

Bagram's Black Hole

Guantanamo Bay was bad enough. Bagram is worse.

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Eric Lewis didn't know much about Ruzatullah's case when he decided to take it on two years ago. All he knew was that in October 2004, Ruzatullah, an Afghan man in his thirties, was spending a quiet evening at home with his family in Jalalabad, Afghanistan, when U.S. troops forced their way in and searched the place. The soldiers found no guns or other weapons, but they seized Ruzatullah and his brother Inavatullah (many Afghans have only one name) and took them to the U.S. military base at Bagram. Inavatullah was released 15 days later; Ruzatullah remained at the de facto detention center. When Lewis took the case in 2006, Ruzatullah was still in U.S. custody. No charges had been brought against him. His friends and family insisted that he had no connection to terrorists, criminals, or any armed forces.

A commercial litigator at Baach Robinson and Lewis, a boutique law firm in Washington, D.C., Lewis ordinarily represents foreign banks, insurance companies, and governments in fraud and insolvency cases. He heard about the detainees at Bagram from Tina Monshipour Foster, a former attorney at the Center for Constitutional Rights (CCR), where Lewis had been a board member. Foster's two-year-old nonprofit, the International Justice Network (IJN), provides legal assistance to victims of human rights abuses, as well as linking advocates around the world. The problems she described to Lewis, hundreds of detainees held incommunicado and without charges at Bagram for years, unable to contact family or friends or even to see the evidence against them, drew him in. "I remember studying *Korematsu* in law school and thinking, of course, that it could never happen again," Lewis says, referring to the landmark case of *Korematsu v. United States*, in which the U.S. Supreme Court upheld the president's right to force Japanese Americans into U.S. internment camps during World War II. "It became clear that [indefinite detention of foreigners by the U.S. government] was the legal issue of our time."

On its face, the legal status of the detainees at Bagram, a U.S. controlled air base leased from the government of Afghanistan, appears to be much like that of the prisoners at Guantanamo Bay, a

U.S. military station leased from Cuba. One would expect the Bagram detainees to benefit from the legal arguments raised on behalf of the Guantanamo inmates, whose due process rights the Supreme Court has repeatedly affirmed, most recently in *Boumediene v. Bush*. But so far, Bagram detainees have not benefited from the precedents that now apply unequivocally to prisoners at Guantanamo Bay. Moreover, the Bagram detainees have failed to garner the same level of public attention and outrage, or the stampede of offers for pro bono representation from major commercial law firms [see “Why Firms Say No,” page 85]. Foster says she’s asked several law firms for help, but so far none of them besides Baach Robinson have been willing to take on Bagram cases.

More than 600 prisoners remain at Bagram without being charged; some have been in legal limbo for more than five years. Because the United States calls Afghanistan a battleground in the war on terror, it contends that prisoners held there have no right to challenge their detention. Whether for political or strategic reasons, or merely because of Guantanamo Bay burnout, no more than a handful of detainees held by the U.S. government at Bagram have any legal representation. Yet their plight reflects a problem that extends far beyond the U.S. air base, and has implications for the United States and the prisoners it holds all over the world.

Of course, Guantanamo detainees weren't so popular initially, either. Neal Katyal is a professor at Georgetown University Law Center who represents Salim Hamdan, the personal driver of Osama Bin Laden who was recently convicted of aiding terrorism. Katyal recalls that when he first sought help on the Hamdan case, only one law firm, Perkins Coie, was willing to take it on, out of about 15 that he approached. “When I filed the case back in 2004, a lot of people were saying we're fighting for the wrong side,” Katyal says [see “Courting Failure,” page 24]. That all changed after the Supreme Court decided *Rasul v. Bush* in June 2004, holding that the federal courts have jurisdiction to review detentions of foreign nationals captured abroad and imprisoned at Guantanamo.

But the success of dozens of prominent American lawyers in representing Guantanamo detainees has had an unintended consequence: The U.S. military has stopped sending captured suspects to Guantanamo, whose total prisoner population has dropped to roughly 275. As of April, reports Human Rights First, only about 30 Afghans remain at the installation, compared with some 200 in 2002. Instead, thousands of individuals who are suspected of participating in, assisting, or having knowledge of terrorism are now being held elsewhere, an estimated 14,000 in Afghanistan and 25,000 in Iraq. Although some will eventually be transferred to Afghan or Iraqi custody, all are initially detained pursuant to President George Bush's November 2001 executive order authorizing indefinite detention of anyone who the president has “reason to believe” is or was a member of Al Qaeda or has engaged in or assisted terrorism against the United States.

