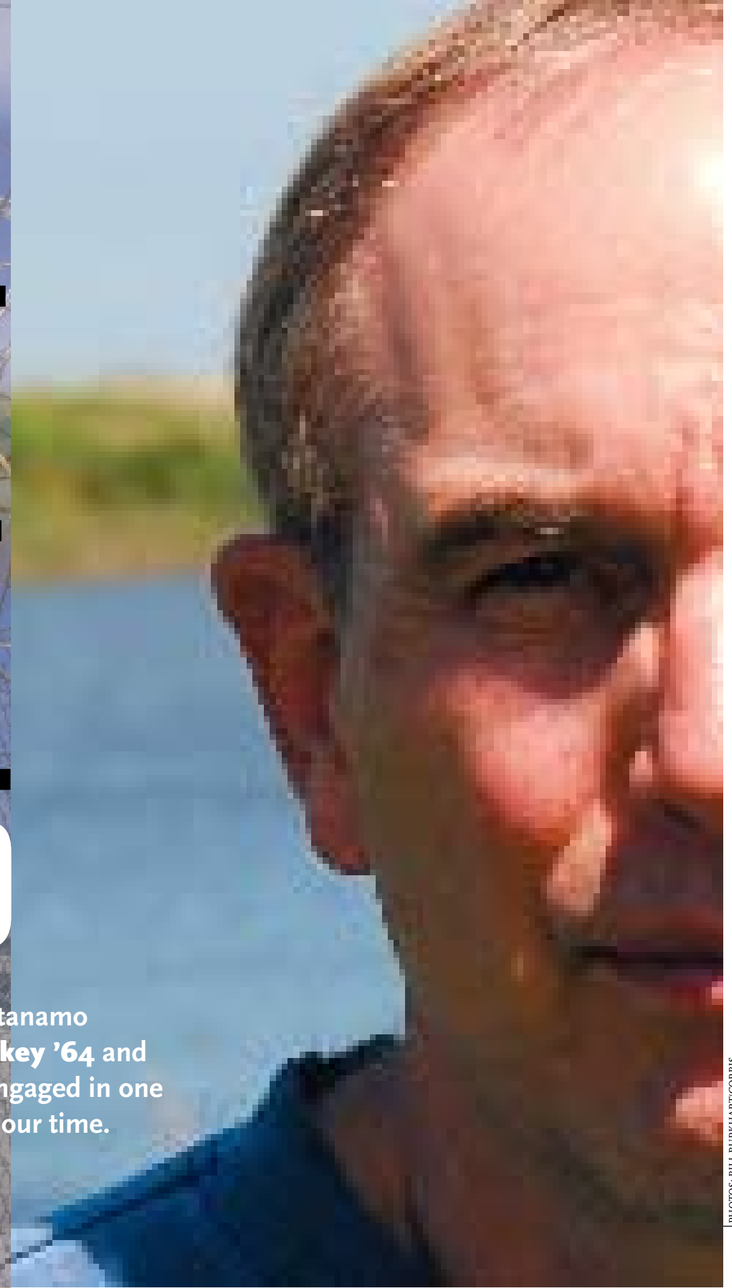
JUSTICE AT GUANTANAMO

BY WILLIAM HOLDER '75

Just gaining the trust of clients at Guantanamo was a significant hurdle for Steve Oleskey '64 and Anna-Cayton Holland '00, who are engaged in one of the most far-reaching legal battles of our time.



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WHEN STEVE OLESKEY '64 first went to Guantanamo Bay Prison in December 2004 to interview six clients he had never seen, one of his new clients put a piece of paper on the table and asked him to sign it. The man then turned over the paper, and Oleskey saw it was the letter he had sent explaining his forthcoming trip and introducing himself, but his signatures did not match.

Oleskey remembered that he had been away from his law office when the letter was prepared and had asked a younger colleague to sign it for him so there would be no delay.

The man in the cell was perturbed and suspicious. He wondered aloud why he should believe that Oleskey was the person he claimed to be.

