

Not Forgotten

If success in the Guantánamo cases was measured by the same standards that we weigh success in more traditional cases—winning motions, obtaining favorable judgments—our clients would probably be justified in firing us. After all, most of the 260 men at Guantánamo have been held in virtual isolation from the outside world for over six and half years. In that time, not a single person has had a hearing in federal court. It wasn't until the middle of this year that the first military trial was completed. Nor has a single person been held accountable in court for abuses at Guantánamo, even though many of these abuses have been documented and corroborated by the government's own reports.

It is true that each time Guantánamo detainees have gone before the Supreme Court in the past four years, they have defeated the administration's attempts to turn Guantánamo into a legal black hole where neither the Constitution nor international humanitarian law apply. But at the same time, despite these incredible legal victories, 2008 looks a lot like 2004, when the Supreme Court first affirmed that detainees had the right to challenge their detention through habeas corpus proceedings in civilian courts. As Justice Souter wrote in his concurring opinion in *Boumediene v. Bush*, "After six years of sustained executive detentions in Guantánamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to the prisoners and the Nation."

I have rarely doubted that the courts would ultimately find that the right to habeas corpus extended to prisoners at Guantánamo Bay. But after my first few months working on the Guantánamo cases at my firm, I wondered what value we really offered our

clients at a time when the lower courts, where our cases were pending, were unable to rule on virtually any aspect of the case until they received guidance from the higher appellate court. And with no ruling from the appellate court in sight, the military at Guantánamo could act with virtual impunity, knowing that no judge was likely to intervene.

I received a powerful answer when we began representing Fahd Umar in late 2005. Fahd wrote us in September 2005, a letter that did not arrive until November of that year. In his letter, he explained that he was very impressed by our work defending the unjustly detained and he was “captivated” by our habeas petitions which demanded a fair trial or release for our clients, and asked if we would represent him in the U.S. courts. We had our hands full representing eleven other detainees at the time, three of whom were participating on a hunger strike, but we agreed to take Fahd’s case.

Two members of our legal team first met Fahd in June 2006. Delighted as he was to meet them and discuss his legal case, having spent over five years in Guantánamo virtually *incommunicado*, Fahd’s primary concern was for his family. So before discussing anything else, Fahd asked the team to call his father and let him know that he was well, if desperate for family letters. So one afternoon back in New York, we sat down in an office and simply dialed the number that Fahd gave us for his father in Saudi Arabia.

We weren’t overly optimistic at being able to reach Fahd’s father. Even if Fahd had remembered the number correctly after being imprisoned for years, there was no way to know if the number had been changed and we couldn’t simply check the Saudi yellow pages. But luck was with us and we reached a family member on the first try. Through our translator, we asked to speak to Fahd’s father, Omar. My colleague, who had

met with Fahd, explained that we were lawyers in New York. Fahd, who was in Guantánamo, had written us a letter asking us to represent him. We were just back from visiting the base and we wanted to call to let him know that Fahd was in good health and anxious to know how his family was.

Clearly stunned, if unfailingly polite, Omar obliged by updating us about the health and status of various family members that Fahd had asked about. Two of Fahd's brothers had gotten married and had children. Another brother who had been married for some time had three children now, two boys and a girl. Two sisters had children, one sister was going to be married in the coming month, and two other sisters had entered college. Fahd's youngest brother was in his last year of elementary school. Omar's voice was neutral and calm as he went through each significant family development of the last five years, as if he were simply reading from a list of his family's achievements.

Omar had finally arrived at the youngest family members when he stopped suddenly. As if the reality of who we were and why we were calling just sunk in, Omar asked again if Fahd was well, this time with some urgency in his voice. How did Fahd look? Were we sure he was in good health? He had heard there was torture at the base; what did we know about that? We repeated what we said at the beginning of the call: that his son was fine and that we were there to make sure that he came home as soon as possible.

There was silence on the line, and then we began to hear muffled sobs. The translator said quietly, "He is weeping."

We waited for Omar to continue, some of us discretely wiping our own eyes. When Omar was able to speak again, the words came rushing out. He began telling

us again about his family, this time not as if we were simply strange foreigners with an unusual interest in his family, but with the realization that we were a link to the son that he had not seen in five years. If he could not travel to Guantánamo and see Fahd in person, he had to impress on us that there was an entire family who missed Fahd desperately and prayed every day for his safe return. Omar took particular care to assure us that Fahd's eight-year-old daughter, whom Fahd had not seen since she was an infant, was healthy and was doing well in the third grade. The conversation gradually wound down, and we hung up after assuring Omar that we would call again soon and urging him to give our best wishes to the whole family.

I left the office feeling euphoric. Even if we could not promise our clients that they would ever get their day in court or the opportunity to clear their names, we could guarantee that they would not be forgotten, trapped in a secret prison far from their families and invisible to the world. And that is a pretty big victory after all.