The difficulty of challenging detentions authorized by the president may be part of what's kept many large firms from taking on Bagram cases. But as insurgents have increased their attacks on U.S. and NATO forces in Afghanistan in recent months, the idea of representing prisoners suspected of aiding terrorism there may also seem imprudent as a political matter. Some lawyers at large law firms deny being deterred by such considerations, but the IJN's Foster disagrees. “They are afraid,” says Foster, who left Clifford Chance for CCR in 2004 to help organize pro

bono representation for Guantanamo detainees. “There hasn't been the public campaign for Bagram yet that we did for Guantanamo.”

Political considerations haven't deterred Baach Robinson, however. “One advantage of being in a small law firm is you can ignore that pressure to a greater degree,” says Lewis, who's working on the case with partner Katherine Toomey. “Most of our clients are abroad. Frankly, commercial clients abroad are proud to see their lawyers are part of this. I think there's almost universal revulsion from every part of the political spectrum outside of the United States about the way the United States has been conducting its business abroad.”

The logistics of representing inmates at Bagram adds another substantial hurdle for U.S. lawyers. If representing detainees at Guantanamo seemed a Kafkaesque exercise for the many big-firm lawyers who made the tortuous trek through military obstacles, checkpoints, and security clearances to defend their clients there [“Justice at Bay,” May 2005], it's a cakewalk compared with representing a client at Bagram.

Not only is Afghanistan about 6,000 miles farther away and much more dangerous than Cuba, but the U.S. Department of Defense does not allow detainees at Bagram to meet with lawyers or human rights organizations. No one has access to the prison other than U.S. government officials and the International Committee of the Red Cross, which does not issue public reports. “For reasons of operational security and military necessity, the number of visitors who can visit detention facilities in a country where U.S. forces are actively engaged in hostilities is necessarily limited,” Lt. Col. Mark Wright, spokesman for the Defense Department, wrote in an email response to questions.

The U.S. government says that Bagram prisoners have no right to see the charges or evidence against them, or to know why they're considered a terrorist threat. “Detention of enemy combatants during wartime is not criminal punishment and therefore does not require that individuals be charged or tried in a court of law,” Wright said in an email.

According to the few lawyers representing prisoners there at the request of relatives, many Bagram detainees were turned over to U.S. authorities by former enemies or neighbors who wanted to settle an old score or collect a bounty from the U.S., a contention supported by human rights organizations such as Amnesty International; news reports from the Associated Press, The McClatchy Company newspapers, and Time magazine; and even former Pakistani president Pervez Musharraf's recent memoir, *In the Line of Fire*. Yet those imprisoned have no way to prove, or even to claim, their innocence.

Conditions at the detention center are atrocious, according to lawyers, news reports, and organizations such as Human Rights Watch and the London-based group Reprieve. Ruzatullah's habeas petition alleged that Bagram detainees are crowded together in wire mesh cages without toilets or running water and “are regularly tortured and abused, including being starved, severely beaten, forced into painful, contorted body positions, ‘waterboarded’, exposed to extremely cold temperatures, and sexually humiliated.” In December 2002, the Pentagon has acknowledged, U.S. soldiers beat two Bagram detainees to death. Although officers allegedly involved in the deaths were prosecuted, five were convicted, but none received a sentence of more than three

months in prison, the Pentagon vehemently denies accusations of systemic torture or abuse at Bagram. "The conditions at the BTIF [Bagram Theater Internment Facility] meet international standards for care and custody of detained persons," Wright told The American Lawyer by email. "The United States strictly prohibits the abuse of detainees in its custody." He acknowledged that there are now about 600 detainees at Bagram, although the facility wasn't built to hold nearly that many.

Detainees at Guantanamo have at least some means of challenging their status as enemy combatants through a Combatant Status Review Tribunal, or CSRT. At Bagram, the process is even more circumscribed. A panel of five U.S. military officers, called an Enemy Combatant Review Board (ECRB), is supposed to review the detainees' status, usually within 75 days of their capture and every six months thereafter. But sometimes just the commanding officer, instead of a review board, decides the case, as Col. Rose Miller, commander of detention operations at Bagram, confirmed in an affidavit submitted in the Ruzatullah case. According to Miller, the designation is based on "all reasonably available and relevant information available on the date of the review." Lewis and Foster say that almost all the evidence used against detainees comes from military personnel involved in their capture and interrogation. The detainees themselves typically have no opportunity to speak at, or even attend, the hearing or subsequent reviews.

"It makes the CSRTs look like the latest thing from the world court of transgalactic justice," Baach Robinson's Lewis says. The disparate treatment of detainees at Bagram is justified, the government argues, because Bagram is different. At Guantanamo, a military base leased from Cuba for more than a century, the United States retains "complete jurisdiction and control," the U.S. Department of Justice asserted in its motion to dismiss the Ruzatullah case. Yet the "United States's use of the Bagram Airfield is 'a wartime necessity' subject to a rather typical lease with the host nation," the Justice Department wrote. Therefore, "the petitioners have no statutory habeas rights in the United States."

