Alumni

Legal Combatant

Michael Ratner ’70LAW goes head-to-head with the U.S. government over the rights of Guantánamo Bay detainees.

By
David J. Craig
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Björn Wallander

It’s a Friday afternoon in late September, and the mood at the Center for Constitutional Rights (CCR) is tense. Young human-rights lawyers are rushing about their scrappy Manhattan office on lower Broadway, digging through documents piled

high on coffee-stained carpets, preparing court motions to contest a new piece of federal legislation.The nonprofit's 63-year-old president, Michael Ratner '70LAW, is picking at a late lunch, interrupted by colleagues in urgent need of advice. Ratner is just back from a stumping tour of New York City radio stations to rail against the new bill. It's all he wants to talk about. The Military Commissions Act, which George W. Bush would sign into law a few weeks later, bars terrorism suspects from challenging their detention in court unless they're United States citizens. It also authorizes the government to hold them indefinitely.

"A complete outrage," says Ratner, his tone turning sharp and his gentle eyes narrowing. "People have been down in Guantánamo Bay for five years, being tortured — which the president has made pretty clear he doesn't want stopped — and most of them had nothing to do with terrorism. And Bush is told that it's okay to round up people anywhere in the world and hold them without even saying why."

Ratner, a leading voice of civil libertarianism, has been sounding the alarm against government abuse for four decades. "But I never imagined I'd see this," he says. "The right to habeas corpus goes back 800 years to the Magna Carta and is the most fundamental constraint on a ruler's power." By not extending habeas corpus to non–U.S. citizens suspected of being terrorists, Ratner says, the Bush administration "threatens everybody's civil rights."

That's his message. And to Ratner nothing is more important. An activist attorney with a history of launching far-out, high-profile cases — he sued the U.S. government to stop the first Iraq war and the bombing of Kosovo — he works the court of public opinion as hard as he works the bench. He's a prolific essayist, co-host of the radio program *Law and Disorder*, and a master of the sound bite. Bush's national security team? "A bunch of thugs." The Iraq situation? "I don't believe in American hegemony." Donald Rumsfeld? "When you see those pictures of growling dogs and naked detainees, just think: He did this."

Ratner's past willingness to represent leftist radicals in Latin America and others who denounce the U.S. government, combined with his tendency to mix lawyering with political advocacy, has led some critics to dismiss him as an anti-American renegade. He is without debate an innovative litigator. Ratner helped establish the precedent that foreigners can be tried in U.S. courts for human-rights violations, winning a 1994 civil case, for instance, against the Haitian dictatorship of Prosper Avril for the abduction and torture of political dissidents. He also filed the first

lawsuit against a U.S. president for violating the War Powers Resolution, suing the Reagan administration in 1981 for supporting the junta in El Salvador. The case was dismissed, but it generated public outcry, which led to congressional hearings.

The most remarkable battle of Ratner's career, however, is the one he's been waging for the past five years against the Bush administration for the way it detains terrorism suspects. In early 2002, Ratner was the first lawyer to challenge the detention of prisoners at Guantánamo Bay following the invasion of Afghanistan. He eventually helped convince the Supreme Court that the military hadn't adequately determined whether detainees should be locked away and that the prisoners should get court hearings. In response to the rulings, Republican senators drafted the Military Commissions Act in the run-up to the 2006 midterm elections. The statute, rushed through Congress with little deliberation and passed largely on a party-line vote, sweeps away a lot of Ratner's work. Now that Congress has joined forces with Bush to keep suspected terrorists out of the courtroom, scholars say, judges will be less apt to overturn the policy. In other words, this is Ratner's kind of fight.

"Our center's job is to take the long shots, the cases no one else will take, the ones that don't necessarily have legal precedent on their side," he says. "We take cases that we think are important, simple as that. If we lose, we're still spotlighting issues, and slowly changing public consciousness. But we'll beat this foolish law."

Breach of peace

Ratner was jogging near the World Trade Center on September 11, 2001, when the first plane hit. He saw the second jetliner lumber straight over his head and then explode into the South Tower. Members of his family barely escaped; his young daughter's soccer coach was killed.

Ratner, who lives with his wife and two children in Greenwich Village, was traumatized. He also had found a new crusade. The government's rollback of civil liberties that fall was "a coup d'état on the country," he says. So he pushed his team of a half-dozen lawyers headlong into preparing lawsuits against Bush policies. Other human-rights and legal-advocacy groups were willing to fight the government on the habeas issue — up to a point. For example, about 20 organizations, including CCR and the American Civil Liberties Union, sued the government for holding

incommunicado some 1,200 illegal immigrants in the United States after September 11.

