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Banana rats at Guantanamo Bay

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By Charles R. Church

That's what Carol Rosenberg warned me about on a recent Friday afternoon. We were talking about our upcoming trips to Guantanamo for the Al Nashiri proceedings, and she was "showing the ropes" to this rookie. I listened closely, for Rosenberg, the Miami Herald military-affairs reporter, has spent more time at the detention facility than any other journalist. I looked askance when she warned me to bring warm clothing, but she had good reason to: The air in the tents at Camp Justice where we will sleep is kept very cold, she told me, and intentionally so, because frigid air keeps the banana rats out.

I had gone to Fordham Law on May 10 for a discussion titled: "Crisis at Guantanamo: Will the Prison Ever Close?" By now, everyone must be aware of the hunger-striking at the facility. Rosenberg put the number at 100 or so, and David Remes, the former big-firm lawyer who has been litigating pro bono on behalf of detainees since 2004, added that the striking has gone on for four months, and that some detainees have lost 60 pounds.

Just 166 detainees remain at the facility, and only seven are being prosecuted — five, including the notorious Khalid Sheikh Mohammed, for the 9/11 attack, and Al Nashiri for the assault on the USS Cole. Eighty-six have been cleared for transfer (discharge to another country under controlled circumstances), but are going nowhere. Of the remaining 80, Rosenberg explains that 46 fall into the category created by an Obama Administration Task Force: too dangerous to release, but ineligible for trial for lack of admissible evidence. I have not studied all these cases, but I believe the latter refers, in large measure, at least, to the unusable confessions wrung from them by Bush-era torture. President Obama on May 1 specifically rejected such a category by stating: "[T]he idea that we would still maintain forever a group of individuals who have not been tried, that is contrary to who we are."

Of the hunger-strikers, 27 are being force-fed, twice a day. This entails strapping and shackling the detainee to a chair, so he is completely immobile, then snaking a tube through his nose, and down through his esophagus into his stomach, so that Ensure can be pumped in. No doubt this is done to avoid the point described by panelist Dr. Gerald Thomsen (a member of the Constitution Project, which recently issued a revealing bi-partisan report on Detainee Treatment), where the body — having exhausted its fat supply — begins to feed off its muscles, including the heart. But Dr. Thomsen was clear in pronouncing the procedure, when done without undue force, "cruel,

inhuman and degrading.” That opinion is no small thing, as the Detainee Treatment Act of 2005 brands unlawful precisely that kind of treatment. When done with excessive force, Thomsen said, the procedure would constitute torture.

Here’s how Guantanamo detainee Samir Naji al Hasan Moqbel described being force-fed in his April 14, New York Times op-ed piece:

“I can’t describe how painful it is to be force-fed this way. As (the feeding tube) was thrust in, it made me feel like throwing up. I wanted to vomit, but I couldn’t. There was agony in my chest, throat and stomach. I had never experienced such pain before....”

That’s why I now believe President Obama will close Guantanamo before his term expires, or at least sharply reduce its population. The man who taught Constitutional Law at University of Chicago Law and who on Aug. 1, 2007, vowed that, as president, “I will make clear that the days of compromising our values is over” simply cannot allow his legacy to be tarred in such a way.

Next time, I will describe the barriers erected by Congress and other obstacles to closing Guantanamo, and what President Obama can do to surmount them.

Charles R. Church is an attorney practicing in Salisbury who focuses primarily on Guantanamo Bay, detention, torture, habeas corpus and related issues.

(Part Two follows on next page.)

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Banana rats at Guantanamo Bay (Part 2)

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By Charles R. Church

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...

On his second day in office, President Obama signed an Executive Order requiring that Guantanamo be closed within a year. But Congress made it difficult to transfer men out of Guantanamo, and other realities got in the way. Currently, as Carol Rosenberg and Michael Doyle wrote in the May 10 Miami Herald, the 2013 National Defense Authorization Act prohibits using military funds to transfer detainees to the United States. It also prohibits transfers to any foreign country unless the administration complies with what David Cole on May 2 in the New York Review of Books called "onerous 'certification' requirements — essentially asking the administration to guarantee that no harm will ever come from a detainee's release."

The 56 Yemenis among the 86 detainees already cleared for transfer present their own obstacle. After the Nigerian "Underwear Bomber" tried to blow up his Detroit-bound plane, then confessed to having been recruited in Yemen, Obama ordered a halt to transfers to Yemen, where an active al-Qaeda branch remains.

With so many barriers, can Obama close the facility? Though it will require great determination, I believe he can, and on May 23 he explained what he will do, and why. The restrictions imposed by Congress "make no sense." For example, why forbid imprisoning detainees in the U.S., when hundreds convicted of terrorism-related offenses already are being held on our soil and no one has ever escaped from one of our super-max or military prisons? "[T]here is no justification beyond politics for Congress to prevent us from closing a facility that should never have been opened," Obama said.

Again the president called on Congress to lift the restrictions on transfers to other countries and our mainland. He didn't say what he would do if Congress refuses, but there are steps he can take. Harold Koh, until recently the top lawyer in the State Department, explained in a May 7 speech that some of the restrictions "are subject to waiver by the executive branch," and all, he warned, must be construed in light of the president's authority under the Constitution.

The president will appoint a senior envoy at the State and Defense departments whose sole responsibility will be to achieve the transfer of detainees to "third countries." He is lifting the moratorium on transfers to Yemen; these will be reviewed on a case-by-case basis. To the greatest extent possible, "we will transfer detainees cleared to go to other countries."

...

As for the "legacy problem" of the dangerous detainees who cannot be prosecuted, often

because the evidence against them has been compromised, the president is “confident this problem can be resolved, consistent with our commitment to the rule of law.”

Obama admitted that the politics are hard:

“But history will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it. Imagine a future — 10 years from now, or 20 years from now — when the [U.S.] is still holding people who have been charged with no crime on a piece of land that is not a part of our country. Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. Is that who we are? Is that something our Founders foresaw? Is that the America we want to leave to our children?”

Charles R. Church is an attorney practicing in Salisbury who focuses primarily on Guantanamo Bay, detention, torture, habeas corpus and related issues.

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