Obama’s Gitmo betrayal

In 2008, detainee lawyers backed him, thinking he'd restore the rule of law. They feel they were hoodwinked

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Nearly five years ago, Gary Isaac, a corporate lawyer at a prestigious Chicago law firm, drank deeply from candidate Sen. Barack Obama’s rhetorical reservoir of hope and change. The change Isaac was most concerned about had to do with the operation, outside the rule of law, of the U.S. military prison camp at Guantanamo Bay, Cuba. Isaac was deeply involved, pro bono, in helping detainees challenge their detention in U.S. courts by asserting their rights under the ancient writ of habeas corpus, which requires that the state justify the detention of a person before a judge.

So convinced was Isaac that a President Obama would restore habeas for detainees that in February 2008 he published a blog called Habeas Lawyers for Obama, composed of one impassioned post, signed by 132 habeas lawyers, and posted just before Super Tuesday in the Democratic primaries. It concluded:

> The writ of habeas corpus dates to the Magna Carta, and was enshrined by the Founders in our Constitution. The Administration’s attack on habeas corpus rights is dangerous and wrong. America needs a President who will not triangulate this issue. We need a President who will restore the rule of law, demonstrate our commitment to human rights, and repair our reputation in the world community. Based on our work with him, we are convinced that Senator Obama can do this because he truly feels these issues “in his bones.”

Five years later, Isaac believes he was hoodwinked by then Sen. Obama. He isn't the only one. Salon spoke with other habeas lawyers, many of whom signed Isaac's 2008 Obama endorsement. Many say they were blindsided by the Obama administration's defense of indefinite detention and the many walls it has erected to make their jobs more difficult. Their belief in the hope and change Obama represented for their clients in the immediate aftermath of the election has slowly been replaced with the grim fact of despair and indefinite detention for their clients.

Brent Mickum, an American lawyer who has represented detainees and signed Isaac's endorsement, speaks for many of his colleagues."Given that Obama is himself an attorney who ran on a platform extolling the sanctity of the legal system and the need for a robust legal process for the detainees, the best that can be said about him is that he is a tremendous disappointment."

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The yawning chasm between what Sen. Obama said during the campaign and how the Obama Justice Department has handled Guantanamo detainee litigation is best illustrated by the case of Adnan Farhan Abd Al Latif.

When the United States invaded Afghanistan in late 2001, Latif, a 25-year-old Yemeni, fled for Pakistan where he was captured by Pakistani authorities on the border, and then sold to the United States as an al-Qaida recruit trained by the Taliban for $5,000. Latif, however, insisted he was in Afghanistan to receive free medical treatment for persistent difficulties tied to a head injury sustained during a car crash in 1994. The U.S. government's key piece of evidence linking Latif to al-Qaida and the Taliban was shaky, a sole intelligence report, which according to the D.C. Circuit Court's majority opinion, was "prepared in stressful and chaotic conditions filtered through interpreters subject to transcription errors and heavily redacted for national security purposes."

Latif landed at Guantanamo in January 2002, one of the first detainees to arrive at the prison camp. Three different times, either the Defense Department or Obama's interagency Guantanamo Review Task Force recommended Latif be transferred out of Gitmo and into Yemeni custody. That, however, would never happen because on Christmas Day 2009, a young Nigerian jihadist named Umar Farouk Abdulmutallab, the "underwear bomber," tried to ignite explosives stashed in his pants on an international flight bound for Detroit. When the government sourced the plot to an increasingly unstable Yemen by the organization calling itself al-Qaida in the Arabian Peninsula, President Obama announced a moratorium on repatriating Yemeni detainees cleared for transfer.

But there was still hope because the Supreme Court ruled in its 2008 Boumediene decision that detainees must be allowed to meaningfully challenge their detention in court. In 2010, D.C. District Court Judge Henry Kennedy heard Latif's habeas petition and ruled in his favor in a heavily redacted decision. "Because [the government has] not demonstrated by a preponderance of the evidence that Latif was part of al-Qaida or an associated force, the Court concludes that his detention is not lawful under the [Authorization to Use Military Force]. Accordingly, his petition must be granted." The Obama administration immediately appealed to the D. C. Circuit Court, where a two-judge majority vacated Kennedy's grant of habeas corpus and ordered his court to rehear the case.