But when Ratner filed habeas petitions on behalf of three Guantánamo detainees in the spring of 2002, his work got lonely. “We found three or four death-penalty lawyers willing to help us, and that was it,” Ratner says. “Human-rights groups wouldn’t touch it.”

The legal precedent looked awful. Even if a judge scrutinized Bush’s wartime powers as commander in chief — the same kind of emergency authority that Franklin D. Roosevelt invoked to intern Japanese Americans during World War II — there was the added complication that most terrorism suspects were held outside the United States. The question of whether habeas rights extend to non–U.S. citizens held on foreign soil hadn’t come up in a long time. The courts were likely to look back to a 1950 case in which the Supreme Court ruled that German war criminals detained in a U.S.-controlled prison in Germany had no access to courts here. “I didn’t get involved, honestly, because I didn’t think they had a chance,” says David Cole, a Georgetown University law professor and frequent CCR collaborator. There was also CCR’s reputation to protect. The center has no endowment and is funded entirely by individual donations and foundation grants, so its fundraisers were worried about political backlash.



Michael Ratner speaks to reporters in late 2002, outside a D.C. court where he argues unsuccessfully that terrorism suspects have the right to challenge their detentions. He is pictured with cooperating attorneys Tom Wilner, of Shearman & Sterling (from left), and Joe Margulies, a law professor at Northwestern University. (AP Photo / J. Scott Applewhite)

The decision to take the cases also was personally difficult, Ratner says, because CCR — founded in 1966 by civil-rights attorneys Arthur Kinoy ’47LAW, William Kunstler ’48LAW, Morton Stavis ’36LAW, and Ben Smith — always represented people whose politics “we more or less agreed with.”

“I come from a tradition of using law to advance progressive social causes,” says Ratner, who clerked for legendary African-American judge Constance Baker Motley ’46LAW before joining CCR in 1972, and previously worked at the NAACP Legal Defense Fund. “I was used to representing feminists, black activists, antiwar folks. This was going to be completely different: protecting someone’s fundamental rights, no matter who they are. At the time, there was a lot of publicity about the detainees being the ‘worst of the worst.’ For all I knew, these were the people who planned 9/11. It wasn’t easy.”

But Ratner was convinced that the government's detention policy established a dangerous precedent. The Bush administration, he thought, was placing itself above the law. By having no formal procedures to determine if individual detainees at Guantánamo were in fact "illegal enemy combatants" or prisoners of war, the administration was ignoring the Geneva Conventions, and by denying habeas corpus, it was obstructing the courts' ability to weigh in on the matter. If the executive branch were allowed to continue making up its own rules, Ratner warned in an essay published on left-wing Web sites in November 2001, Americans could expect worse to come: torture, kangaroo courts weighted toward convictions, draconian surveillance programs, maybe even the suspension of habeas for U.S. citizens.

Federal judges, he thought, needed a chance to put the brakes on Bush.

First to fight

For nearly two years, CCR's cases went nowhere. Ratner knew little about the men he represented, because the military wouldn't allow prisoners to call, meet, or write lawyers. That didn't have a direct bearing on the case, though, because CCR argued simply that Australian David Hicks and Britons Shafiq Rasul and Asif Iqbal, alleged Taliban fighters whose families had contacted CCR, should be able to contest their detentions. Government lawyers maintained that the circumstances of their arrests and evidence against them were top secret, and that the Pentagon would try them in special tribunals before a military judge — if and when it charged them with crimes.

The habeas petitions were heard by a D.C. district court in July 2002, together with the petitions of 12 Kuwaiti detainees represented by Tom Wilner, a Shearman & Sterling partner and the first big-firm attorney to represent Guantánamo Bay detainees. Wilner was retained by a Kuwaiti businessman whose son is held at Guantánamo. "In the legal community," Wilner says, "I was a pariah."

The petitions were rejected. One month later on appeal, they were rejected again. Both judges were persuaded by the government's argument that U.S. courts don't have jurisdiction at Guantánamo.

Over the next 18 months, CCR lawyers called attention to the plight of detainees by filing Freedom of Information Act requests pertaining to conditions at Guantánamo, publishing a book on the topic, and encouraging governments and other human-rights organizations to speak out. The center also won the first lawsuit to challenge the Patriot Act, persuading a federal court in early 2004 to strike down its broad definition of “assistance to terrorist organizations.”

