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Gaining a Foothold In Guantánamo

Defense lawyers want access to every detainee-and a say in prisoner transfers; Recruiting Litigants; Lawyering Up

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Legal Times
March 28, 2005

The U.S. military's detention of alleged enemy fighters at Guantánamo Bay, Cuba, is becoming increasingly burdened by ongoing litigation in the federal courts.

Suddenly a cause célèbre for powerful law firms, the legal effort on behalf of the prisoners has attracted roughly 225 pro bono lawyers. All told, 130 of the approximately 540 prisoners at the base currently have suits pending in the U.S. District Court for the District of Columbia.

That number may be about to explode. Judge Colleen Kollar-Kotelly is considering a habeas corpus petition filed by civil rights activists on behalf of hundreds of unidentified prisoners. As part of the suit challenging the prisoners' confinement, lawyers have asked for access to the U.S. naval base at Guantánamo Bay so they can meet with detainees in person and offer legal assistance.

Every new case means more high-level security clearances to process, more sensitive documentation to compile, more motions, and more delays. And it's not just the Pentagon that is complaining. Even some attorneys with clients at Guantánamo Bay question whether the sheer volume of litigation may bog down a dispute that already has been plodding through the courts for three years.

Since the beginning, lawyers representing Guantánamo Bay detainees have demanded that the U.S. government charge their clients with crimes or set them free. Yet the latest round of legal maneuvering raises the possibility that prisoners already slated to leave the military base could remain imprisoned there while lawyers in Washington argue over the terms of a transfer.

Last week, lawyers for several detainees asked Judge Henry Kennedy Jr. of the U.S. District Court for the District of Columbia to block the Defense Department from moving their clients off the U.S. military base without first providing 30 days' notice to the court -- ostensibly to give lawyers time to contest any transfers they see as problematic.

Similar motions have been made in roughly 20 additional cases. Already, several judges have taken action to temporarily prevent the government from transferring detainees with pending cases until the issue is resolved.

After last week's hearing, Kennedy extended a temporary restraining order already in place against the government for 10 additional days and indicated that he would rule before its new expiration of April 1.

The court's intervention is a slap to the Bush administration, which has aggressively argued that decisions related to the Guantánamo Bay prison facility should be made by the executive branch without judicial interference.

Government attorneys say providing advance notice would inevitably open the door to wrangling over the terms of transfer agreements reached with other countries. That, Justice Department lawyer Joseph Hunt told Kennedy, would violate the Constitution's separation of powers.

"The executive will have made the decision based on its negotiations and agreements with the foreign governments only then to have that not only delayed but second-guessed and possibly overruled by the judicial branch," Hunt said.

Lawyers for the detainees say they must be given notice to ensure that their clients won't be sent to foreign countries where they may be tortured or mistreated. To date, 149 Guantánamo Bay prisoners have been freed and 65 have been transferred for incarceration in countries including Pakistan, France, Russia, Saudi Arabia, and Great Britain.

"All we want is to be notified in advance if the government intends to remove our clients from Guantánamo," says Covington & Burling partner David Remes, who argued at last week's hearing on behalf of his clients, 13 Yemeni nationals. "Absent a court order, I could wake up tomorrow morning and find they've all been shipped to some secret CIA garrison in outer Mongolia."

In June 2004, the U.S. Supreme Court ruled that federal courts have authority to hear challenges from prisoners held at Guantánamo Bay. Since the decision, government lawyers have continued to urge federal judges not to encroach on military and foreign policy decisions that belong to the executive branch.

Earlier this year, Judge Richard Leon and Senior Judge Joyce Hens Green -- both of the U.S. District Court for the District of Columbia -- reached conflicting decisions on whether the mounting number of habeas corpus claims brought by Guantánamo prisoners should proceed to trial. Leon, a George W. Bush appointee, ruled in favor of the government Jan. 20 and threw out the cases assigned to him. Two weeks later, Green, a Jimmy Carter appointee, decided that the cases should go forward.