The Circuit Court's ruling set a dangerous precedent. In ordering the lower court to grant

government intelligence reports, like the one claiming Latif was al-Qaida or Taliban, a "presumption of regularity," the two Republican-appointed judges were upending the writ of habeas, essentially shifting the burden of proof from the government to the detainee. Previously, presumptions of regularity were granted to government reports, like state court trial transcripts, produced according to a regular, transparent process, not the error-prone nature of intelligence, particularly during the chaos of war. If the courts had to assume that all government claims against detainees were accurate then the burden of proof shifted to detainees and their lawyers to prove that the government's claims were wrong. Worse, the burden imposed came years after the detainees were captured and transported thousands of miles from where the crimes allegedly had occurred. Some detainees, like Latif, had been indefinitely detained without charge or trial for almost a decade.

In his dissenting opinion, D.C. Circuit Court Judge David Tatel, a Clinton appointee, questioned his colleagues' "assault on Boumediene," which he suggested had left detainee habeas review meaningless.

> Why does this court now require district courts to categorically presume that a government report—again, one created in a REDACTED near an REDACTED with multiple layers of hearsay, and drafted by unidentified translators and scriveners of unknown quality—is accurate? Whether the presumption can be overcome by a preponderance of the evidence or by clear and specific evidence—this court never says which—I fear that in practice it "comes perilously close to suggesting that whatever the government says must be treated as true…"

"Pause a moment," Sabin Willett, another 2008 signee who represented Uighur detainees at Guantanamo, commented at Lawfare, the wonky national security law blog where Gitmo is debated feverishly. "A man sits in government prison for ten years and counting, on the strength of a secret document created by the jailer, in haste, from hearsay, which didn't persuade an experienced trial judge. Does that sound like the stuff of regimes we are prone to condemn? Even Odysseus headed for home after ten years."

In September, Latif finally left Guantanamo. He left in a coffin, dying mysteriously in his cell a few months after the Supreme Court declined to review the D.C. Circuit's ruling, a decision the Obama administration argued for. Gitmo broke him. Over the years, Latif resisted. He went on hunger strikes, smeared shit all over himself, slit his wrists, swallowed metal shards, and chewed glass in defiance of his detention. In one episode, he sawed through his wrist and threw his blood at his lawyer David Remes. He existed in isolation in the camp's psychiatric ward. He spoke of ghosts. He complained of torture, neglect, and abuse. Remes believed him. It wasn't hard.

The current detainee population of Guantanamo is 166, according to Human Rights First. Of those, 86 have been cleared for transfer or release. Nevertheless, none of them is going anywhere anytime soon. They remain legally suspended in animation as their bodies continue to age and their former lives fade into oblivion. Their only chance, it seems, is whether a second term will give Obama the courage to do what the habeas lawyers thought he would do all along–charge or release those still languishing in Gitmo.

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Many habeas lawyers believed Obama would be a radical departure from the Bush

administration's handling of detainees issues. Slowly, they came to the realization that the new boss was the same as the old boss.

Mickum, who represented five detainees, including Abu Zubaydah, the detainee once hailed as al-Qaida's number three whom the Bush Administration tortured extensively, destroyed 90 videotapes of his torture and interrogation, and later conceded that Zubaydah wasn't even a member of the organization, describes the brazen hypocrisy of how the Obama administration has handled detainee issues since coming to office.

"DOJ attorneys under the direction of his Administration have advocated positions before the D.C. Circuit that are not only antithetical to the platform upon which he ran in 2008 but are simply contrary to accepted jurisprudence," he told Salon. The cases decided by the D.C. Circuit Court have "eviscerated the writ of habeas corpus and left detainees with no chance of winning any case."

Mickum has come to a harsh conclusion after working pro bono on detainee issues for so many years."In some respects Obama is worse than Bush," he says. "Under Obama, the litigation is much more difficult. The cases are cloaked in far greater secrecy than under Bush. And the ability of counsel to cooperate has been greatly restricted for no legitimate reason."

Isaac seems more dejected than angry about the situation. He remembers the blog post just before Super Tuesday 2008 telling Democratic voters that Obama felt these constitutional issues "in his bones." Now that blog post looks naive. "That's what I wrote and I'm not sure about that anymore," he said. "I don't have the basis to think that anymore."

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