

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

Guantanamo Detainee Cases Torn Between Two Judges

Vanessa Blum
Legal Times
11-30-2004

Wrangling on D.C.'s federal court threatens to complicate the process of deciding the rights of military detainees in the war on terror.

Senior Judge Joyce Hens Green and Judge Richard Leon, both of the U.S. District Court for the District of Columbia, are preparing to rule independently on a government motion to dismiss all challenges filed by Guantanamo Bay inmates.

Arguments are scheduled for Wednesday before Green, a Jimmy Carter appointee, and for Thursday before Leon, a George W. Bush appointee, creating the possibility of conflicting opinions on the same fundamental legal questions.

Lawyers for the prisoners believe that Leon, an ideological conservative, may be more likely than Green to side with the government.

The double booking astounded lawyers involved in the cases, who had expected Green alone to decide common issues.

In September, the court's judges designated Green to coordinate proceedings in the various cases and, to the extent possible, rule on common issues. Earlier this month, eight of the nine judges assigned Guantanamo Bay cases agreed to let Green decide the government's motion to dismiss. The cases would return to the original judges for trial, if necessary. Leon was the only holdout.

Legal briefs on the motion to dismiss had been filed only before Green. The first indication that Leon would hear his cases separately came as Green scheduled oral arguments.

"It was quite a surprise to learn that our case was being carved out for arguments before Judge Leon," says Robert Kirsch, a Boston-based partner with Wilmer Cutler Pickering Hale and Dorr who represents six detainees. "It's hard to imagine a context where there are more common issues than where the issues had been joined and identified and briefed in a consolidated fashion."

Both Leon and Green declined, through their assistants, to comment.

At a Nov. 19 status conference, Leon downplayed his decision to take back control of the two cases assigned to him after prisoners' lawyers signaled their concern about conflicting rulings.

"No one knows where we're going to come out on all this. It could turn out if Judge Green reaches resolution on all these issues before me, I could just adopt it. And I'd like to think vice versa, if I ruled before her," Leon said. "We both have that option as far as I can tell."

Government lawyers initially asked the court to consolidate the pending habeas cases before one judge. When that request was denied, they successfully argued to allow one judge to coordinate pretrial proceedings for greater efficiency and to avoid inconsistent rulings.

Thomas Goldstein, of D.C.'s Goldstein & Howe, calls Leon's move a classic example of judicial independence, but says it may put the government in an "untenable position."

"There's a genuine prospect of conflicting signals, if not outright conflicting rulings," says Goldstein, who is not involved in the habeas litigation. "In other contexts, getting a diversity of judicial opinions is a good thing. Here's a situation where we need a clear answer."

LOOMING LEGAL SHOWDOWN

The current dispute began with a Supreme Court decision this summer that was hailed by civil libertarians as a victory for detainees. But instead of clearing the path for swift judicial review of the prisoners' cases, the Supreme Court decision merely set the stage for another legal showdown.

While the Court's 6-3 ruling in *Rasul v. Bush* conclusively answers the question of whether the federal courts have jurisdiction to hear the cases -- they do, the Court concluded -- it provides little guidance on how lower courts should proceed, leaving lawyers for the prisoners and those for the government to squabble over what the decision truly means.

Five months ago the Center for Constitutional Rights, a New York-based group spearheading the Guantanamo Bay litigation, applauded the Supreme Court's ruling as a mandate for the detainees to receive speedy justice.

The center recruited lawyers to represent additional prisoners, and within a month, 10 new suits were filed in D.C. federal court against the government. Major law firms, including D.C.'s Covington & Burling, New York's Clifford Chance, Minneapolis-based Dorsey & Whitney, and Wilmer Cutler Pickering Hale and Dorr, took on cases pro bono, as did professors at American University Washington College of Law and at Hofstra University School of Law.

In a July 2004 letter to Secretary of Defense Donald Rumsfeld, the center pledged to "organize a delegation of attorneys" to provide legal counsel to other detainees.

Government lawyers contend that the prisoners -- foreign nationals captured outside the United States and held as enemy combatants -- have no valid claims under U.S. or international law and that suits filed on behalf of roughly 60 prisoners should be tossed out.

Lawyers for the detainees accuse the government of attempting to evade judicial review of its detentions by relitigating issues already settled by the Supreme Court in *Rasul*.

"The government has really fought every step of the way to limit the decision in *Rasul* to the point that it's meaningless," says Clifford Chance associate Tina Foster, part of a team representing a French national held at Guantanamo Bay. "We're covering territory that has already been covered and decided."

