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## **Innocent, But in Limbo at Guantánamo**

Five Chinese Muslims, captured in Pakistan by mistake, try to get the US Supreme Court to take their case.

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MIAMI - Five Muslim detainees from China's western Xinjiang province are stranded in a legal no man's land at the US terrorism prison camp at Guantánamo Bay, Cuba.

They shouldn't be there. Even the US military has found that the men, members of the besieged Uighur ethnic group, are not enemy combatants. But their ordeal in custody isn't over. Because they could face harsh treatment back in China - and the US doesn't want to set a precedent by granting them asylum here - they sit in a barracks-like detention center waiting for a country to give them a home.

Now, more than four years after their imprisonment by US military forces, the men are asking the US Supreme Court to examine their case. At issue is whether individuals captured abroad can be held in military detention indefinitely - even after the US government has declared that they pose no threat to national security.

"These men have been adjudged by the military to be, essentially, mistakes. They are innocent men captured by mistake by US forces abroad," says Neil McGaraghan, a lawyer representing two of the detainees.

Though the five are not considered enemy combatants, the men can be held indefinitely under the executive branch's power to wind up wartime detentions in an orderly fashion, government lawyers say.

"The US has no interest in detaining anyone any longer than necessary," says Lt. Cmdr. Jeffrey Gordon, a Pentagon spokesman. "We continue to detain the Uighurs as we continue to work on their resettlement."

Their request comes after a federal judge in Washington, ruled in December that the open-ended detention was unlawful. But because of the murky legal status of the prisoners at Guantánamo, he said he lacked authority to order military commanders to release them.

"The question ... is whether the law gives me the power to do what I believe justice requires," US District Judge James Robertson wrote in his Dec. 22 decision. "The answer, I believe, is no."

Lawyers for Abu Bakker Qassim and Adel Abdu Al-Hakim took the unusual step of appealing directly to the Supreme Court even before the issue has been presented to a federal appeals court to prevent their clients from spending any more time in prison than necessary.

In their petition, the lawyers say Judge Robertson abdicated his judicial responsibility by failing to order the release of their clients.

"Liberty can never be secure when the judicial branch declares its impotence," writes Boston lawyer Sabin Willett. "The ruling proclaims an executive with unchecked power to seize innocents from around the globe, transport them to United States territory, and imprison them at its pleasure." If the lower court ruling is allowed to stand, it will render Guantánamo "a place and prison beyond law," Mr. Willett says.

The case arises at a time when Congress and the White House seek to limit the opportunities for detainees at Guantánamo to challenge their captivity in US courts. The Detainee Treatment Act, signed Dec. 30, strips federal judges of their authority to hear such challenges, and narrows the types of cases that can be heard by the federal appeals court in Washington. Aspects of the law are being challenged at the federal appeals court and in a pending Supreme Court case.

Lawyers for Mr. Qassim and Mr. Al-Hakim say the Detainee Act doesn't apply to their case because Robertson issued his ruling prior to Dec. 30. But it does for others at Guantánamo classified as enemy combatants - including other Uighurs captured with Qassim and Al-Hakim, who say they were sold by Pakistani bounty hunters to US forces for \$5,000 each.

The government's brief to the high court is due Feb. 21. Government lawyers have sought to prevent a judicial order to bring the Uighur detainees to a US-based courthouse. Should that happen, they would be entitled to seek asylum in the US as political refugees from persecution by the Chinese government in their homeland.

But because the Uighurs are held on a naval base outside the jurisdiction of US immigration law, they may not make the claim at Guantánamo, analysts say.

Roughly 1,000 Uighurs live in the US, says Nury Turkel, president of the Uyghur American Association. "The Uighur community in the United States has offered to help with the individuals if the US government allowed them to be released on US soil on an interim basis while the government tries to find a permanent home," he says.

But government lawyers declined the offer because it might open a door into the US for others held at Guantánamo.

Robertson declined to order the government to bring the men to the US. It is unclear whether the US Supreme Court will agree to hear it.

The case raises questions, too, about the proper role of the judiciary in checking presidential power, analysts say.

"Judge Robertson's decision sets up a very real constitutional crisis," says Mr. McGaraghan. "The court's decision sets up this anomaly where it finds executive branch actions unlawful, and yet decides there is nothing it can do to remedy the unlawful action."

Besides the Uighur detainees, four other non-enemy combatants are being held at Guantánamo because of human rights concerns if they are returned to their home countries of Saudi Arabia, Algeria, Egypt, and Uzbekistan.