

RUSH TRANSCRIPT

Caleb Brown: This is the Cato daily podcast for Thursday, January 22, 2009. I'm Caleb Brown. President Obama is apparently working to make good on one campaign pledge to close Guantanamo Bay. David Rittgers is a legal policy analyst at the Cato institute and is a former Special Forces Officer who served three tours in Afghanistan. He says closing the facility serves both justice and the fight against terrorism, and it couldn't have come at a better time.

David Rittgers: Well his rationale was that Guantanamo has damaged our standing internationally and has made relationships with our allies more difficult, and that's an accurate assessment. So he made the promise as a candidate to close Guantanamo. We've seen the beginnings of that process the day after his inauguration.

First we've seen that he's asked for the trials of detainees and the military commissions to be halted. Those orders have been granted by the military judges overseeing those trials. Second, there's been circulation of a draft of an executive order to actually close Guantanamo. The timeline for that is as soon as is practicable but not more than one year from the enactment of that executive order. That may be a bit of an ambitious timeline, but even 18 months at the outside is really what we should be pushing for, so this is an ambitious and admirable goal.

Brown: When people talk about detention, they refer to Guantanamo Bay, and you suggest that that's not really appropriate.

Rittgers: No, and there's an honorable tradition in the military of giving quarter, of taking people prisoner, and once you do that you're responsible for their safety. That is among the finest traditions that a civilized nation's military will uphold, to take prisoners and treat them humanely. And Guantanamo has been a stain on our national honor with regard to that particular tradition.

We should take people prisoner, we should treat them humanely. We have said we will do so in signing the Geneva conventions, conventions against torture. These are all things that we should be doing. And Guantanamo has put a stain on the honorable act of giving quarter on the battle field. Winston Churchill once said that a prisoner of war is someone who was trying to kill you five minutes ago and asking you not to return the favor.

Well, the honorable thing to do is to give them quarter. By setting a moral example it creates a contrast between us and those we are fighting, the Taliban, insurgents and terrorists abroad, because they don't give quarter. The last time anyone has been taken hostage and traded for someone, point that out for me, because hostages have a pretty poor track record in surviving detention from Al-Qaeda. So it gives us a chance to show that we are the civilized party in the struggle.

Brown: Isn't there a risk though, for making this change?

Rittgers: Well, no. In fact it's smart on a number of levels. First, it's smart procedurally, and it's a good thing that Obama did ask for a halt to these trials upfront, because less than a week after his inauguration another trial was getting ready to begin, in the case of Omar Khadr. Khadr comes from a family of hardcore Al-Qaeda supporters. His father was killed in a gun battle with Pakistani troops in the tribal areas, his brother was paralyzed. And Khadr was responsible for, we believe, throwing a grenade that killed a special operations soldier in this gun battle in Afghanistan.

There are several problems. First off, if we let this trial start and we stop it then jeopardy has attached and we face double jeopardy bar to trying him in another court system, so the time to stop the military commissions is now, and it is a good thing he has done so. And second, the military commissions were drawn up without the possibility of a felony murder prosecution.

Felony murder is if a couple of people engage in criminal act together then they can be can be responsible for a murder that comes out of that. So the getaway driver in robbing a seven-eleven is just as culpable as the stickup man. Because with Khadr's instance there's the possibility that someone else threw the grenade, so having a felony murder theory available is a good thing, and military commissions don't procedurally have that in their rules.

So this allows us to take him into a federal court which is an unimpeachable, unassailable gold-standard of criminal justice and show the world that these people we are fighting are not freedom fighters, they're criminals.

Brown: What value does the current system of the existence of Guantanamo Bay have for people who really are trying to kill us?

Rittgers: Well it becomes a bully pulpit where they get to play both the freedom fighter and a martyr. The problem with the military commissions is that they depart from accepted norms in terms of criminal courts or military courts, courts martial. Because they have lower protections for the civil liberties of those being tried, they have very loose evidentiary rules and because they can allow evidence in gained by torture they're not seen as credible across the world, and rightfully so.

So the problem with this is that it lets someone who is a terrorist and really does want to harm this country play the martyr, and say first, they're attacking our countries and doing these horrible things and now they're attacking me with this illegitimate legal system just to make a victim out of me. They're not victims and they shouldn't have opportunities to play the victims.

We've seen Khalid Sheik Muhammed, one of the architects of the 9/11 attacks, and several of his co-conspirators have actually tried to plead guilty and are asking for the death penalty. So this is sort of one final martyrdom mission where they get to become martyrs and they can say, 'Oh, they've convicted me in this illegitimate court and now

they're going to sentence me to death and kill me,' and it will be one final propaganda mission for them.

We should deny them that opportunity. We should try them in a federal court and screen the evidence using the Classified Information Procedures Act, and once they've been found guilty, because there is ample evidence to convict them with, then they're no longer a freedom fighter. They're no longer a hero. They're no longer Robin Hood. They're just inmate number whatever in the Federal prison system.

Brown: David Rittgers is a legal policy analyst at the Cato Institute and former Special Forces Officer who served three tours in Afghanistan. You can read more of his recent work at cato.org.