Ruzatullah's lawyers vigorously disagree. "They have a U.S. lease at Bagram that's similar to Guantanamo," Lewis says. "It should be treated the same." Regardless of the particular details of different military leases, Lewis and his colleagues are also trying to establish a broader principle that could apply to the thousands of other prisoners held elsewhere in the world by the United States. As they put it in their brief to the court opposing dismissal of Ruzatullah's habeas case: "Freedom from arbitrary executive detention dates to the Magna Carta, is not limited territorially, and is one of the most fundamental tenets of the rule of law." They also object that enemy combatant determinations don't meet the demands of the Military Commissions Act (MCA); that such indefinite incarceration violates the Geneva Conventions and U.S. law; and that the MCA is unconstitutional because it does not provide an adequate alternative remedy to habeas corpus.

These may not be easy arguments to win. Traditionally, the government has been allowed to detain prisoners during a war indefinitely. Yet the "war on terror," which does not conform to any definition of "war" under international law, presents a unique challenge to this principle, Lewis says. "What happens when you have a war that is unlimited in time and space?" he asks. "When the battlefield is everywhere and it will never end? It's not a war against a nation state, it's

a war against a concept. The law of war was developed when conflicts were defined in time and space. In the absence of that, you're talking about detention for a lifetime."

The case that Bagram detainees should have habeas corpus rights might be easier to make on behalf of non-Afghan prisoners who were captured outside of Afghanistan and then sent to Bagram. The United States can't counter that such detainees are merely being held on the battlefield for the duration of hostilities.

Take the case of Fadi Al Maqaleh, whom Tina Foster represents in a habeas petition in federal court in Washington, D.C. Foster met Al Maqaleh's father in Yemen in 2006. He knew only that his 25-year-old son had disappeared from his home in Sana'a, Yemen, until the International Committee of the Red Cross delivered a letter from Al Maqaleh in 2003. The letter informed Al Maqaleh's father that his son was in U.S. custody. Any details that might have explained how Al Maqaleh ended up at Bagram were redacted. Al Maqaleh's father insists that his son has never been an enemy or combatant of any kind against the United States. Yet neither he nor his son's lawyer is allowed to visit his son, and no one outside the U.S. government is allowed to see the evidence against Al Maqaleh. The Justice Department has moved to dismiss the habeas case Foster filed on his behalf on the same grounds that it cited in seeking to dismiss the Ruzatullah case: The federal courts, the department maintains, have no jurisdiction to rule on habeas petitions of aliens captured abroad and detained outside the U.S.

The presence of non-Afghan detainees such as Al Maqaleh at Bagram, Foster insists, makes it clear that the government is not merely using the prison as a battlefield detention center for local suspects. "Bagram is functioning exactly the same way as Gitmo is functioning," she says. "They're using it as a prison because it is close to a zone of active combat. That makes it look more like a normal battlefield detention situation. But that is really camouflage for a law-free zone that the U.S. can use as cover to bring people from anywhere in the world."

On June 19, 2007, eight months after Lewis and his colleagues filed a habeas petition in the D.C. federal court on his behalf, Ruzatullah, without ever having been charged with a crime, was transferred from Bagram to a special national security wing within an old Afghan prison called Policharky. A portion of the prison known as the Afghan National Detention Facility, also designated Block D, is being used to detain suspected terrorists previously held at Bagram or Guantanamo Bay, according to the Defense Department. More than 400 such prisoners have been transferred there.

Lawyers representing Afghan prisoners, such as Lewis and Foster (legal clinics at Stanford and Yale law schools are also helping Foster's organization on several more habeas cases) believe the military is transferring some prisoners to Policharky in order to escape American judicial scrutiny. Indeed, in July the Justice Department filed a motion to dismiss Ruzatullah's habeas petition as moot. The U.S. government said he was now in Afghan custody and no longer under U.S. control.

His lawyers disputed that, arguing that Block D, opened in April 2007, is in fact controlled by the U.S. military. A U.S. Department of State official responsible for U.S. run programs to improve the Afghani justice system confirmed that while his team advises Afghan officials on

their prison and criminal justice systems, Block D is “strictly within the province of the Department of Defense.” Other lawyers who represent detainees at Policharky, some transferred there from Guantanamo, say their clients describe a U.S. controlled prison. “My client said to me, ‘The guards who bring us our food are in U.S. uniforms, the guards who take us to recreation time are in U.S. uniforms,’” says Kent Spriggs, a Tallahassee-based lawyer who recently gave up his employment litigation practice to focus on representing Guantanamo detainees, some of whom are now imprisoned at Policharky.