During the same period, newspapers revealed that the CIA was using interrogation techniques generally considered torture, and that army lawyers assigned to defend detainees were dismissed for complaining that the tribunals being planned were a sham. In that climate, the Supreme Court agreed in April 2004 to hear CCR’s and Wilner’s habeas petitions together. Ratner was cocounsel; CCR recruited retired federal judge John Gibbons to argue before the high court. A few days after arguments were heard in *Rasul v. Bush*, the Abu Ghraib scandal broke. Government lawyers had rested their case “by basically saying judges can’t oversee detention matters for national security reasons, and that the courts just had ‘to trust’ the executive branch,” Ratner recalls. “When I saw the news the next week, I knew we’d won.”

Gitmo libre

Following the Supreme Court victory, CCR filed habeas petitions for hundreds of Guantánamo Bay detainees. Ratner got to work finding them lawyers. He brought on prestigious firms like Paul, Weiss, Rifkind, Wharton & Garrison; Debevoise & Plimpton; and Wilmer Cutler Pickering Hale and Dorr. “Now everybody was coming out of the woodwork,” he says.

Soon, attorneys were allowed into Guantánamo Bay for the first time. They brought back stories of torture and harsh prison conditions, which saturated the media and appeared in scathing reports by Amnesty International and the United Nations Commission on Human Rights. And as the prisoners’ habeas petitions flooded U.S. courts, Guantánamo’s exit doors flung open.

About 345 detainees have been released or transferred to other countries to date, the majority since the Rasul decision, according to the Pentagon; about 110 of the remaining 435 prisoners at Guantánamo are scheduled for release.

Still, no detainee received a civilian court hearing, and in October the Military Commissions Act made that impossible. Human-rights lawyers involved in the cases say that the Pentagon often released suspects as their day in court approached. “Government lawyers went through hell and high water to make sure no hearings took place,” says Gibbons, who represents several terrorism suspects. “They don’t want to reveal that they bought many of these guys from bounty hunters, for starters, and that they got their evidence through torture.”

Lawyers at CCR, meanwhile, say their resolve has been galvanized by meeting detainees and former prisoners. “I’m convinced that the men I represent haven’t done what the government says they’ve done,” says Gita Gutierrez, a CCR attorney who represents 20 detainees. She’s helped free two prisoners: a young man who’s now a student at a prestigious English university, and Moazzam Begg, a British citizen who has published a memoir about his experience.

Gutierrez spent several weeks at Guantánamo Bay last summer. She says the hardest part of her job, aside from solving “extensive logistical difficulties” getting access to prisoners, is in gaining their confidence. Government interrogators have told detainees that their lawyers are spies working for the government, or are Jewish, or gay, she says. In the effort to persuade them to trust her, she has traveled to meet prisoners’ families and taken snapshots of herself with a brother, a father, or an aunt.

Ratner knows too well Guantánamo Bay’s 105-degree heat and banana rats from time he spent there in the early 1990s, working for the release of Haitian refugees detained by the U.S. because they were HIV-positive. “Emotionally brutal work,” he says. He hasn’t been back. Ratner still argues in court periodically, but on the Guantánamo cases he mostly guides legal strategy with CCR lawyers and others. His office maintains a vast computer database that allows 500 collaborating lawyers to share information about their Guantánamo cases. He’s convinced that the government has “the wrong guys” at Guantánamo after reading detainees’ letters, meeting their families, and getting to know released prisoners. “I met the British guys known as the Tipton Three after they got out,” he says, “and if they were terrorists, so is my kid.”

Ratner initially “drew an ethical line” at representing terrorism suspects in their habeas petitions only, not against criminal charges. He has since changed his mind, he says, partly because the procedures established for their trials through the recent

Military Commissions Act “are so draconian.” Under the statute, the tribunals will allow as evidence hearsay and information withheld from defendants, as well as confessions obtained through coercion that occurred before 2006, when Congress outlawed the harshest interrogation techniques. The tribunals could begin this summer, according to news reports, although CCR and other human-rights groups are challenging their legality in court.

“I don’t think anyone at CCR would have a problem now defending terrorism suspects in front of these tribunals if they take place,” says Ratner. (He is the brother of Fox News contributor Ellen Ratner and New Jersey Nets owner and real-estate developer Bruce Ratner.) “The trials won’t appear legitimate to the world, and at worst they’ll convict innocent people. But we need to help these men get a good defense. I very seriously question whether the government has any real evidence on them.”

