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Roadblocks to Effective Representation of Uncharged Indefinitely Imprisoned Clients at Guantanamo Bay Military Base

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Roadblocks to Effective Representation of Uncharged Indefinitely Imprisoned Clients at Guantanamo Bay Military Base

Martha Rayner

Abstract

In Part I, this Note will discuss the current epidemic of human trafficking, the various ways the United Nations and the United States have attempted to combat trafficking, and highlight the importance of U.S. prosecutorial duties of witness protection that are especially implicated in human trafficking cases. Part II will present criticisms of efforts by the United Nations and the United States to protect victims of trafficking and their family members. This part will also focus on current U.S. protections afforded to families of human trafficking survivors and programs such as the Witness Security Program, from which U.S. lawmakers may model family protections. In Part III, this Note will argue that, despite an increase in cost, it is crucial that future legislative efforts expand current protection programs to better, and more quickly, protect families of victims. Offering family members in imminent harm derivative continued presence, currently only available to survivors of trafficking, is essential to the goals of U.S. trafficking legislation. Expanding protections for family members would accomplish three goals: (1) allow the survivor to feel secure in coming forward, knowing that her family members will not be harmed; (2) encourage survivors to come forward and cooperate with law enforcement officials, which could lead to further prosecutions of human traffickers and increase the protections offered to survivors of human trafficking; and (3) permit prosecutors to adhere to their duties of witness protection, which extend to family members who are in imminent danger due to the witnesses' cooperation. This Article discusses the many barriers to effective representation and the lawyering realities on the ground at Guantánamo Bay, Cuba. There are certainly many, but let me recount a recent experience.

SPEECH

ROADBLOCKS TO EFFECTIVE REPRESENTATION OF UNCHARGED, INDEFINITELY IMPRISONED CLIENTS AT GUANTÁNAMO BAY MILITARY BASE

*Martha Rayner**

Thank you for the opportunity to talk about the barriers to effective representation and the lawyering realities on the ground at Guantánamo Bay, Cuba. There are certainly many,¹ but let me recount a recent experience.

After litigating two motions over the course of many months, the clinic that I direct, Fordham Law School's International Justice Clinic,² finally secured a judge's order and then a concession from our adversary and gatekeeper to our clients, the U.S. Department of Defense ("DoD"), to allow me to meet with a man who had been incarcerated for nearly five years without legal representation.³

This green light obtained through litigation led to more

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1. The means of communication with a client that we take for granted as lawyers simply do not exist in the Guantánamo habeas context. Phone calls with counsel are prohibited except in the rarest of circumstances (Salim Hamdan, one of the few prisoners charged with a war crime, was allowed a phone call with his military defense counsel the day his case was decided by the Supreme Court). Mail to clients undergoes significant delays, not least of which is a peculiar system that depends on civilian habeas counsel to physically transfer mail to the military once it arrives at the office of a private carrier located at the base. See Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantánamo Bay, Cuba, § IV (A) available at www.pegc.us/archive/DC_Gitmo_Cases_JHG/govt_resp_20041104_ex_1.pdf (last visited April 1, 2007) [hereinafter Revised Procedures].

2. The Fall 2006 International Justice Clinic included Rafik Aldina, Stephanie Coste, Brendan Driscoll, Amber Lewis, Shant Manoukian, Deborah Mantell, Nicholas Mitchell, and Kristina Scotto. Adjunct Professor Ramzi Kassem accompanied me on the November 2006 client meeting that is the subject of this talk.

3. Though a habeas corpus petition was filed on behalf of my client challenging the lawfulness of his uncharged, indefinite imprisonment, the U.S. Department of Defense ("DoD") attempted to block my access to him on many grounds. In a final effort to prohibit a meeting, the DoD maintained that it could not identify our client because the name we submitted in connection with our client's Internment Serial Number ("ISN")—the DoD's identification system—was slightly different from the name the

wrangling with the DoD, to arrange the logistics of actually setting foot in Guantánamo Bay, Cuba: a “theater clearance” allowing me onto the military base and approval to see this client on a particular day. There was yet more fuss to secure a reservation on the twelve-seat plane that flies once per day to Guantánamo. Eventually, approval, theater clearances, and travel plans were all in place.⁴

The only information the clinic had about our client was that he had requested a lawyer at least one year ago, and this request was passed on to another man incarcerated at Guantánamo, whom we refer to as our client’s “next friend.”⁵ The next friend passed our client’s name on to his lawyer, who relayed the information to the Center for Constitutional Rights (“CCR”), a public interest law office that has been at the forefront of challenging indefinite detention in the “war on terror” and recruiting volunteer lawyers to represent the many hundreds of men held pursuant to our President’s claim to such power. The CCR requested that we represent this man.⁶

We knew very little about our client. We had a possible home country and indications that he was likely to have been incarcerated at Guantánamo since close to when the first prisoners were transferred to the base in January 2002—placing him into his sixth year of captivity.

