

## NAVIGATING A “LEGAL BLACK HOLE”: THE VIEW FROM GUANTANAMO BAY

*Carlos Warner\**

*Editor’s Note: Mr. Warner agreed to discuss the various legal and practical issues he has encountered in his work representing individuals detained in Guantanamo Bay, Cuba. As noted in Mr. Warner’s responses, classified or leaked information could not be discussed.*

### ABOUT CARLOS WARNER

Since 2005, Carlos Warner has worked as a criminal defense attorney at the Office of the Federal Public Defender for the Northern District of Ohio. In addition to representing clients in the Northern District of Ohio, Mr. Warner currently represents or has represented twelve individuals detained by the United States Government in Guantanamo Bay, Cuba. Mr. Warner has filed Habeas Corpus petitions on behalf of each of his detained clients in the U.S. District Court for the District of Columbia.

Mr. Warner has made approximately thirty trips to Guantanamo Bay to meet with his clients and to negotiate on their behalf with military prosecutors and with the U.S. Department of Justice. He currently represents one “High Value Detainee.” One of his clients, Muhammed Rahim, is frequently mentioned by international media outlets for his candid letters to Mr. Warner.

### EDITOR:

In an interview with Al Jazeera, you discussed your fear for your clients’ lives during the ongoing hunger strikes at Guantanamo Bay.<sup>1</sup>

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\* Carlos Warner is an assistant federal defender for the Northern District of Ohio. In 1997, he graduated cum laude from the University of Akron with a Juris Doctor and a Masters Degree in Public Administration. Mr. Warner served on the Editorial Board of the *Akron Law Review* and began his career in public service with the Legal Clinic and Office of Appellate Review at The University of Akron. Mr. Warner currently resides in the Greater Akron area and has two children.

You described a letter received from Fayiz Mohammed Ahmend Al Kandari as potentially a “goodbye letter.”<sup>2</sup> Do you feel compelled to advise your clients to end their hunger strikes, or could these tactics be the only recourse available with indefinite detention in place? Has media coverage surrounding the hunger strikes helped your clients’ legal position, bringing their story back into the public focus?

MR. WARNER:

There is no question the hunger strikes have provided renewed attention to the desperate situation in Guantanamo. However, the news cycle is very fickle, and unless there are tragic or outrageous developments, the hunger strike slowly fades into the background. I have close relationships with my clients. I would never advocate for or encourage a hunger strike. In fact, I encourage my clients to trust my work and ask them to eat whenever we speak. That being said, they have made a knowing and voluntary choice to engage in a peaceful hunger strike, and I believe this is their right as a human being. They control nothing in Guantanamo, having little to no prospect of release, even though our government has promised release for many years. It is mind-boggling that these same individuals who have been promised release are now being force fed on a twice daily basis after they have made a voluntary decision to end their lives.

Force feeding has been defined as unethical by the American Medical Association and as torture by the United Nations and other human rights groups. The answer is not force feeding. The answer is the President using his current authority to release these innocent individuals to third party countries immediately. He has the authority to do so under current law. The question is whether or not he has the political will to release innocent men.

EDITOR:

Congress and the federal courts have repeatedly wrestled with the issue of what government entity—a specialized military tribunal or a federal district court—should be vested with the authority to hear petitions for writs of habeas corpus on behalf of Guantanamo Bay detainees. Congress has used the Military Commissions Act (“MCA”)

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1. Interview for INSIDE STORY AMERICAS with Carlos Warner, Federal Public Defender (Apr. 5, 2013), *available* at <http://www.aljazeera.com/programmes/insidestoryamericas/2013/04/20134594410507373.html>.

2. *Id.*

of 2006, as amended in 2009, to apparently narrow the federal district court purview in military detainee cases. In *Schlesinger v. Councilman*,<sup>3</sup> the U.S. Supreme Court said: “[F]ederal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted.”<sup>4</sup> From the perspective of a practicing attorney, how would you compare the substitute procedures put in place by Congress with the criminal procedures and protections available in federal court? How much of an impediment, if at all, to administering justice have laws like the MCA been for your clients?

MR. WARNER:

Although the U.S. Supreme Court required “meaningful judicial review” in *Boumediene v. Bush*, the death knell to federal habeas corpus in Guantanamo was dealt by the U.S. Court of Appeals for the District of Columbia in *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2011) (reissued on April 27, 2012). In *Latif*, the Circuit Court essentially overruled the Supreme Court when it opined that evidence against detainees must be presumed accurate and authentic if the government claims it is accurate. Despite holding in *Boumediene* that habeas corpus petitions must permit an inquiry into the sufficiency of evidence, the Supreme Court denied *certiorari*, allowing *Latif* to stand. The *Latif* standard makes “meaningful judicial review” impossible. Even prior to this decision, the D.C. Circuit defanged any power conferred by the Great Writ in Guantanamo when it held that the District Court was without remedy to order the release of an individual who has won his case. See *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009). These decisions read together render *Boumediene* useless to those detained in Cuba. The men can meet with lawyers, but there is little or no process available to the lawyers to secure the release of their clients, no matter their culpability.