The habeas cases also became bogged down by disputes over lawyers' ability to consult with their clients at Guantanamo Bay and procedures for handling classified information.

Initially, government attorneys took the position that the prisoners had no right to legal representation and that all meetings would therefore take place at the Pentagon's discretion.

Military officials at Guantanamo Bay indicated that they planned to conduct real-time monitoring of some attorney-client conversations due to national security concerns.

In October, Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia rejected the government's position as "flimsy," and insisted that lawyers be permitted to meet with their clients at Guantanamo Bay without being listened in on by government agents.

"The privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system in the United States," Kollar-Kotelly wrote in her 25-page opinion.

More recently, lawyers for the prisoners have lodged complaints about redactions in the government's filings providing factual support for their clients' detentions.

"What you see at each step along the way is the government attempting to make itself the ultimate arbiter of all these issues normally decided by judges," says Covington & Burling partner David Remes, who represents 13 Yemeni nationals held at Guantanamo Bay. "It's part of the general view of the government that its decisions in this area should be beyond judicial scrutiny."

Government lawyers maintain that those on the other side of the issue simply exaggerate the impact of the Supreme Court's ruling in Rasul.

"Petitioners' counsels seem to think anything they don't like conflicts with Rasul," says Justice Department spokesman John Nowacki. "The reality is that the government has provided the alien detainees the very process that the Supreme Court ruled ... would be sufficient."

OBJECTIONS TO THE PROCESS

Disputes over the Pentagon's process for formally reviewing each prisoner's detention are expected to be aired during this week's hearings in D.C. federal court.

In the wake of the Supreme Court ruling, the Pentagon began holding military hearings to confirm that each detainee had been properly classified as an enemy combatant.

As of Nov. 22, the Pentagon had conducted 401 proceedings and issued 144 final determinations. All but one detainee was found to meet the definition of an enemy combatant. The one prisoner determined not to be an enemy combatant was subsequently released to his home country of Pakistan.

For each case, three military officers review classified and unclassified evidence and determine whether the prisoner supported the Taliban, al-Qaida, or associated forces engaged in hostilities against the United States or its coalition partners. The presumption is in favor of the government, and detainees have no right to legal representation.

All of the cases filed in the District object to the Pentagon's procedure, which detainees' lawyers say does not provide a meaningful opportunity to challenge detentions. In their motion to dismiss the cases, government lawyers argue that the military hearings, known as combatant status review tribunals, provide "all the process that petitioners are due (and then some)."

The Bush administration draws support for its position from language in another recent Supreme Court decision, Hamdi v. Rumsfeld.

In that opinion, handed down the same day as the Guantanamo Bay case, a plurality of justices suggest that review before a military tribunal might be sufficient to meet due process requirements for Yaser Esam Hamdi, a U.S. citizen designated by the president as an enemy combatant.

Government attorneys argue that what is acceptable for a U.S. citizen must be good enough for noncitizens and have put forward records of the combatant status review tribunals convened for the petitioners to support their continued detentions.

The documents shed new light about whom the government has in custody.

Many of those challenging their confinement claim to have been engaged in humanitarian work at the time of their capture and sold to the U.S. military for bounties.

One Yemeni prisoner whose habeas petition is currently before Green testified before the military panel reviewing his case that he had traveled to Afghanistan to teach the Quran. He disputed the government's allegations that he fought alongside Taliban forces. The panel found him to be an enemy combatant.

Court records reveal that following the hearing, a military officer involved in the process submitted a written complaint that the allegations against the Yemeni were based on statements from an untrustworthy source.

"I do feel with some certainty that [the accuser] has lied about other detainees to receive preferable treatment," wrote the Army officer, a nonlawyer who helped prepare the detainee for his appearance before the panel. "Had the tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran [to the Taliban's children] is an enemy combatant."

In at least two other cases now pending in D.C. District Court -- one before Green and one before Leon -- a military panel upheld a prisoner's technical classification as an enemy combatant, but recommended that he be considered for release.

Lawyers for the prisoners say the military hearings, which they are barred from attending, are part of the Bush administration's strategy to keep the detentions at Guantanamo Bay from being scrutinized by federal courts.

"The government takes the position that these men are not entitled to any due process, but if they are, the [combatant status review tribunal] is as much as they are due," says Wilmer's Kirsch, who represents six prisoners held at Guantanamo Bay. "When you contrast that position to the reality of what is going on in these hearings, the argument just falls flat."

"Even the members of the panel," Kirsch adds, "seem to acknowledge that they are impotent to do anything except act as a rubber stamp for the government."