My students made diligent efforts to locate our client’s family by working with a human rights organization in what we believed was his home country. This organization had helped to put us in touch with the family of another client. This time, unfortunately, family members could not be found. Thus, we had no endorsement from the family supporting who we were and why we sought to meet with this man.

To prepare for this first meeting, my students anticipated the possible issues that would arise: Would our client consent to

DoD connected to the same ISN. The DoD took this position even though it was its policy to rely on ISNs rather than the transliteration of Arabic names.

4. A U.S. Government secret level security clearance is required before meeting with clients because the DoD deems all information obtained from clients as presumptively classified. Thus, a lengthy and burdensome security clearance process was a condition precedent to securing approval and working out the logistics of travel.

5. Someone acting on behalf of an incarcerated person may file a habeas corpus petition. *See* 28 U.S.C. § 2242 (2007).

6. In addition, the Center for Constitutional Rights (“CCR”) has been at the helm of the process of organizing volunteer lawyers to represent Guantánamo detainees.

seeing us? How could we assure him that we are who we say we are? What questions would he have? What documents should we provide? How would we explain the complex areas of law and lengthy litigation history that relate to our client's situation: the law of war, human rights law, the Authorization for Use of Military Force,⁷ the Detainee Treatment Act,⁸ the Military Commissions Act,⁹ *Rasul*,¹⁰ *Hamdi*,¹¹ *Hamdan*¹²—the list could go on. How do we explain his current predicament? His legal status? What predictions can we make about this man's future?

Then there is the other side of the first client meeting coin: What information do we need from him? How do we go about asking questions of a person who may have been subjected to numerous interrogations, coercion, or even torture? Finally, how do we explain why we are here? How do we explain our role—the role of an attorney in U.S. society—loyalty, zealous advocacy, and confidentiality?

The students prepared a detailed and comprehensive interview plan that was revised and honed over the weeks preceding the visit. In addition, they proposed taking a photograph of all of us in front of the law school building with the Fordham name displayed prominently in the background. Students decided to include the clinic brochure containing my photograph. The students also included an original and photocopied versions of an interview with me, along with my photo, featured in a Bahrainian newspaper and written in Arabic. These documents and plans were all in an effort to try to present information and

7. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

8. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in various sections of 10, 18, and 28 U.S.C.).

9. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, §§ 1001-1006, 119 Stat. 2680, 2739-43 (2005) (codified at 42 U.S.C. § 200dd(a)).

10. See generally *Rasul v. Bush*, 542 U.S. 466 (2004) (deciding that jurisdiction exists for federal district courts to hear habeas petitions filed by non-U.S. citizens detained by the United States at Guantánamo Bay, Cuba).

11. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process requires that a U.S. citizen being held as an enemy combatant be given meaningful opportunity to contest the factual basis for his detention).

12. See generally *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) (finding that military commission convened to try Hamdan—an alleged alien combatant being held at Guantánamo Bay, Cuba—lacked power to proceed because it both structurally and procedurally violated the Uniform Code of Military Justice and the Geneva Conventions).

evidence that I am who I say I am. I can be trusted. I am not an interrogator posing as an attorney. I do not work for the U.S. Government. I am a lawyer, a law professor, here to provide legal representation.

The students also prepared a file that contained a copy of the original document that named our client, among other prisoners, as requesting a lawyer. The students planned for me to show it to our client to explain how we came to represent him—how it is we came to be here talking to him and offering him our legal assistance. Also included was a copy of the habeas corpus petition filed on behalf of our client based on the next friend document. A selected group of publicly filed legal papers was also included to demonstrate a portion of the work we had been engaged in on his behalf.

Though there was much more we would have liked to provide, in the end we packed light because we were, and continue to be, prohibited from providing certain information to our client that does not directly relate to his legal representation.¹³ This rule is one of many contained in the protective order that governs client visits and mail, as well as the filing of court papers, and the handling of classified documents—to name just a few of the protective order subject areas.¹⁴ As a result, the students conduct a careful sorting process because everything we provide to our client must adhere to the protective order.