One advantage of Policharky, however, is that prisoners there have been allowed to meet with relatives and lawyers. In January, Foster met with Ruzatullah for the first time. Under the watchful eye of prison guards, she was able to communicate with her client, a lanky man with bright green eyes and a softspoken demeanor, through a tiny hole in a Plexiglas partition.

Ruzatullah told Foster that about a month earlier, he had received a trial of sorts in the prison. Although no witnesses and minimal evidence were presented, Afghan judges presided over the proceeding, and Ruzatullah himself was able to attend. Representing Ruzatullah was Shabeer, an Afghan lawyer from The International Legal Foundation (ILF), a nonprofit organization based in New York. However, neither Ruzatullah nor his attorney had more than a few days’ notice of the proceeding, according to Foster and Shabeer. (Because Shabeer does not speak English, his notes about the case were translated and provided to The American Lawyer by ILF director Natalie Rea.)

A panel of Afghan judges read a statement charging that Ruzatullah had aided terrorists. The only “evidence” presented, according to Shabeer’s notes, was that his captors had found names of “government enemies” in Ruzatullah’s diary; his mobile phone number was in the possession of other suspects who had been killed by coalition and Afghan forces; Ruzatullah had graduated from a university that many antigovernment suspects have attended; and he had been living in a refugee camp believed to serve as a base for government enemies. The judges, who acted also as prosecutors, did not present any witnesses or sworn statements to support the charges, according to Foster and Shabeer. During the proceeding, Shabeer objected that there was no evidence to support the claims; the names in the diary had not been written by Ruzatullah; and many who had attended the same university or lived in the refugee camp were neither terrorists nor enemies of the Afghan or U.S. government. Ruzatullah himself also denied the charges at the trial, he told Foster during their meeting. Two days after the trial, as he told Foster, Ruzatullah was informed that he had been convicted and sentenced to three-and-a-half years in prison. Because he had already spent almost that much time in detention, however, he had only a month left in his sentence. Ruzatullah was released last spring. “They convicted him on the say-so of the U.S. government without any supporting evidence,” says Foster, who was bewildered by the news. “On the one hand, he got out of prison. But he got a criminal conviction based on nothing.” After Foster learned of Ruzatullah’s release, she and Lewis withdrew his habeas petition. (Another client of theirs, Ruhollah, named on the same habeas petition, was similarly transferred to Policharky on July 30; the Justice Department has moved to dismiss his petition.)

Ruzatullah is only one of dozens of prisoners in Block D who have undergone similar quasi-legal proceedings. Human Rights First reports that trials for prisoners at Block D began in October 2007, and by April, 65 prisoners had been convicted and 17 acquitted. No family members or

members of the press have been allowed to observe the trials. Sahar Muhammed Ally of the Law & Security program of Human Rights First is one of the few Americans outside of the military who has been permitted to witness any of them. She confirms that no evidence was presented in the two proceedings she observed, but simply a statement of the charges. Based on that, “the prisoners were sentenced to eight and ten years, respectively,” she says. Although they had lawyers provided by the ILF, there was little that the attorneys could do for their clients.

“Defense counsel during hearings were asking, ‘Where is the evidence? Where are the witnesses?’” recalls Muhammed Ally. “Judges would say, ‘Why would the Americans lie? Why would the coalition forces lie?’”

The Defense Department has assisted Afghan authorities “in conducting the trials in a fair manner, and we have insisted that lawyers be provided for the accused to ensure that these proceedings are done in a manner consistent with fundamental guarantees of due process,” Defense spokesman Wright wrote in an email. “The U.S. has provided information to the Afghan authorities where appropriate and necessary to provide information on the circumstances that led to detention by U.S. forces.”

As more detainees are transferred to Block D at Policharky, new prisoners continue to arrive at Bagram from around the world. Acknowledging that the current facility isn’t nearly large enough to hold the more than 600 detainees there, the Defense Department is now building a new facility on the base to house more prisoners. Whether more lawyers will be willing to represent these new prisoners, though, remains unclear.

Both Barack Obama and John McCain have said that if elected president, they will close the prison at Guantanamo Bay. If that happens, many prisoners will likely be shifted to centers where the right to challenge their detention is far less certain. For many, that will be in Afghanistan. “Afghanistan is the critical next frontier of trying to push the law to establish that there’s an irreducible minimum on actions of U.S. officials,” Lewis says. He insists: “Wherever they go, torture, indefinite detention, humiliation, these are not things U.S. officials can do.” Not even in Bagram.