Recently, the same Circuit Court decided *Hamdan*, which provides that a charge of material support of terrorism cannot be prosecuted *ex post facto* through the Military Commissions. While many civil libertarians hailed *Hamdan* as a victory for the detainees, I view it as the Circuit blessing indefinite detention as the ultimate solution in Guantanamo. Now, the detainees do not have access to meaningful judicial review and do not have an avenue to plea bargain, even if the detainee and the government contemplate an *Alford* Plea in furtherance of a diplomatic effort to gain release. From my perspective, due to the

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3. *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

4. *Id.* at 758 (citations omitted).

D.C. Circuit's recent decisions, there is not a viable legal process available to the detainees seeking release. Thus, I have focused my efforts on extrajudicial political and diplomatic solutions. This is the only avenue that makes sense given the current state of the law.

EDITOR:

In 2009, State Department information was leaked revealing what some political commentators likened to “haggling” between the United States and foreign governments over relocating Guantanamo Bay detainees. With so much negative public sentiment, political action to help free detainees may be an albatross some government officials and institutions are unwilling to bear. Can you elaborate, to the extent possible, on what extrajudicial political and diplomatic solutions you are pursuing?

MR. WARNER:

Because of my agreement with the government regarding the access to Top Secret/Secure Compartmentalized Information (hereinafter TS/SCI), I have been specifically prohibited from examining any illegally leaked material. I have gone to great lengths to insulate myself from the possible accusation that I accessed WikiLeaks material or any other material that according to the United States was arguably illegally leaked.

These restrictions do not prohibit me from commenting on my extrajudicial and diplomatic activities, as those activities are all unclassified. Diplomatically, my representation requires that I engage and/or understand foreign governments, with the blessing of the State Department, for the purpose of creating settlement plans for my clients. The innocent Uighurs are testament that, unless there's a mutually agreeable place for a client to be released, clients will stay in Guantanamo indefinitely. An interesting side note on this issue is that pursuant to my TS/SCI agreement, I must notify the Department of Justice whenever I leave the United States or set foot on a foreign embassy in Washington. In an Orwellian moment, an official once contacted me when he thought I left the country, even though I hadn't. It was one of the first times I knew someone was watching my activities.

Extrajudicially, I spent several years negotiating with different parts of the Executive Branch on both large and small issues. For many years our discussions were not secret but were confidential for the purpose of keeping an open and free dialogue. These discussions included possible

global resolutions for the men detained and collaboration regarding possible repatriation of different detainees. The discussions also included conditions at the prison. Over the years, I came to realize that the Executive Branch was at odds with itself and was powerful yet utterly paralyzed to a degree that it was nonfunctional on even the most trivial issue regarding Guantanamo. For example, an understanding could be reached between one faction of the Department of Defense or Department of Justice, only to have another faction of the same bureaucracy thwart the solution.

Thus, my negotiations eventually evolved to focusing all my effort on getting a shareholder in the White House to assist in resolving infighting within the Executive Branch. I discovered that once former White House Counsel Gregory B. Craig left the Obama Administration, there was not a member of the White House staff charged with coordinating solutions on Guantanamo—the White House washed its hands completely on the issue. I knew we required an individual with power in the White House.

I was hopeful that once Brigadier General Mark Martins was appointed as Chief Military Prosecutor in Guantanamo in October 2011, many of these problems would be solved. I was led to believe General Martins had the ear of the President as they attended Harvard together and were on the same editorial board of the Harvard Law Review. I have come to understand this simply wasn't the case. General Martins appears not to be interested in closing Guantanamo or assisting in the creation of a military commissions system that brings fairness and finality to criminal sentences. Thus, for the past year or so we have refocused our efforts to bring attention to the real issues that thwart closure of the base. As it stands today, I have concluded that my efforts should focus on getting the tragic stories of injustice out to the public. The public must understand that innocent human beings are being detained by our government for no good reason.

Until I see movement from the Obama Administration on this issue, I intend to focus on public education, which is bound to correlate into intellectual backlash. Once (and if) the Administration is ready to work on closing the prison at Guantanamo, I will be one of the first lawyers back at the bargaining table on behalf of the detainees.

EDITOR:

According to a recent Associated Press article by Ben Fox, a detainee named Muhammed Rahim Al-Afghani, who is described as a

high-value detainee housed in Guantanamo Bay Camp Seven, is among the clients you are representing.<sup>5</sup> Fox's article details your attempts to remind others that Rahim is a human being and that he should be treated as such.<sup>6</sup> What impact, if any, do you think public apathy regarding the Guantanamo Bay "terrorists" has had on slowing the judicial process for your clients? Or, put simply, do you think the federal government has been able to hold suspected terrorists longer because the American people as a whole do not care about protecting the due process rights of foreign detainees?

