

The following text may be printed, copy/pasted, or downloaded and emailed.

Disagreement Over Detainees' Legal Rights Simmers

NEIL A. LEWIS
New York Times
October 31, 2004

GUANTÁNAMO BAY, Cuba, Oct. 31 - From the moment the Bush administration decided to use the naval base here as a prison colony for accused terrorists, policy makers were determined to keep everything that went on here beyond the reach of United States courts.

But a decision by the Supreme Court in June seemed to upset those plans as the justices ruled that prisoners at Guantánamo were entitled to some rights, notably the ability to have their claims that they were wrongfully imprisoned heard by a federal judge. But what the justices meant as to how far the government must go to accommodate the Guantánamo prisoners has produced a sharp debate now being played out in lower courts.

Lawyers for many of the detainees, including the ones named in the Supreme Court ruling, say the Bush administration is purposely ignoring the justices' mandate and stalling.

They cite the government's refusal to acknowledge that detainees are entitled to free access to lawyers to make their cases before federal judges. More broadly, they argue that the government is still trying to argue issues it has already lost in the Supreme Court, especially that the detainees have full rights to challenge their detentions in lower federal courts.

The Justice Department responded to demands by the detainees' lawyers with language remarkably similar to that it used almost two years ago in the case it has already lost.

"The notion that the U.S. Constitution affords due process and other rights to enemy aliens captured abroad and confined outside the sovereign territory of the United States is contrary to law and history," a recent government brief asserts, in an echo of the briefs submitted in the original Supreme Court case.

Thomas Wilner, a lawyer for several detainees who were involved in the original lawsuit, said in his brief that the government's motion was "simply outrageous."

"It is filed in direct violation of the federal rules and it simply rehashes the same arguments that were made before, and rejected by the Supreme Court," Mr. Wilner said.

He compared the government's behavior to the "massive resistance" urged by some Southerners in response to the court's landmark desegregation ruling in *Brown v. Board of Education*.

A senior Justice Department official said in response, "It's easy for our adversaries to say, 'My gosh, when the Supreme Court said that there is habeas jurisdiction, that must mean there are real rights at stake, that the detainees are protected by the Constitution.' " But the official, who spoke on the condition of anonymity because the litigation was continuing, said the court's ruling that prisoners may challenge their detentions in lawsuits called habeas corpus actions left open that question for lower courts.

The court, by a 6 to 3 margin, ruled in June that the people held at Guantánamo as unlawful enemy combatants "no less than American citizens are entitled to federal courts' authority" to challenge their detentions.

The Justice Department said in its brief that "the court expressly declined to address 'whether and what further proceedings' would be appropriate after remand," as proof the justices left open the issue of whether the government was required to afford the prisoners more rights. But the full sentence at the end of the principal opinion reads, "Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now."

Prof. Anthony G. Amsterdam of the New York University School of Law said he believed that the government's resistance to recognizing the detainees' rights, including the right to a lawyer, to make their cases bordered on the unethical.

"It's simply amazing that they are proceeding as if those cases had not been heard before the Supreme Court and that those arguments had not been heard and rejected by the court," Professor Amsterdam said. "I would not expect a reputable lawyer to split nonexistent hairs that way and treat what was plainly a decision that these people had a right to be in court as if it were nothing."

He said the government was apparently hoping to delay the day it would have to explain for each detainee the reasons of imprisonment.

Prof. Douglas W. Kmiec of the Pepperdine University School of Law said he believed that the Supreme Court ruling in June was "written in a deliberately incomplete manner so that it found a right to habeas review but left the nature of that review to some district court." Professor Kmiec said he believed the government was acting "well within its bounds and is not obliged to do anything beyond what they have done."

The senior Justice Department official who asked not to be named said the administration understood that while "we don't think there is a constitutional right to counsel, we understand there is a sort of a functional right" under the federal law that covers habeas corpus challenges.

The administration has agreed to let lawyers visit with detainees to help them bring habeas challenges but under strict security conditions that prohibit them from discussing some aspects of the cases with the client. Defense lawyers have challenged those restrictions.

The administration has also argued that a new legal proceeding it put in place here at Guantánamo after the Supreme Court ruling, combatant status review tribunals, should satisfy the justices' demand that the detainees get individualized fair hearings. Under that procedure, detainees are allowed to contest their imprisonment but do not have a lawyer and are not entitled to see the evidence against them. So far, about half of the base's 580 detainees have been through such hearings, and one detainee has been sent home after having been deemed not to be an unlawful enemy combatant.

Another set of legal proceedings involving the Guantánamo detainees, war crimes trials before military commissions, is set to resume here on Monday.