEMORANDUM OF UNDERSTANDING: OBAMA FINALLY FIGURED OUT HOW TO CLOSE DOWN GITMO!

Yesterday, the NYT weighed in on a new practice at Gitmo: the requirement that lawyers whose clients have lost their habeas case sign new memoranda of understanding governing the terms of access to their client.

> The Obama administration's latest overuse of executive authority at Guantánamo Bay is a decision not to let lawyers visit clients in detention under terms that have been in place since 2004. Because these meetings pose little risk and would send a message about America's adherence to the rule of law, the administration looks as if it is imperiously punishing detainees for their temerity in bringing legal challenges to their detention and losing.
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> [snip]
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> Four years after the Supreme Court ruled that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," the government may be calculating that it can decide what "meaningful" means.
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> But if the wars where detainees were captured have been to defend American interests, surely the country has an interest in an unequivocal commitment to

> the rule of law, including full legal representation for detainees.

The NYT got closer to ascribing a motive and envisioning the impact of the policy than Lawfare's several posts on the subject. But I think both are missing what I suspect is the point.

Aside from giving detainees little recourse over issues affecting their own treatment (which is most urgent, in my opinion, to monitor the mental health of the detainees), the MOU will have three effects:

- Gutting Obama's own promise to provide Periodic Reviews to detainees
- Eliminating the risk that detainees will pursue justice internationally
- Burying Obama's biggest failed promise

Gutting the Periodic Review Boards

As Jack Goldsmith reminded back in April, a year earlier Obama had issued an executive order promising a Periodic Review Board for all detainees.

> In March 2011, the Obama administration issued an Executive Order (13567) that created a process of Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force." The "review and hearing" process was designed to operate on top of the habeas review process and the other internal review processes for GTMO detainees, and to facilitate release of detainees who were not "a significant threat to the security of the United States." Bobby analyzed the

> EO here and here, as did Tom Nachbar here.
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> The EO states: "For each detainee, an initial review shall commence as soon as possible but *no later than 1 year from the date of this order*" (emphasis added). I have heard little about these reviews since last Spring, and the deadline for their commencement passed last month. Has the administration carried out its pledges under the EO?

Irrespective of the delay, it was crystal clear by April that Obama didn't put much stock in his promise to tie continued detention to the risk a detainee posed. After all, the Administration was willing to gut habeas with a detainee who, on multiple occasions, under both the Bush and Obama Administration, was cleared for release. When Obama did release the PRB guidelines, the timing involved—providing for just 4 months of election season during which the PRB would function (one of which has already elapsed)—made it clear it wasn't actually supposed to function.

But the whole thing is supposed to be driven by new information; it's not a reconsideration of information already in the files. And not only does the PRB determine the priority in which they'll consider cases, they get to decide whether any information from the detainee is relevant.

> Any additional relevant information (as defined in the Glossary) that has become available since the later of the Reference (k) review or prior PRB review, including information discovered as a consequence of information presented by the detainee's personal representative or private counsel.
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> [snip]
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> (1) The personal representative and private counsel, if any, shall be

> provided with advance notice of the PRB review, as well as a reasonable opportunity to meet or talk to the detainee to discuss the PRB process and the information the detainee may wish to submit.
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> (2) The personal representative and private counsel, if any, may prepare a written submission for the PRB, which may include a written statement from the detainee. The written submission shall include all factual information that the detainee intends to present in the PRB proceedings. Such submission shall only contain information relevant and material to the determination of whether continued law of war detention of the detainee is necessary to protect against a continuing significant threat to the security of the United States. Relevance of the information is determined by the PRB.

And now the MOU warns that lawyers cannot assist their client for PRB matters under the MOU.

> Undersigned counsel and translator understand and acknowledge that access to the detainee post-habeas is for the sole purpose of obtaining the detainee's transfer or release from detention by the United States Government at Guantanamo Bay through potential habeas corpus or other litigation in United States federal courts or through discussions with the United States Government. Undersigned counsel and translator also understand that access under this MOU is not authorized for any other purpose, including assisting or representing that detainee in connection with military commission proceedings or Periodic Review Board proceedings under Executive Order 13567 (access for these purposes shall be governed by a separate set of procedures).

In effect, this means there is no way for a lawyer who knows a detainee's case best to try to present information to the PRB during its 3 remaining months.

The PRB, then, becomes nothing more than a campaign prop, in place for election season, but designed so it is almost impossible for it to do any good.

Eliminating the risk that detainees will pursue justice internationally

More troubling still is the second half of that above paragraph: the MOU explicitly prohibits lawyers from providing assistance to their clients for matters pertaining to anything aside from transfer. This in effect solidifies a practice already put into place through operation of the legal mail process, in which the government has prevented detainees from getting any documents pertaining to other kinds of legal challenges.

I'm most familiar with this happening in the context of Abu Zubaydah, who will, of course, never be transferred, partly because he's an extremist though not the high level al Qaeda figure they used to claim he was, partly because the government wants to hide how his torture and detention made him crazy.

But the government has repeatedly refused to allow AZ's legal team to get other legal documents to him. They refused to let him have a document to sign that would authorize a lawsuit in Lithuania.

> Attorneys for Abu Zubaydah say they have been trying to mount a meaningful defense for the "high-value" detainee, who has been in the custody of the US government since March 2002, and have also sought legal remedies outside of the United States to hold accountable those who were complicit in his rendition and torture.
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> But the attorneys claim their efforts

> have been stymied by the Justice Department (DOJ), which refuses to turn over to them critical documents they need to press forward with Zubaydah's case.
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> For example, late Thursday, Zubaydah's legal team filed a lawsuit against Lithuania with the Strasbourg-based European Court of Human Rights (ECHR), the leading human rights tribunal in the world, over the country's failure to reopen an investigation into its role in Zubaydah's rendition to a CIA black site prison in Lithuania and the torture he was subjected to there in 2005.
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> But the DOJ on Wednesday told Zubaydah's lawyers they would not declassify and turn over to them a power-of-attorney form Zubaydah signed earlier this year authorizing his legal team to file the lawsuit against Lithuania on his behalf.

And they've tried to do that to prevent AZ from giving permission to release his FBI file.

At one level, this serves simply to ensure that no other country will hold American responsible for the torture it committed. At another level, it serves to prevent the full stories of Gitmo detainees from becoming public. In effect, it turns Gitmo back into the black hole that Rasul and then Boumediene, briefly, opened up.

Burying Obama's biggest failed promise

And all that happens in time for election season!

Obama made a bunch of promises before he got elected he has failed to keep: passing a public option and not passing a health insurance mandate, fixing the FISA Amendments Act, addressing climate change, renegotiating NAFTA.

But none of those promises was accompanied by the kind of first day theater as his promise to close Gitmo. Obama got into office, and the

first thing he did was implement a promise to close Gitmo.

And then (as Daniel Klaidman's book makes clear) he failed to do any of the political things he needed to do to make that happen.

That's probably the biggest effect of the this MOU: closing down Gitmo, as a press item or a political football, for election season (at least). It's effectively as much a political gimmick as it is a legal document—though of course it has pretty serious legal consequences.