MR. WARNER:

I think apathy, inaccurate information, and the general public's lack of basic knowledge has allowed Guantanamo to exist for far too long. I often say, as lawyers representing the men, we have to litigate with both our hands tied behind our back. We cannot talk about specific allegations with the public, making it impossible to investigate and educate on a particular client or point. We cannot share the allegations with the accused, which is a preposterous result from security restrictions. I have learned to litigate with my feet in this bizarre arena. I can't tell you why I believe Mr. Rahim may be innocent of the allegations made public by the government, which is a purposeful restriction imposed by the United States Government, so I have been forced to adapt my strategy.

Recently, a federal public defender named Stephen Demik made the perfect analogy regarding our litigation strategy. He compared what some of us do to the creation of Dadaism in reaction to World War I. The conditions are so onerous and the restrictions are so illogical that it falls upon us to embrace the chaos and irrationality. We need to make irrationality our currency and use it as a sword at every instance. The public pays attention to this kind of demonstration because, frankly, the public is tired of hearing our calls for the application of human rights, due process, and fundamental fairness. The general public does not read and is not interested in legal publications like this Journal, and we are foolish as lawyers to believe that someday legal tomes and platitudes will somehow prevail. Deep down, as litigators know, the keys to Guantanamo are buried with the general public and its muted outrage over the injustice the detainees suffer.

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5. Ben Fox, *A Lesson in Pop Culture Via Guantanamo*, ASSOCIATED PRESS (Dec. 31, 2012 1:03 PM EST), <http://bigstory.ap.org/article/lesson-pop-culture-guantanamo>.

6. *Id.*

Dada artists described Dadaism as “a phenomenon bursting forth in the midst of moral crisis, a savior, a monster, which would lay waste to everything in its path. It was a systematic work of destruction and demoralization and in the end it became nothing but an act of sacrilege.” *See* Helen Gardner, Fred S. Kleiner, and Christin J. Mamiya, Gardner’s *Art Through the Ages 75* (12th ed. 2006). In the end, we are sacrilegious about Guantanamo, and we intend to legally challenge it until the prison is shuttered. Muhammed Rahim understands this strategy and has helped the cause by authoring letters about LeBron James, kittens, and reward cards. For the first time, people realize my client is human, and they are asking questions about him and his plight. I have fielded calls from India asking about who my client is and why he is writing his letters. Because of the classification restrictions, I usually cannot answer their questions, causing greater mystery and intrigue. I believe Mr. Rahim’s freedom, and for that matter the freedom of most other detainees, is found somewhere in this public dialogue and interest.

This strategy is more convincing than stating over and over that our government’s intelligence agencies unanimously determined that eighty-seven of the one hundred sixty-six men currently held in Guantanamo should be immediately released because they are not terrorists and pose no risk whatsoever to our Military or to our Country. The public doesn’t care that innocent men have not been released because closing Guantanamo is not a priority for the Obama Administration. The public is tired of hearing that conservatives enjoy inaccurately portraying the entire Guantanamo population as terrorists. The myth that Guantanamo houses “the worst of the worst” has been debunked for years, but the public doesn’t remember this. A mountain of public evidence describes the dozens of innocent men who are currently held in Guantanamo, but the public will not voluntarily access or use this information.

But when the public is interested, I have an opportunity to advocate that innocent men be freed from Guantanamo. When they listen, I advocate that, if the government claims a Guantanamo detainee committed a crime, that individual should be permitted his day in court. These are simple, bedrock American principles that somehow do not apply to men held in Guantanamo but resonate with almost everyone. As a Federal Defender and as an American, I do not simply accept as truth claims made by our government. I have learned that the veracity of a government story usually correlates directly to the strength of an open court utilizing tested due process. No legitimate courts or actual due process exist in Guantanamo. I have embraced that we must be avant-garde in our approach in order to properly raise public consciousness on

these issues. Most importantly, I have faith in the public once they wake up. I firmly believe the tragedy that Guantanamo has become will only end through the education of the common citizen and the resulting public outcry. I believe Mr. Rahim understands this as dynamic, and that's why he is a special client.

EDITOR:

In the Associated Press article, Fox reports on a statement made by Abdul Basit, Rahim's younger brother: "[Basit] suggests his brother is being held more for who he might know rather than what he has done."<sup>7</sup> From your experience, do you think many foreign detainees are being held for this reason—their interrogation value rather than their criminal propensities?

MR. WARNER:

Again, I cannot comment on any particular case. I think the government generally has diverse motives to keep an individual's story secret. It cannot be denied that the general public would be outraged and embarrassed if it knew fully the conduct of our government, especially when our government (as Dick Cheney said) entered "the dark side." I propose that the "dark side" does not merely mean the torture of bad actors, which is abhorrent in its own right. "The dark side" also means we persecute and incarcerate indefinitely innocent individuals. Examining the cases of released detainees easily leads any fair-minded individual to the conclusion that the government has a vested interest to keep its mistakes private and secret. The solution to the Guantanamo problem ultimately is a simple one: Allow the detained a trial in an open and public court with capable and motivated counsel. This would sort the wheat from the chaff expeditiously.

