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Legal Tide Turning on Detainee Issue

Shifting opinion threatens nominee

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WASHINGTON -- In the spring of 2002, a handful of lawyers made the rounds of U.S. law firms seeking help for a very big, but very unpopular, cause: providing legal representation for the 600 or so accused foreign enemy combatants held at the U.S. naval base at Guantanamo Bay, Cuba.

With the memory of the Sept. 11 attacks still fresh and military overseers of Guantanamo describing their prisoners as the "worst elements of Al Qaeda and the Taliban," few lawyers volunteered to fight for any rights the detainees might have.

"They would give an answer like, 'Well, we've raised this with [the law firm's] management committee and decided not to take this one on,'" recalled Douglass Cassel, director of the Center for International Human Rights at Northwestern University's School of Law.

After three years and a trip to the U.S. Supreme Court, attitudes and the legal landscape have shifted dramatically.

Sixty-nine Guantanamo detainees have filed papers seeking access to U.S. courts assisted by lawyers from at least 17 firms, according to a review of court filings. In addition, four detainees are on trial before military commissions, although the cases have been suspended while new legal issues are considered.

The increased legal representation by American lawyers of foreign detainees came after the disclosure of abuses, including the Abu Ghraib prison scandal, that helped galvanize some lawyers' opposition to Bush administration detention policies.

Although Abu Ghraib is in Iraq, the abuses helped focus attention on how prisoners in the war on terrorism are treated, said Thomas Wilner, a corporate lawyer from Washington whose defense of Kuwaiti detainees helped trigger the Supreme Court's landmark ruling in June that gave Guantanamo detainees a foothold to contest their confinement in U.S. courts.

Though some firms still are reluctant get involved, "it's become sort of chic now" to represent detainees, Wilner said.

New accounts of abuse of Guantanamo detainees surfaced in December in documents from the FBI and the Army indicating that mistreatment of prisoners in Cuba, Iraq and Afghanistan may be more widespread and serious than the Defense Department had acknowledged.

The increasingly aggressive legal response to the detention policies could translate into difficulties at Senate confirmation hearings for White House counsel Alberto Gonzales, President Bush's nominee to succeed John Ashcroft as attorney general.

In his current job, Gonzales played a role in the production of memos that argued Bush was not bound by federal or international law governing the duration and conditions of detainees' confinement and prohibiting torture.

One of the more notorious memos, crafted by the Justice Department for Gonzales in August 2002, appeared to sanction torture and was explicitly repudiated in a memo issued Thursday, a week before the hearings are slated to begin.

While it is not believed that the nomination is in trouble, some who have come forward to assist the detainees, including former high-ranking military lawyers, are furious at the administration's unwillingness to abide by international law. They could turn Gonzales' confirmation into a messy proceeding.

Wilner, who overcame objections from his partners at the law firm Shearman & Sterling to take the Kuwaitis' case in 2002, said accounts of detainee abuse were a wake-up call to a large chunk of the legal community that "just had been cowed by [the Bush] administration."

Lawyers were not being asked to defend terrorists, he said. They were being asked to oppose a policy that decreed detainees had no rights, except as Bush might recognize them.

"The rule of law is what distinguishes us from the animals," Wilner said.

Administration defends policy

The administration, however, vehemently disputes that detainees are held in a lawless limbo.

The government maintains that detainees are not covered by the Geneva Conventions, but they have been treated humanely, with multiple safeguards to ensure that only unlawful combatants are imprisoned.

While lawyers for the detainees don't dispute that detention in wartime is an act of security and necessity, they contend the issue boils down to who, if anyone, gets to look over the government's shoulder.

Until the Supreme Court ruled in June, the answer had been: no one.

Two early cases--Wilner's and another involving British and Australian detainees represented by the Center for Constitutional Rights and Joseph Margulies of the University of Chicago's MacArthur Justice Center--were tossed out by federal courts.

The lawyers for the detainees decided to focus their case on what they said are fundamental constitutional values.

"We made a strategic decision that it could no longer be 'terrorists versus the United States.' It had to be the 'rule of law versus the United States,'" said Northwestern's Cassel.

Detention foes build case

By the time the Supreme Court heard arguments in April, Guantanamo lawyers had collected supporting briefs from former leaders of the military legal system, former U.S. prisoners of war, groups of retired federal judges and diplomats, among others--and they found a pool of lawyers willing to work on the cases.

Among those who filed briefs in support of the detainees was retired Adm. John Hutson, dean of the Franklin Pierce Law School in Concord, N.H., and from 1997 to 2000 the Navy's top legal officer.

"The U.S., of all countries, has to take the high ground," Hutson said in a recent interview. "Yeah, they [terrorists] are beheading people, but to say, 'Well, we're not going to live up to the Geneva Convention. . . . ' Sinking down to their level just means that they won."

A self-described conservative and "a Republican my whole life," Hutson said the core legal issues in the detainee cases--the need to check presidential power and to adhere to international law--cut across the political spectrum.

Hutson said Gonzales did not appear to have thought about U.S. troops held captive.

"When we're captives, we sure don't want the Geneva Convention referred to as 'quaint' and 'obsolete,'" said Hutson, referring to one of Gonzales' memos.