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perspective Justice detained at Guantanamo

Prisoners held in long legal limbo

By John Holland and Anna Cayton-Holland



A detainee is escorted by military police at Camp 4 of the maximum security prison Camp Delta at Guantanamo Bay Naval Base in August 2004. (AP / Mark Wilson)

We recently returned from visiting with several prisoners in Guantánamo Bay's military prison, where there are still hundreds of faceless, uncharged prisoners who have been held for

nearly four years without ever seeing an attorney.

When many of these prisoners arrived in American custody, they were initially relieved to be in the control of a country that valued justice and due process.

Four years later, many just want to die. They starve themselves for long periods of time and attempt bloody suicides. The government responds by forcing tubes down their throats. People are trying to kill themselves to get out of custody, because they have no legal recourse. "They won't let us live, but they won't let us die," one of our clients explained.

Suits have been filed on behalf of well over a hundred of these detainees, asking that courts require that the government charge these people with crimes, even war crimes, or let them go. Now some in Congress are actively seeking to strip our courts of their historic habeas corpus jurisdiction to even demand that charges be stated by the

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government against those it wishes to imprison.

There is a mountain of procedure and logistics a lawyer has to climb before meeting clients, including lengthy security clearances.

When you finally do meet your clients, you suddenly realize that you are nowhere near the top of that mountain. You still are faced with the daunting task of winning their trust. Prisoners have been interrogated so many times by people pretending to be their lawyers, there is no way to prove that you aren't actually another interrogator. As our client from Mauritania, Ahamed Abdul Aziz, said to us, "The inability to trust is enough to make a wise man crazy."

These men believe they are being kept as scapegoats by an administration afraid to admit it has made a mistake. Many of them have been held for years with no charges, "in a grave," as Aziz calls it.

In representing these prisoners, we have joined a growing volunteer force of outraged attorneys who come from small and large firms across America. The group includes death penalty and amnesty lawyers, plaintiff and defense lawyers, bankruptcy and corporate lawyers. It even includes advocates for retired generals and admirals, all working for free.

Coordinating this effort is the Center for Constitutional Rights in New York. The goal of all involved is to preserve the most basic components of our Constitution, including the right to be charged with a crime as a condition of being held; the right to have those charges speedily determined; the right to hearings before impartial judges; the right to counsel; the right to confront one's accusers; the right to have access to all case evidence; the right not to have evidence extracted under torture used against you; and the right to be free from torture under the Geneva Conventions..

When the U.S. Supreme Court decided the first Guantánamo Bay prisoner issues in *Rasul vs. Bush* in late June 2004, it reaffirmed the proposition, as old as the Magna Carta, that a core bedrock value of liberty for all persons is a speedy right to challenge the lawfulness of their imprisonment.

In *Rasul*, the Supreme Court held that the lower courts had the power to determine the legality of the president's "potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." It returned the cases to the lower courts with the directive that they were to "consider in the first instance the merits of

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petitioners' claims."

Almost a year and a half after the Rasul ruling, not a single one of the more than 500 men and boys still held in abysmal conditions of confinement in Guantánamo has seen the inside of a U.S. district courthouse.

Lower court judicial infighting about whether to acknowledge the core rights at stake, in combination with the government's strategy of delay, has created a logjam in which most cases have now been stayed indefinitely pending appeals.

The litigation strategy of the government is to prevent hearings on the merits through innumerable delaying challenges aimed at denying these prisoners any access to justice for as long as the president says the "war on terror" is continuing.

Supreme Court Justice Sandra Day O'Connor stated in mid-2004 that "a state of war is not a blank check for the president." The president is not free as commander in chief to "turn our system of checks and balances on its head." Even Justice Antonin Scalia, in a dissenting message to the president, added that "if civil rights are to be curtailed during wartime, it must be done openly and democratically."

As Joseph Margulies, who was lead counsel in the Rasul case, has written, "Sometimes called the Great Writ, habeas has been part of our law for more than 200 years and is one of the only protections of individual liberty enshrined in the Constitution (as opposed to the protections subsequently added in the Bill of Rights)."

The writ of habeas corpus is supposed to be a rocket vehicle for justice, ensuring that no one is long imprisoned without good cause being shown. Many of these prisoners are entering their fourth year of confinement without any due process.

Even in the very few military tribunal cases that have begun, there has already been a gross abuse of process. Three military prosecutors resigned in early August, citing ethical and legal concerns that the planned military hearings were "rigged." These military prosecutors reported being told that the judges would be hand-picked to ensure convictions.

In the midst of all these events, it has been far too easy for some of us to lose sight of the fact that these alleged enemy combatants are and remain human beings.

Ahamed Abdul Aziz has studied literature and

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philosophy. He speaks French and English, in addition to Arabic. Aziz fled political persecution in Mauritania, only to be incarcerated by the Americans. The regime he fled has now been overthrown in a bloodless coup with political prisoners released. He speaks eloquently about the abuses he has suffered, here and abroad.

Recently, many prisoners have begun a hunger strike - including two of our clients, Aziz and Ahmed Ghulam Rabbani from Pakistan. Rabbani, who has lost a great deal of weight, recently broke his 35-day hunger strike to honor Ramadan. He was joined in his strike by Aziz and hundreds of other detainees. Now that Ramadan has ended, it is anticipated that the hunger strikes will resume with full force.

Abdul Raheem Ghulam Rabbani, Ahmed's brother, also imprisoned in Guantánamo, told us of his horrible torture in Pakistan and his subsequent mistreatment by Americans in Guantánamo.

The logic of placing these prisoners on the edge of the American consciousness, just south of Florida, is to reassure us by their presence that somewhere, there are shackled men in small cells wearing orange and fitting our stereotypes. Their function is to be far enough away so that no one regularly thinks of the abuses they are suffering but close enough to make us feel safe - like the president and the government are doing something about terrorism. So we leave them there, suffering at the hands of frustrated interrogators and guards, an incomprehensible policy and an administration that seems to ignore the core values of constitutional peoples.

It is a decidedly un-American thing for courts to allow people, any people from any place, no matter what they may have done, to be held beyond the law, uncharged and unheard, under abusive, intolerable and illegal conditions based on untested government theories of enemy combatant status. This obviously also applies to the secret CIA prisons just revealed by The Washington Post.

If the courts do not begin to perform their historic functions, it will be fairly said that they abdicated their responsibilities in supine delegations of power to the president and thereby permanently weakened the critical role of the judiciary as the guardians of our most valued rights.

How hollow and startling in contrast is President Bush's insistent post-indictment reminder that vice presidential aide I. Lewis Libby is to be "presumed innocent and entitled to due process."

As we flew home, we couldn't help but think these

cases are actually about whether America will remain America.

The effort now underway in the Congress to silence these habeas corpus cases by retroactively stripping all courts of any jurisdiction to hear them would shock our founders. In the Federalist Papers, Alexander Hamilton extolled the writ of habeas corpus, along with the prohibition of ex-post-facto laws, as among the "great securities to liberty and republicanism."

In times of perceived crisis, fear and panic can push us way off course. We must not allow the exigencies of the moment to collapse our constitutional structure. If we continue to strip the Constitution of its deepest meaning by allowing such abuses to continue, unchecked in a legal black hole, we may well lose the very things for which we are fighting.

Terrorism wins big if at the end of all these fights, the rights of the people are gone.

Justice delayed is justice denied. This must stop now.

John Holland and Anna Cayton-Holland are Denver civil-rights attorneys

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