EDITOR:

In discussing issues surrounding U.S. military action in Afghanistan and Iraq—including issues such as due process rights for foreign detainees, the Bush and Obama administrations' use of combat drones, and Congressional military privatization—it could be argued that many Americans accept these actions as necessary to achieve the United States' post-9/11 political and military objectives. Opponents of the

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7. *Id.*



U.S. Government's military actions would argue that a zeitgeist has emerged in which average Americans are willfully ignorant of rights violations as they relate to foreign detainees. How would you explain to the average American that your clients' situations are of importance to the American people as a whole?

MR. WARNER:

The average citizen should be petrified by the notion that the Executive would purposely endeavor to avoid the rule of law. The Bush Administration proudly announced that Guantanamo Bay was chosen as the site for the prison camp because it was a legal black hole. Courts do not exist to assist the Executive in thwarting the law. Courts are designed to enforce laws. The President takes an oath to uphold the Constitution and enforce the nation's laws. An Executive that is interested in breaking the law, internationally or otherwise, is a very scary proposition, in my mind.

EDITOR:

Much of the media attention focused on Guantanamo Bay has involved treatment of detainees, term of detention, and the detention facilities themselves. Although most Americans are probably familiar with interrogation techniques like water boarding and sleep deprivation, many may not be familiar with what a detainee goes through on a daily basis. Can you describe the facilities and treatment of detainees in Guantanamo Bay that have become a condition of daily life for your clients? How has life for a detainee improved or worsened over the past few years?

MR. WARNER:

Again, I am not permitted to discuss specific conditions of confinement or detention procedures at Guantanamo. I can comment on a few items. Generally, it is my opinion that the conditions (depending on the detainee) are similar to conditions found in the United States for medium to high security prisoners. The institutions built in Cuba are similar to those built in the United States, so it stands to reason that the conditions are also similar. There are some unique aspects to the facility in Guantanamo.

One oddity is that I am allowed to bring my clients food. This food is subject to inspection, of course. Guantanamo developed this rule

because in the beginning many prisoners engaged in hunger strikes. Many lawyers bring their clients McDonalds. Many of the same lawyers claim that their clients refuse to eat in front of them. I always tell these lawyers, "If you were locked away in a foreign land with no prospect for release and your lawyer, who could bring you any food on the planet, brought you McDonalds, would you eat it?" Thus, many detainees have requested that I be their lawyer. While I like to believe these requests stem from my legal acumen, the reality is that many men desire the food I bring. I have brought all sorts of creative food items to the men, including fresh fish caught from Guantanamo Bay. Once I brought circus peanuts, which was a confusing choice. I assured the client that many people like circus peanuts. Sharing a meal with many of the men can be a therapeutic experience for all involved. The food rules constantly change. As a Guantanamo veteran lawyer, I have learned to be flexible and adapt.

I have never brought my clients housed in the United States food. Over the years, I have developed relationships with very generous people and organizations in the United States that donate food for the clients. I pay for the fresh food out at the base out of my own pocket because the Federal Defender Organization will not authorize the purchase of food for clients. Our Organization is very inflexible on this point in spite of my strong admonition that this part of the representation is vital to our relationship for the obvious reasons.

Finally, I believe, if the men are ever moved to the United States, their prospects of release may brighten, but the conditions of their confinement will worsen. Over the years, the conditions have fluctuated, usually due to command changes at the base. Whenever I am asked superficially about the conditions in Guantanamo, my reply is always "the conditions are horrible." This reply is based mostly upon the fact that none of the men have any idea when and if they will be released. This reality has allegedly driven many men to suicide and casts a dark shadow over any particular physical condition of confinement at the base.

EDITOR:

In several habeas petitions filed in federal district courts by foreign detainees over the past few years, detainees have alleged that they were captured and interrogated in other countries prior to being moved to a detention facility under U.S. control. It is conceivable, then, that some of your clients have been interrogated by various individuals, each of

which may have provided misinformation as an interrogation tactic. Once introduced to your clients, how difficult is the task of gaining their confidence? What practical effect does this have on your ability to represent potentially apprehensive clients?

MR. WARNER:

I cannot confirm or deny any fact regarding the detention, alleged torture, and/or rendition of my clients. Most experts on torture generally agree it is ineffectual. You may get pieces of information, but those pieces will be invariably mixed with inaccurate information. Sometimes torturers get no valuable information at all. People will usually say whatever is required to avoid or end the application of torture. What amazes me to this day is that in the United States of America I must engage in this conversation at all. Torture is abhorrent to a civilized society. I have always been of the position that the debate on this issue should end with that one sentence.

So far as rapport with clients in Guantanamo, for me it is no different than building rapport with any client I represent. As a lawyer I give honest and straightforward answers. If I promise to do something, I do what I promise. I do not promise to do things I cannot accomplish. I treat all my clients as valuable human beings. I listen to their thoughts, ideas, and strategy with interest. The biggest litigation breaks in my career have always begun with words from my clients. I treat my clients with civility and courtesy. I educate myself about their particular culture (if I am unfamiliar) and do my best to respect their wishes and customs. My experience is that my civility and courtesy is not mistaken for weakness by clients and these principles combined with fifteen years of practice lead to a strong attorney-client relationship.