"You're going to have to take it on faith," Oleskey replied. He described how he had come to be involved, but gaining the trust of his new clients was incredibly difficult. "He had no reason to trust me," Oleskey says. "Interrogators play all kinds of games, and these men had been tortured."

Then again, the men had every reason to hope that he was genuine because he brought what they desperately needed: a reason to believe that they might someday return to their wives and children.

For Oleskey, a Boston attorney with the prestigious international law firm of Wilmer Cutler Pickering Hale and Dorr, the opportunity to represent six of the longest-held captives at Guantanamo meant that he would not only have a chance to help men he regarded as illegally seized and unjustly imprisoned without charges or trial, but he also could address an issue of fundamental legal importance. No principle is more enshrined in the history of U.S. jurisprudence than the right of *habeas corpus*, protecting individuals from indefinite imprisonment without good cause being shown to a court, which conducts an independent hearing, and no principle has been more sorely tested by the war on terror.

"I thought it was very important that these men all have representation," he says. "And I thought it was outrageous that our government would take the position that people like my clients (non-citizens) have absolutely no rights and could be placed in a legal black hole beyond the reach of any courts."

He traces his deeply held convictions about personal liberty issues ultimately to his childhood in New Hampshire during the McCarthy era of the early 1950s. His mother was a secretary in a county courthouse where numerous grand jury cases against alleged leftists and communist sympathizers were heard. Many of the accused took the Fifth Amendment, were found in contempt, and thrown in jail. Some of the cases went all the way to the Supreme Court. The use of government power to stifle dissent and inquire into political beliefs, and the need for lawyers willing to advocate for due process in such circumstances, left a strong impression on Oleskey.

"I decided then that I wanted to be a trial lawyer because lawyers can make a difference when the government is unjust. After 38 years of practice, a case has come along that allows me to try to vindicate those principles which I had perceived were so important to our country."

The captivity of his clients began in October 2001, in the weeks after the 9/11 attacks, when the hunt for those thought to be Al Qaeda operatives and sympathizers had grown into a feverish, worldwide effort. U.S. intelligence officials had placed a wiretap on the phone of a suspected Al Qaeda operative in Bosnia. According to Bosnian court records, intelligence officials said they heard the suspect talking "in code" about a plot to blow up the U.S. and British embassies in Sarajevo.

Subsequently, Bosnian authorities, at the demand of the United States, arrested the suspect and five other individuals who had come to Bosnia from Algeria during the Bosnian war and stayed. Four had married Bosnian women. The men had 20 children among them.

In January of 2002, after a three-month investigation by Bosnian police and prosecutors, the Bosnian Supreme Court ordered the release of the six Algerians, citing lack of any evidence that would warrant detention. Simultaneously, the Bosnian Human Rights Chamber Court, established by the United States and the Bosnia/Serbian/Croatian parties to the Dayton Accords of 1995, issued a decision that the men could not be deported and could remain in Bosnia if they wished.

The Center for Constitutional Rights, which has compiled a report on torture at Guantanamo, describes what happened next to Mohammed Nechla and his fellow Bosnians (based on attorneys notes and other documents cleared for public release):

"On the night of January 18, 2002, Mr. Nechla and the other five Bosnians were taken to the courtyard of the Sarajevo jail. Mr. Nechla was given a document confirming that he was to be released. But he was not set free.

"Instead, he was turned over to nine officer/soldiers, including at least one American soldier, in full riot gear.

A hood was placed over his head and his wrists were bound extremely tightly. The six were taken to an airport, where they were handed over to the Americans. The Americans removed Mr. Nechla's hood and placed sensory deprivation goggles on his eyes, a surgical-type mask on his mouth, and headphone-type coverings on his ears."

The account describes how the Bosnians were placed on an airplane after spending hours on the ground in subfreezing temperatures. During a two-day trip, Nechla received one apple as his only food. After the plane landed, he was forced to sit in intense heat for an extended period and fainted.

"He was having difficulty breathing through the mask and believed he was going to suffocate," the report adds. "He cried out for help. A soldier came and pulled the mask out and let it snap against his face. He began to cry. He had arrived at Guantanamo."