Path of most resistance

The Center for Constitutional Rights today is fighting the Bush administration on nearly all its national-security policies that encroach on civil liberties. CCR is suing the government to reel in the National Security Agency’s warrantless domestic spying program; it’s challenging laws that make it illegal to give humanitarian assistance to groups labeled terrorist organizations simply because, according to CCR, they do not toe the line on American foreign policy; and it’s representing Canadian citizen and former detainee Maher Arar in a civil suit against the Bush administration for his rendition to Syria, where he claims he was tortured. In addition, CCR is leading the legal battle to get representation for 14 high-value detainees transferred from secret “black-site” CIA prisons to Guantánamo Bay in September. The center filed court motions this fall seeking access to Pakistani Majid Khan, who is accused of plotting to blow up gas stations and to poison reservoirs in the United States. Khan was arrested in Pakistan three years ago and subsequently held by the U.S. in Afghanistan. His family discovered his fate shortly before he was transferred to Guantánamo Bay, and they asked CCR to represent him.

Ratner’s lawyers haven’t been allowed to speak with Khan because “alternative interrogation methods” used on him cannot be made public, CIA and Justice Department officials argue in court filings, should terrorists otherwise prepare to

withstand those methods. Government lawyers say they need time to create new rules restricting what Khan and other high-level detainees can discuss with attorneys before they're allowed counsel. Ratner says the government merely intends to cover up its "illegal and embarrassing" treatment of suspects.

"The clear achievement for Ratner has been bringing information on this kind of issue into the light and influencing public opinion," says José Alvarez, a Columbia professor of human-rights law. "His battle now is to pressure Congress to keep the information flowing through hearings and investigations."

That battle got a lot easier with the Democratic sweep in the November midterms. Congress now can be expected to initiate serious hearings, scholars say, on matters such as torture and wiretapping. "I don't consider the Democrats in Congress to be the most courageous people," says Ratner. "But I think we can expect the civil liberties situation now won't get any worse."



More than half of the 775 men and boys held at Guantanamo Bay since 2001 have been released or transferred to other countries, most of them after the U.S. Supreme Court ruled in 2004 that detainees have the right to habeas corpus. (U.S. Department of Defense)

Lawyers at CCR also are preparing for another showdown on the habeas issue. The Supreme Court is expected to consider in the next year or two whether non-U.S. citizens held in other countries have a constitutional right to habeas corpus. When the high court previously ruled on detention matters, including in *Rasul v. Bush*, the justices declared simply that the executive branch cannot bar detainees from the courts without congressional approval.

After obliging the Bush administration last fall, even some Senate Republicans who voted for the Military Commissions Act said they think the provision denying habeas is on shaky legal ground. “We should have done it right, because we’re going to have to do it again,” said Gordon Smith (R-OR). The habeas provision is “patently unconstitutional,” agreed Arlen Specter (R-PA). But it’s difficult to predict how the Supreme Court would rule on whether habeas extends to non–U.S. citizens jailed overseas, says Michael Dorf, a Columbia professor of constitutional law, because it’s uncharted legal territory. “The Bush administration will argue that if prisoners of war don’t get to file habeas petitions, unlawful enemy combatants certainly don’t have that right,” he says. “And the opposition will point out that the administration is trying to have it both ways. It’s saying that in wartime there’s a different paradigm for holding people, which means civilian courts aren’t involved. Yet these detainees aren’t getting the protections given to prisoners in wartime, either, such as being treated humanely.

“As with any court case that involves the reading of an ambiguous text,” Dorf says, “public opinion will play a factor.”

To that end, Ratner offers this: war crimes charges all around. In November, CCR filed a criminal complaint in Germany against Secretary of Defense Donald Rumsfeld and 13 other high-ranking American officials and former officials. It accuses them of authorizing torture at Abu Ghraib. No one expects Rumsfeld to get hauled before German courts — which were petitioned because they recognize the principle of universal jurisdiction for war crimes — but headlines did stamp him as a monster for a couple days. At a splashy news conference in Berlin, Ratner stood beside members of small European human-rights groups, looking dutifully somber but triumphant.

Tactics like that, say some observers, threaten to undermine CCR’s cause.

“I expect that moderate NGOs like Human Rights Watch might look at that aghast, thinking that Ratner’s gone too far and that it’s counterproductive,” says Alvarez.

“Whenever you divide the human-rights community, that’s not good news. So I’m not sure he’s on solid political ground on that one. On the other hand, do I think war crimes were committed? Yes, I certainly do. Do I think there was a conspiracy leading up the chain of command? Well, when you connect the dots between the secret prisons, the torture, the Bush administration’s stonewalling everybody on it, I think, my God, Ratner had it right.”