EDITOR:

The U.S. Department of Defense has not released a recent, comprehensive list of Guantanamo Bay detainees or their nationalities. Nonetheless, information compiled from various news sources suggests that many of these detainees are from regions in the Middle East where Islam is the predominant religion.<sup>8</sup> Do the conditions of confinement at Guantanamo Bay prevent or impede detainees' ability to observe and

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8. See, e.g., High Value Detainee Biographies, U.S. Department of Defense (Apr. 5, 2013), <http://www.defense.gov/pdf/detaineebiographies1.pdf>; A History of the Detainee Population, N.Y. TIMES (Dec. 11, 2012), <http://projects.nytimes.com/guantanamo?ref=guantanamoynavalbasecuba>.

practice their religious beliefs? Does underlying religious tension exist between detainees and/or between the detainees and the military service members who guard them?

MR. WARNER:

I cannot comment about specific instances in Guantanamo. I believe the military has done its best to provide the detainees every opportunity to observe Islam within the security restrictions at the base. The base is comprised mostly of young men and women. Most of these soldiers are mature far beyond their years. When a soldier tells me he or she will be at a certain place at a certain time, that soldier invariably arrives there five minutes early. Dozens have asked me about becoming lawyers. I always tell them that if they can bring the same diligence I have observed to the legal profession they will be very successful.

I have associated with dozens if not hundreds of soldiers, and I am always surprised by how mature the soldiers are at a young age. It is a fact that many of these young men and women must be educated about Islam and Islamic culture. I have met soldiers that were ignorant about the camp and the men detained. I can't confirm or deny that this caused issues with the detainees because I have no idea about individual incidents involving individual soldiers. I just notice that those who are not properly trained don't seem to be working with me when I return. It is only my opinion, but I do not believe the military has any interest whatsoever in imparting religious intolerance onto detainees. This would be dangerous and counterproductive.

EDITOR:

In *Boumediene v. Bush*, Justice Kennedy performs a lengthy historical analysis that traces the traditional, and sometimes geographic, underpinnings of the writ of habeas corpus.<sup>9</sup> He concludes that modern foreign detainee cases necessitate a practical test, rather than a strict formalistic test, for determining whether federal courts can exercise jurisdiction to consider habeas petitions.<sup>10</sup> Although the practical, three-part test from *Boumediene* has benefitted some detainees, situations could be conceived where the increased threat of foreign attacks warrants denying habeas petitions. What rule of law or general legal principal would you advance to support your client if one of your cases

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9. *Boumediene v. Bush*, 553 U.S. 723, 739-47 (2008).

10. *See id.* at 764-66.

were argued before the current panel of the U.S. Supreme Court?

MR. WARNER:

As I stated previously, *Boumediene* has been eviscerated by the Circuit Court in D.C. Meaningful review is impossible given the current state of the law. It appears that the Supreme Court has no interest at all in revisiting the issue, as the Circuit has all but called *Boumediene* a farce through its repeated decisions. I could easily argue that *Boumediene* has benefited exactly one detainee. While individual arguments can be made with substance (like "the habeas discovery process forced the Executive to transfer detainees"), perhaps Mohamed Jawad, a young Afghan, is the only example of habeas actually freeing an individual from Guantanamo. Mr. Jawad's release was based upon courageous work by his defense team and by District Judge Ellen Huevelle, who pressured the Executive into an actual release of Mr. Jawad to Afghanistan. After Jawad, the Department of Justice decided to appeal all granted writs to the Circuit Court, where they always prevailed.

Sixty percent of all petitions brought to the moderate District Court in D.C. were originally granted (thirty-eight out of sixty-three decisions). As of today, the D.C. Circuit has issued decisions in twenty-two of these cases. Their dispositions are as follows:

- 3 decisions reversed district court grants and directed denials (Adahi, Uthman, Almerfedi)
- 13 decisions affirmed district court denials (Bihani, Awad, Barhoumi, Al Odah, Esmail, Madhwani, al Alwi, Khan, Kandari, Sulaiman, al Sabri, Obaydullah, Khairkhwa)
- 1 decision summarily affirmed a district court denial (Tofiq al Bihani)
- 3 decisions remanded district court grants for further proceedings (Salahi, Hatim, Latif)
- 2 decisions remanded district court denials for further proceedings (Bensayah, Warafi)
- 0 decisions affirmed a district court grant
- 0 decisions reversed a district court denial and directed a grant

The twenty-two circuit court decisions affected the 38-25 result from the petitions being heard in the District Court as follows:

- Adahi flips from a grant to denial: 37-26
- Uthman flips from a grant to denial: 36-27
- Almerfeddi flips from a grant to denial: 35-28
- Salahi, Hatim, and Latif are removed from the grants: 32-28
- Bensayah and Warafi are removed from the denials: 32-26

Bihani, Awad, Barhoumi, Al Odah, Tofiq al Bihani, Esmail, Madhwani, al Alwi, Khan, Kandari, Sulaiman, al Sabri, Obaydullah, and Khairkhwa have no effect on the scorecard.