OLESKEY has the resources of a large firm willing to commit millions of dollars in donated legal services and nearly unlimited time to the defense of the six Guantanamo detainees. During the past two years, he estimates that he spent 50 percent of his time on this matter. In Denver, another Wesleyan graduate with very different circumstances also has committed herself to defending detainees.

Anna Cayton-Holland '00 had just joined her father, John Holland, in a family firm specializing in civil rights-related cases when she wrote to Oleskey and asked whether she could volunteer in some capacity to help with the Guantanamo cases. His response was to contact the Center for Constitutional Law, which is coordinating attorneys in all Guantanamo cases, and ask that she be assigned a case.

"Then it was just a matter of convincing my father," she says, "that since I'd been licensed for three months, I should be allowed to jump into one of the biggest legal battles of our time. He took a long walk to think about it, and when he came back, he said, 'If I wouldn't say yes to this case, what would I say yes to?'"

In late September she had just returned from her third trip to Guantanamo, but her notes had not yet cleared security, so she could not discuss the substance of that trip. Attorneys are not allowed to take their notes with them; they must hand them over for security review and clearance before they can discuss their interviews.

She made her first trip to the base in October of 2005. For her, Oleskey, and other attorneys, just getting to Guantanamo is a significant undertaking. Attorneys must have a security clearance, which requires fingerprinting, signing a release allowing federal agents to inspect tax returns and credit histories, and providing pages of information about former addresses and neighbors or friends.

Once cleared, attorneys have to gain government permission to visit Guantanamo. There are two flights daily from Fort Lauderdale to the base aboard small planes that seat fewer than 20 people. They might or might not leave as scheduled. Lawyers must bring their own Arabic translators. The supply of individuals with security clearances who are able and willing to do this is limited, and attorneys must be sure to avoid translators who have worked previously with interrogators.

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From the quarters where attorneys stay, they take a 20-minute bus ride to a ferry, and then a half-hour trip on the ferry to the client detention area. Red tape can dog every step of the process. Cayton-Holland and her father wasted an entire afternoon on one trip trying to address a government claim that their visit had not been properly scheduled.

She faced the same hurdle as Oleskey in gaining the trust of her clients, plus she had the additional burden of being a woman interacting with conservative Muslims.

"You realize once you arrive that government agents have been posing as lawyers as an interrogation technique. Mr. [Abdul] Aziz (one of her clients) had been interrogated 50 times by people claiming to be lawyers. There is nothing you can do except talk and hope that eventually they will see you are there to represent their interests.

"At first I didn't talk to my clients directly. I kept my head covered and sat further back from my father and the translator. Slowly, I have been able to become more direct with several of my clients."

Cayton-Holland is representing four clients. She describes Aziz as an educated and articulate man who was teaching in Afghanistan and then fled to Pakistan when the United States invaded. He was sold into custody by Pakistani mercenaries and actually witnessed money changing hands. Since his wife was pregnant when he was arrested, he has a son he has never met. [Aziz is not Ali Abd al-Aziz, a known Al Qaeda conspirator recently transferred to Guantanamo.] Two clients are Pakistani brothers who were cab drivers, while the fourth is a 23-year-old man from Mauritania named Al Amin. He was just 17 when he was arrested and has been extensively involved in hunger strikes at Guantanamo.

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Anna Cayton-Holland '00 had her law license in hand for a mere three months when she and her father, John Holland, plunged into the defense of Guantanamo detainees.

Lawyers interview their clients in a small room, with a cell, toilet, and shower on one side, a security camera, and a small table on the other side. Rarely do lawyers see the compounds where the men are kept. During interviews, detainees are shackled to the floor, but their hands are free. If the air conditioning is working, the room may be frigid; if not, then it is steamy hot.

Of the 440 or so detainees, only 10 have been charged with crimes and are awaiting trial. Many of the rest are in a legal limbo that has seen two trips to the Supreme Court, most recently in the June 2006 case, *Hamdan v. Rumsfeld*, where the Court ruled that military commissions proposed by the administration violated both the Uniform Code of Military Justice and the Geneva Conventions. The Court insisted that even dangerous detainees at Guantanamo brought before military commissions must be tried according to the prevailing rule of law.

