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Why Sweat the Details of the Legal War on Terror: Ann Woolner

Ann Woolner (op-ed)
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March 31 (Bloomberg) -- A friend quite passionate about civil rights, women's rights, gay rights, and even animal rights told me once she doesn't much care about the rights of the inmates at Guantanamo Bay, Cuba.

Given the Sept. 11 atrocities, people linked to al Qaeda or who battled U.S. troops in Afghanistan just aren't getting any sympathy from my friend.

She isn't alone. Polls say most Americans consider the treatment of prisoners at Guantanamo to be fine by them.

It is natural, of course, to care more for your own security than for the legal rights of those who threaten it. But that is a false choice, and it blinds us to the disturbing little details of the Bush administration's war on terror.

If we just don't care, we just don't notice the multiple ways the administration thumbs its nose at U.S. law and principles.

It is easy to overlook all those news stories, credible though they may be, that many demonstrably innocent men have been held by the U.S. for years at Guantanamo with no real chance to show their innocence.

And if you don't care, you might not have noticed that after losing in court, lawyers representing the U.S. keep resisting judges' orders and Supreme Court rulings that they must give detainees a fair way to challenge their imprisonment.

Chastising the Government

Just last week a federal magistrate judge in Washington chastised the government for keeping a volunteer lawyer away from a detainee for more than a year, preventing the detainee from even starting a legal process to which the Supreme Court said the detainees are entitled.

So far the administration has succeeded in making essentially meaningless the Supreme Court ruling in 2004 that the detainees do, in fact, have a right to challenge in court their incarceration.

This week lawyers for another detainee, Salim Ahmed Hamdan, a former driver for Osama bin Laden, argued before the high court that the administration is still ignoring the law in yet another way.

Now the government has charged 10 detainees with conspiracy and plans to try them before a military tribunal of the sort that President George W. Bush established four years ago. The administration plans to prosecute 75 detainees in such tribunals.

War Crimes

"You want to try a war crime, you want to say this is a war crimes tribunal," Justice Stephen Breyer said to U.S. Solicitor General Paul Clement during this week's argument.

And yet, conspiracy is no longer considered a war crime, the tribunal doesn't meet minimum U.S. or international standards for fairness and the prerequisites for trying cases at a war crimes tribunal instead of civilian or established military courts don't exist.

If that is true, as Hamdan's lawyers contend, and if the government gets away with it, the president ``can set up commissions to go to Toledo, and in Toledo pick up an alien and not have any trial at all except before that special commission," Breyer said.

Before the 90-minute argument was over, some justices were referring to the tribunals as just ``a group of people" assembled by the president with no real standards to guide them.

So what? Does it really matter that the Guantanamo prisoners aren't getting a fair shake?

Dangerous Terrorists

If Bush and Defense Secretary Donald Rumsfeld are right that all of them are dangerous terrorists, why should it matter whether they get a lawyer or whether they are afforded this kind of trial instead of that kind?

The thing is, Bush and Rumsfeld are wrong. While many are surely dangerous enemies, many others accused of having been Taliban warriors weren't, according to multiple news reports based on extensive research. They were picked up far from the battlefield by bounty hunters turning them in for cash.

Without some minimally fair process, as the law requires, there is no way to know whether the allegations are true.

The administration has been trying mightily to deny them that process. And along the way has meddled with a bedrock principle of American law: the writ of habeas corpus.

The writ can be a ticket to freedom for prisoners who successfully prove in court that their incarceration is unlawful. The Supreme Court ruled in 2004 that the prisoners in fact have the right to go to federal court to seek a writ of habeas corpus.

Detainee Treatment Act

And if it is true that they have not engaged in combat or terrorism against the U.S. but have been held for years without charge, they would win their habeas cases, the court said in a footnote.

Uh-oh.

So Congress passed a law in December, the Detainee Treatment Act, which curtails the detainees' habeas rights. And some sponsors say that law calls a halt to all pending habeas petitions from Guantanamo inmates, including the case that was already before the Supreme Court.

``It is an extraordinary act," Justice Ruth Bader Ginsberg said to Clement this week, ``to withdraw jurisdiction from this court in a pending case."

``Isn't there a pretty good argument that a suspension of the writ by Congress is just about the most stupendously significant act that the Congress of the United States can take," Justice David Souter asked Clement.

And when Clement remarked off-handedly that the administration thinks the Supreme Court was wrong to declare habeas rights for the detainees, Souter wouldn't hear of it.

“The writ is the -- now wait a minute -- the writ is the writ. There are not two writs of habeas corpus” for different groups of people, an agitated Souter said.

Even if most Americans don't care about one group of people, surely we care about the rule of law.