As of the date of this interview, there are fifty-nine GTMO merits decisions standing. Of those, there are thirty-two grants and twenty-seven denials. There are four previous decisions remanded by the D.C. Circuit and not yet resolved: three district court grants (Salahi, Hatim, and Latif) and one district court denial (Bensayah). (Latif's death resolves his case as a practical matter, but it remains active until certain ancillary issues are resolved.) There are four active appeals yet to be decided by the D.C. Circuit: all are petitioner appeals from district court denials (Ali, Warafi II, Hentif, and Hussain).

In some cases (like the Uighurs), the Department of Justice did not appeal the granting of the writ. Instead they argued no remedy was available, and the D.O.J. prevailed on this issue as well. *See Kiyemba, supra*. The short story is that the D.C. Circuit has never affirmed a district court decision to grant the Great Writ to someone detained in Guantanamo. Lawyers for the detainees have asked the Supreme Court to weigh in on this issue on twelve occasions. Each time, the Court has refused to grant *certiorari*. The Supreme Court issued *Boumediene*, with its legal platitudes, and now remains silent. I would advocate to the Court that it must refine the law in a way that makes "meaningful review" possible. At a minimum, this would require doing away with the presumption of accuracy as described in *Latif*, allowing for a judicial remedy with teeth, and imposing a sensible standard of review with deference to the district court on appeal. Otherwise, to the men in Guantanamo, *Boumediene* is merely lip service by the Supreme Court.

EDITOR:

The "meaningful review" you describe undoubtedly presupposes a nexus of some sort between habeas corpus and due process (a nexus the D.C. Circuit was unwilling to recognize). Presuming *Kiyemba* and *Latif* were roadblocks the Supreme Court was willing to remove, do you

believe the district court is the best forum to make the ultimate determination on habeas writs *and* on the extent of detainee due process rights? Could "due process" rights for foreign detainees mean something different on a case-by-case basis depending upon the actual charges brought forth and the conditions of capture?

MR. WARNER:

Habeas corpus and the Great Writ have a lofty and decorated place in our national history. I have full faith in our courts' ability to fact find and administer a full and fair proceeding. The District Court in Washington, D.C. demonstrated as much before the Circuit Court began applying its own unique *stare decisis* to Guantanamo. Although the District Court in Washington, D.C. has jurists from all philosophical perspectives, early habeas hearings were almost unanimously in favor of the detainees. Those opinions are still widely available for public review. The opinions detail heartbreaking stories of innocence and the Government relying on preposterous claims and tenuous, if not outrageous, connections justifying detention. Many of these men are still detained. Some were detained, after being delivered to the United States by way of paying bounties to known rivals, because of ridiculous allegations like "he wore a Casio watch."

Due process is due process. Remember, this is a system where as counsel I usually cannot share the Government's allegations with my own client. I cannot investigate the charge because I cannot share the allegations with the subject of the investigation. Imagine trying to get to the bottom of a bar fight that resulted in a death. I can't tell my client who was killed or why the Government says he's involved. I can't even tell him when the assault occurred or in what bar the assault took place. I certainly cannot interview or cross examine his accusers. Moreover, I can't visit the bar or talk to any other witness to the fight. I am also prohibited from speaking with the coroner or any of the investigating officers. Sometimes, the Government will say "we have important evidence about your client regarding our allegation, but we can't tell you what that evidence is." Sometimes, the Government just tells the judge without telling or notifying me at all. All of my communications with my client are observed and recorded. All of my legal correspondence is read and inspected by the Government. Guantanamo has been referred to as "Kafka-esque," and that reference is right. "Catch-22" also aptly describes the legal malaise that is currently called Guantanamo habeas corpus. Nothing in my legal training prepared me for this endeavor.

The Supreme Court could fix this with two opinions addressing *Kiyemba* and *Latif*, but the Court has not yet done so. The accused should have the right to confront and challenge evidence. Unreliable evidence should not be relied upon by the fact finder. The Government should carry some burden of proof when a person's liberty is at stake. When the court declares that someone should be released, they should be released. These are simple and straightforward principles that are not applied to Guantanamo detainees.

EDITOR:

The Supreme Court has in recent years decided cases, such as *Roper v. Simmons*,<sup>11</sup> *Graham v. Florida*,<sup>12</sup> and *Miller v. Alabama*,<sup>13</sup> that employ the Eighth Amendment to protect juvenile offenders from harsher punishments like the death penalty and life imprisonment. Omar Khadr was a Guantanamo Bay detainee who was captured when he was fifteen years old.<sup>14</sup> Over eight years after his capture, Khadr was still seeking his release.<sup>15</sup> The military tribunal recommended forty years imprisonment for Khadr, but he reached a plea agreement which required him to serve only an additional eight years.<sup>16</sup> Is youth an aggravating or mitigating factor for Guantanamo Bay detainees? Does the current scheme of detention for younger prisoners take into account the "mismatches between the culpability of a class of offenders and the severity of a penalty" as the Court discussed in *Miller v. Alabama*?<sup>17</sup>

MR. WARNER:

In *Bush v. Gore*, Justice Stevens opined in dissent that "[o]ne thing . . . is certain. Although we may never know the winner with complete certainty, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law." The Supreme Court's role in Guantanamo is eerily similar, the only true difference being that the erosion of the rule of law is less obvious to the general public due to propaganda and the general public's

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11. *Roper v. Simmons*, 543 U.S. 551 (2005).