In Ratner’s view, the purpose of CCR is to take risks that larger human-rights organizations cannot. In fact, he worries that the center, which has doubled in size since September 11 and is receiving increasingly large foundation grants, might one day become less aggressive. And he wrestles constantly with the paradoxes involved in pursuing his ideals in the realm of big-time politics.

“The whole issue of compromise came up immediately when I was lobbying senators in Washington against the habeas provision this fall,” says Ratner, who during the 1968 student riots at Columbia was “radicalized, in a good way,” he says, when beaten up by police for blocking the entrance to Low Library. “There was a deal on the table that could have preserved habeas only partially for detainees. I said no, that’s not what our center is about. What I believe is simple: Social change comes through principled opposition to the worst excesses.”

Silence, Writ Large

Michael Ratner has argued for five years that terrorism suspects should be able to walk into a federal courtroom and demand to hear the evidence against them, regardless of whether they’re U.S. citizens.

That raises tough legal questions. On one hand, the right to habeas corpus traditionally applies only to American citizens, or to people arrested in this country or held on U.S. soil. Scholars say that’s partly why the Pentagon brought terrorism suspects to Cuba’s Guantánamo Bay — to avoid U.S. court jurisdiction. And yet, the U.S. government has never before arrested and held large numbers of foreigners other than during traditional, state-based wars, when it was relatively clear who were combatants and that the conflict would definitely end, bringing about the release of prisoners.

So are new laws in order? Absolutely, according to Columbia legal scholars. But the Military Commissions Act passed last fall, they say, is ill conceived, ambiguous, and

riddled with unconstitutional provisions. “Detainees arrived at Guantánamo Bay five years ago, and it’s as if we’re starting from scratch now trying to figure out how to deal with them,” says José Alvarez, a Columbia professor of human-rights law. Blame President George W. Bush for his ham-fisted approach, Alvarez and others say, as well as Congress for waiting so long to address the issue.

Here’s what happened: Following September 11, the Bush administration aggressively defined its authority to fight the war on terror, arguing, for instance, that men captured by the U.S. military in Afghanistan deserved no formal status review process. For years, “Congress was almost entirely silent” on the matter, writes Michael Dorf, a Columbia professor of constitutional law, in a forthcoming paper in *Political Science Quarterly*.

The U.S. Supreme Court, meanwhile, has agreed to hear three cases related to U.S. detention policy. In each case, the justices struck down key parts of the policy on the grounds that the president didn’t have the authority he claimed as commander in chief. The justices carefully avoided saying if non–U.S. citizens have a constitutional right to habeas corpus. They instead addressed more narrow issues relevant to each case. In *Rasul v. Bush*, for instance, they said Guantánamo Bay detainees could file habeas petitions because the military base there is essentially U.S. sovereign territory, and because Congress never indicated otherwise. In *Hamdan v. Rumsfeld*, similarly, the justices ruled that the Pentagon couldn’t try alleged terrorists before military tribunals because Congress never authorized the special trial procedures limiting defendants’ rights.

According to Dorf, these decisions were the Supreme Court’s way of nudging Congress to do its job. The results, he says, are “atrocious.” Not only does the Military Commissions Act deny habeas for terrorism suspects who aren’t U.S. citizens, which accounts for the vast majority, but it authorizes the president to jail U.S. citizens as enemy combatants, no explanation needed. It also strips habeas rights from resident aliens accused of links to terrorism. (Americans jailed as enemy combatants still would be able to challenge their detentions.) “Anybody who knows anything about these issues knows that the provisions regarding U.S. citizens and alien residents are blatantly unconstitutional,” says Dorf. “That could color the way the Supreme Court looks at the act, in general.”

Ultimately, Dorf says, the government needs to develop a process for dealing with

terrorism suspects that “doesn’t treat them like combatants in a traditional war, and doesn’t treat them as ordinary criminals to be tried in civilian court, either.” The military, after all, needs to keep secret some evidence when trying alleged terrorists, for national security reasons. “So I agree with the administration that new procedures are necessary,” he says. “But those procedures can’t be off the map. They need to ensure humane treatment of prisoners and the presumption of innocence.”

Elected leaders, he says, ought to be encouraging real public debate on the matter. “That hasn’t happened, and I mostly blame Congress,” Dorf says. “Any president can be expected to expand his authority during wartime, and Bush obviously has been extraordinarily assertive. But Congress needs to push back, if for no other reason than for the purpose of its own prerogatives. Instead, the Supreme Court has had to drag in Congress kicking and screaming.”

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