Any expectation lawyers might have had that *Hamdan* would force a resolution to the indefinite, potentially lifetime detainment of clients has been quashed by Congressional passage this September of new legislation spelling out a legal process for adjudicating Guantanamo cases. The Government contends that the new law specifically states that no *habeas corpus* hearing would be available for any aliens seized anywhere in the world by the United States—those found to be so-called enemy combatants in a military proceeding conducted without attorneys where secret evidence would be shown to the military officers but not the prisoners. President Bush signed this new law, the Military Commission Act of 2006, on October 17. The legislation, which Oleskey believes is in direct conflict with *Hamdan* if interpreted as the U.S. government asserts, and otherwise to violate the Suspension Clause of the Constitution, which prohibits the suspension of the privilege of the writ of *habeas corpus* except in time of rebellion or invasion, appears likely to spur yet another Supreme Court decision—at some point.

Meanwhile, Oleskey worries about the physical and mental health of his clients, now in their fifth year of imprisonment.

"They have been very badly treated, consistent with what has been reported in the press," he says. He described one client who was told that he had to give up his long pants, which contravenes a Muslim practice of keeping knees covered when praying. He refused. The guards summoned an Immediate Reaction Force, consisting of six people who tear-gassed his cell and clubbed him with batons, which left him with permanent injuries on the left side of his face. Two of his clients were held in solitary confinement for more than a year—kept in a cell with constant light 24 hours a day and exercised once every 10 days.

"They have various physical and psychological ailments that you would expect from a very repressive prison environment," Oleskey says. "Their medical treatment has been very deficient by any standard. There has been only one dentist for all the detainees; many have advanced dental decay. Several of our clients, we believe, may have some form of mental illness caused by their imprisonment under such circumstances."

Some prisoners have ambivalent feelings about visits from the attorneys, according to Oleskey. The military may take them from their living quarters days before the scheduled interview and sequester them in interview cells. Meals and routines have been altered. They can be deprived of food and water at the usual hours as well as normal sleeping conditions. As their incarceration has become protracted, disruptions to routine have become more difficult for the men to bear.

Recent news reports suggest that day-to-day treatment of the detainees has improved. They are reportedly receiving ample amounts of food, religious customs are better respected, and some compliant men are allowed regular exercise. Nonetheless, the fundamental problem remains: individuals have been imprisoned for years without being charged or tried for any crime, let alone having had any meaningful opportunity to refute the claims made against them in their military proceedings.

Although some of the detainees have been identified in the press as dangerous terrorists, particularly with the recent transfer of 14 so-called high value Al Qaeda agents from secret prisons, the federal government has conceded that most of the detainees pose no threat. The Pentagon says that 335 prisoners have been transferred out of Guantanamo since the camp's creation in 2002, and 110 currently at the facility are eligible for transfer or release. Repatriation is agonizingly slow, in part because some host countries do not want men who have been imprisoned at Guantanamo. A page-one story in the Oct. 17 *Washington Post* said that Britain, Germany, and other European allies of the United States have balked at accepting prisoners on the security conditions being insisted upon by the United States as condition for their release. In the case of the Bosnians, the fragility of the Bosnian government has complicated negotiations. The United States also is under pressure to avoid sending detainees to countries where they may be imprisoned and tortured, such as China or Egypt.

Oleskey says that he and his firm are committed to pursuing these cases for as long as it takes. Cayton-Holland evinces a similar commitment. None of their clients has yet been declared eligible for release.

"We plan to keep going to Guantanamo for as long as we're allowed," Cayton-Holland says. "How much hope we bring anymore, I don't know. I'm so disgusted with what our government is doing, but at the same time I have so much faith in our political process and our Constitution. I want to make it clear to the world that there are Americans who are horrified by what is going on."

She and Oleskey believe passionately that their clients have the right to challenge the grounds for their imprisonment, to see the evidence against them, and to have their day in a federal court where the government is required to show substantial grounds to justify holding them for what could be a life term in Guantanamo. They hope that, in the end, Aziz will not be proved right in the prediction he has offered to Cayton-Holland—"We're living in a grave."

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