12. *Graham v. Florida*, 130 S.Ct. 2011 (2010).

13. *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

14. See Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. TIMES (Nov. 1, 2010), [http://www.nytimes.com/2010/11/02/us/02detain.html?ref=omarkhadr&\\_r=0](http://www.nytimes.com/2010/11/02/us/02detain.html?ref=omarkhadr&_r=0).

15. *Id.*

16. *Id.*

17. *Miller*, 132 S.Ct. at 2463.



ignorance regarding those detained. Many innocent men and children have been incarcerated for over ten years, with no recourse or remedy. In the absence of the rule of law, guilt, innocence, child, and adult are all treated equally harshly. Those held in Guantanamo do not fit into a "current scheme of detention." There is no viable court or rule of law. Our nation has abrogated the Geneva Conventions and international law through a "scheme" of indefinite and illegal detention. In this "scheme" the severity of penalty has nothing to do with culpability or status as child or adult. The result is always the same, detention forever with no due process. The current system not only degrades our nation's place in the world order, but it also promotes terrorism in radical madrassas and communities across the globe.

EDITOR:

In *Amanatullah v. Obama*,<sup>18</sup> the petitioner argued, *inter alia*, that his detention in Bagram was an attempt by the U.S. government to "purposefully evade" the rule of law and judicial review.<sup>19</sup> The D.C. Circuit disagreed, holding that the habeas writ analysis was jurisdictional in nature and that "purposeful evasion" as a factor in jurisdictional analysis would "lack any limiting principle and would threaten to create universal habeas jurisdiction." While the accused individual is often portrayed as evading the rule of law, the D.C. Circuit seems to overlook the possibility that the Government may do the same. Would you agree with Amanatullah's argument that purposeful evasion should become part of the habeas writ analysis for foreign detainees? Could this argument prevent the federal government from detaining prisoners indefinitely, or would physical relocation of detainees into federal prisons be the only way to resolve the enigmatic jurisdictional issues surrounding GTMO?

MR. WARNER:

Guantanamo was imagined by the Neoconservative powers in the Bush Administration. Guantanamo Bay was selected by President Bush, Dick Cheney, Donald Rumsfeld, Paul Wolfowitz, and others because it was considered to be beyond the jurisdiction of any United States court or any international court. It was a purposeful effort to avoid the rule of

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18. *Amanatullah v. Obama*, Case No. 10-CV-536 (RCL), 2012 WL 5563955 (D.D.C. Nov. 15, 2012).

19. *Id.* at \*1.

law. Officials in the Bush Administration also assumed due process would not apply to foreign nationals who the Administration unilaterally declared were “unlawful enemy combatants.” The Administration wagered that, in the shadow of 9/11, our courts would allow the suspension of our Constitution for the Administration’s “War on Terror.” The Supreme Court appeared to harshly rebuke the Administration in *Hamdan v. Rumsfeld* and later in *Boumediene*. In hindsight, given the work of the Circuit Court in Washington, D.C., these victories were almost entirely pyrrhic. However, the general facts remain—the Bush Administration made purposeful efforts to avoid the law by housing men in Guantanamo.

Retired Army Colonel Lawrence B. Wilkerson, who was the Chief of Staff for Colin Powell during the Bush Administration, has said on numerous occasions that President Bush and others within his Administration refused to release innocent men because of fear of political repercussions. *See, e.g.*, Dana Milbank, *Colonel Finally Saw Whites of Their Eyes*, WASHINGTON POST (Oct. 20, 2005). Col. Wilkerson has laid the blame at the feet of Donald Rumsfeld and Dick Cheney, whom he claims knew the majority of the seven hundred forty-two men sent to Guantanamo in 2002 were innocent. Many of these men remain in Guantanamo today. One must begin every discussion about Guantanamo and its *stare decisis* using these facts as a backdrop. The Bush Administration strenuously argued in *Rasul v. Bush* that the Geneva Conventions do not apply to the men held in Guantanamo because Guantanamo is not a sovereign territory of the United States. Our Government argued to our courts that Guantanamo was its own creation where they could do whatever they wanted to whomever they wanted. The Circuit Court in Washington, D.C. embraced this view of Guantanamo until the Circuit was reversed by the Supreme Court.

Bagram and Afghanistan present a completely different situation. I do not believe that an individual picked up on the battlefield in Afghanistan and held in military detention in Afghanistan is entitled to habeas corpus review in the United States. One obvious distinction is that the Geneva Conventions and international law apply to Bagram, even though the United States can still argue an individual is an “unlawful combatant.” Even unlawful combatants have some status under the Geneva Conventions.