My students, a significant part of this client's legal team, will not be allowed to meet their client. Our opposing counsel, the Department of Justice ("DOJ"), the agency that also controls the

13. Revised Procedures, *supra* note 1, § V (B).

Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

14. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantánamo Bay, Cuba, *In re* Guantanamo Detainee Cases, Civ. Nos. 02-CV-0299 etc. (consolidated cases) (D.D.C. Nov. 5, 2004). See generally Brendan M. Driscoll, Note, *The Guantánamo Protective Order*, 30 FORDHAM INT'L L.J. 873 (2007) (arguing against any further restrictions on existing Guantánamo protective order).

security clearance process, will not allow law students to apply for security clearances—a rule the DOJ unilaterally created and enforce even though the protective order allows for the clearance of petitioner’s counsel, which is defined to include “interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.”¹⁵ Without clearances, students are blocked from meeting with clients because all information we receive from clients is presumed to be classified.

After a full day of travel,¹⁶ I arrive at Guantánamo on a Sunday night and wake up Monday morning to catch a rickety white school bus that will take me to a ferry that will take me across Guantánamo Bay where I meet my military escort. The escort guides me to Camp Echo, where most attorney-client meetings occur.¹⁷ Before entering the main part of the camp, a military guard wands me with a metal detector front and back and then looks through every piece of paper in my file.

It is important to note that I have been security cleared by the DOJ—subjected to an extensive background check and deemed qualified to keep safe, classified information. In addition, I’ve signed and filed with the U.S. District Court for the District of Columbia a memorandum of understanding that obligates me to adhere to the protective order, including directives regarding information that may not be communicated to clients. Nevertheless, the soldier pulls out the clinic brochure and tells me I can’t bring it in. She pulls out the photo of me and my students in front of Fordham Law School and tells me I can’t bring it in. She takes out the next friend document and tells me I can’t bring it in because it contains the name of another detainee. She takes out my client’s petition and tells me I can’t bring it in because it contains the names of other detainees, even though those names appear on the caption of the petition because it was filed on behalf of a group of over 100 men imprisoned at Guantánamo. I start to explain this to the guard, but the

15. Revised Procedures, *supra* note 1, § II(B).

16. The two commercial airlines servicing the base depart from Ft. Lauderdale, Florida. After reaching Ft. Lauderdale, lawyers face another three-hour flight to the base due to the circuitous route required to avoid Cuban air space.

17. This has changed somewhat with the opening of Camp VI in December of 2006, a new, permanent facility modeled after super maximum prisons in the United States, which now houses 160 prisoners.

clock is ticking—I am standing in the rain while she is rifling through and reading every piece of paper, including work product, and I am losing time with my client.¹⁸ I take the file and pull out the most critical documents. I leave the contested documents with the guard¹⁹ and give the remainder to the escort officer and ask him to store it on the bus. The Bahrain articles don't go in—neither originals nor photocopies. The petition doesn't go in, but inexplicably the guard lets in an Arabic translation of another detainee's petition that is very similar to my client's, which habeas counsel²⁰ have routinely used as a generic translation rather than translating each petition. The guard also lets in an Arabic translation of the Detainee Treatment Act,²¹ even though I cannot imagine she has any clue as to the contents of this document since it contains not one word of English.

I am finally allowed to move on to a series of locked gates that lead to a courtyard of white gravel raked into oddly assorted pathways, which is surrounded on three sides by shed-like structures. I am led into one of the sheds. A very young looking man, chained to the concrete floor, sits behind a table. I pull up a chair, sit down and there is this amazing moment: there is a lawyer and there is a client, and there are many problems to be solved.

18. If all goes well, attorneys have approximately two hours to meet with clients in the morning and about 3.5 hours in the afternoon. The Fordham team typically spends four days at Guantánamo to see four clients, so we have little time with each client, further condensed by the time taken for interpretation.

19. I am told that if I disagree with this guard's actions I can have the documents submitted to a legal team of sorts which is posted at the base, which I request be done. During a lunch break, two days later, I receive a memorandum, which requests that I justify how the document expressing my client's request for a lawyer directly relates to the legal representation. Another memorandum tells me that the clinic brochure does not relate to my legal representation.

20. The DoD refers to the lawyers representing prisoners at Guantánamo as "habeas counsel," which is ironic since DoD takes the position that our clients have no right to invoke habeas corpus and the courts have no jurisdiction to hear our clients' habeas cases.

21. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, §§ 1001-1006, 119 Stat. 2680, 2739-43 (2005).