Although currently feeble, there is a legal system in Afghanistan. Afghanistan as a sovereign country presents different international hurdles for the United States Government, both diplomatically and in international courts. Finally, all signs indicate the Obama

Administration intends to end hostilities in Afghanistan in 2014 and is preparing to turn control of the prison over to the Afghan government. It does not appear to me that the majority of the men held in Bagram will be indefinitely detained, although only time will tell.

What is missing from the Bagram litigation is the uncontroverted evidence that the United States intended to avoid the law by creating a legal black hole at Bagram. One thing *Hamdan* and *Boumediene* did do is stop the flow of new detainees to Guantanamo. As an example of the potential to circumvent legal restrictions, consider the killing of Osama bin Laden. If Osama bin Laden was not killed and was instead captured, a legal quagmire would have ensued. The U.S. Government was unlikely to detain him at Guantanamo, and he if was rendered to Bagram, international attention and scrutiny could have been brought to the prison there. The U.S. Government was also unlikely to agree to his detention in Pakistan, and a political nightmare would have resulted had he been brought to the United States. Situations like these motivate governments to look for the most advantageous place to detain foreign enemies, but these situations may also prompt governments to evade legal entanglement by placing a detainee beyond the reach of the law. The Obama Administration does not hesitate to kill al-Qaeda members on the spot. Given this history, the Administration's decision to exclusively use drone attacks against terror suspects may be seen as an unintended consequence of the legal battles surrounding the detention of foreign terror suspects. Death by drone is a much cleaner solution for the Executive.

Nonetheless, if a detainee could prove that he was rendered to Bagram by the United States with the purposeful intent to avoid the hand of the law, international or otherwise, my opinion would likely change. To that extent, I agree with the "purposeful evasion" doctrine so long as an extraordinarily high standard of proof is imposed on the petitioner. Basically, in my view the petitioner would be required to prove what was proven in Guantanamo—that the United States purposely intended to create a legal black hole. The roots of this argument are grounded in the Separation of Powers Doctrine. The Executive cannot Constitutionally rob the Judiciary of its power to check the Executive's unconstitutional action. Imposing a very high standard upon the petitioner would protect against "universal habeas jurisdiction."

Bringing the detainees to the United States would likely bring a new round of habeas petitions in a different jurisdiction. It would also require the Courts, in my opinion, to reexamine the remedy problem described *Kiyemba*. The outcomes are impossible to predict, but

perhaps the remedy in lieu of repatriation would be administrative custody or release through the Bureau of Immigration and Customs Enforcement. Everyday our country deals with the dilemma of what we should do with an individual who is deportable but who also qualifies as a refugee because of conditions in his or her own country. We do not indefinitely detain asylum applicants. I see no reason why general asylum principles shouldn't be applied to innocent Guantanamo detainees if they were transferred to the United States.

EDITOR:

As council for foreign detainees, how does your role differ from that of a criminal defense attorney working in the United States? The defense attorney often plays an unpopular role when he or she defends an individual accused of serious crimes. Have you faced criticism for defending the detainees held at Guantanamo Bay, and how would you answer those critics?

MR. WARNER:

I have never felt "unpopular" in my current role. I contend I am very popular with the tribunals where I work because I take pride in my work and always do my best to be courteous and professional. Perhaps a particular judge or prosecutor may not like that I push them to discharge their duties, but the majority of those I work with are also diligent, courteous, and professional. In the end, I think those in the legal profession respect my commitment to my clients and the rule of law.

Most importantly, I am popular with my clients. My relationship with my clients is my first priority in every case I handle. I treat every case like it was my own and approach each case with that mind set. This strategy, combined with a commitment to ethics and professionalism, has guided me through many difficult and supposedly unpopular legal challenges. It also helps that I do not squabble with my clients over money. I am lucky that I have the resources to properly defend the cases I am assigned.

At my core, like most Americans, I am a civil libertarian. I say most Americans are civil libertarians because, in my experience, most Americans believe in our Constitution and want it enforced. I take pride in vigorously defending our Constitution and the principles this great nation was founded upon. Once the public appreciates this about my practice, my causes often become very popular. Citizens are generally frightened by corrupt law enforcement, overzealous prosecutors, or the

abdication of the law by our courts. Sure, I have had people drink a few too many cocktails and confront me about my work at Guantanamo or other controversial cases I have handled. When possible (sobriety is usually required for a productive conversation), I take the time to calmly and concisely explain to them what I do and why I am passionate about my work. Usually they have no idea about a particular controversial case. They may only know what they read on the Internet or hear in the news, which is often inaccurate or incomplete. After fifteen years of practicing how to answer "what do you do if you know your client is guilty" and "how can you sleep at night," I have become adept at educating others about our judicial system, our Constitution, and my role as a public defender. More times than not, those who inquire in this fashion actually turn into citizens that would make great jurors.