For the moment, most of the habeas actions brought on behalf of detainees have been put on hold while the U.S. Court of Appeals for the D.C. Circuit considers what rights, if any, the prisoners have. Arguments before the appeals court have not yet been scheduled. The final briefs are due June 28.

Despite the upcoming appeal, the litigation effort in the lower courts has been anything but dormant.

Since Green's ruling on Feb. 2, 26 new habeas cases have been filed. On Feb. 10, the Center for Constitutional Rights filed an ambitious lawsuit on behalf of unidentified detainees at Guantánamo Bay, referred to as John Does 1-570. The center, a public interest law firm based in New York, has coordinated much of the Guantánamo Bay habeas litigation and recruited dozens of high-profile law firms willing to provide free legal services.

Barbara Olshansky, deputy litigation director for the center, says the purpose of the John Doe suit is to secure legal representation for every prisoner who wants to fight his detention in U.S. court. Lawyers from Mayer, Brown, Rowe & Maw are co-counsel on the case.

"From the very beginning, I had this nutty idea that I wanted to file a class action habeas claim," she says. "After we won the decision at the Supreme Court, I went back to the idea. I just don't want to wait another two years."

The suit asks for the names of all detainees held at Guantánamo Bay and for an opportunity to offer legal representation to the prisoners in person.

In a March 17 court filing, Justice Department lawyers call the case improper and unprecedented: "The attorneys have not been authorized by the detainees, whom they do not know, to file this habeas petition."

The John Doe tactic also raises concerns among some attorneys involved in the Guantánamo cases who believe it would be more effective to proceed with a limited number of cases.

"Everyone is entitled to a lawyer," says Shearman & Sterling D.C. partner Thomas Wilner, who represents 11 Kuwaiti nationals held at Guantánamo Bay. "Of course, the proliferation of lawyers and cases makes coordination somewhat difficult. We need to keep our eye on the ball -- on the fact that people have been rotting in jail without any justice for three years."

Olshansky perceives power in numbers. Among the well-heeled law firms that have stepped up to represent Guantánamo Bay prisoners are Covington & Burling; Wilmer Cutler Pickering Hale and Dorr; Paul, Weiss, Rifkind, Wharton & Garrison; and Clifford Chance. Since August of last year, approximately 50 lawyers have traveled to Guantánamo Bay to meet with clients.

"When I talk with the government on the phone, I suddenly have a lot of power behind me," Olshansky says. "The lawyers on this case represent a wide spectrum in this country. We're not all Democrats. There are some serious Republicans. But we are all in the same place about what justice means."

If the John Doe suit succeeds, it would place all the detainees -- those who have formally obtained counsel and those who have not -- on equal footing.

For instance, Olshansky has already asked Kollar-Kotelly, the judge assigned to the case, to prevent the Pentagon from transferring any of the John Doe detainees without providing 30 days' notice to the court.

Government lawyers call the tactic "absurd" and contend that it might delay the release of a detainee who never consented to be part of a lawsuit in the first place.

"Such a detainee might understandably be surprised to learn that his repatriation will be delayed to give some well-meaning American lawyers . . . an opportunity to consider to their satisfaction whether they perceive any issues with the transfer," the lawyers state in the government's brief.

The dispute over the possible transfer of detainees comes even as the Pentagon steps up efforts to repatriate large portions of the Guantánamo Bay prison population.

In December, the Defense Department initiated formal proceedings, known as administrative review boards, to assess on an individual basis whether prisoners should continue to be held at Guantánamo Bay. So far, approximately 65 detainees have had their cases reviewed as part of the process. No final decisions have yet been reached. In addition, the Bush administration is deeply engaged in negotiations with foreign governments to secure the transfer of prisoners for release, prosecution, or continued detention.

Twenty-eight prisoners who have been cleared of any connection to al Qaeda or the Taliban remain at Guantánamo Bay while the Pentagon works out the details of their release. The request for a 30-day notification period raises the possibility that those detainees, and others scheduled to leave the base, could stay in U.S. custody longer.

"It is a tension," concedes Clifford Chance counsel Wesley Powell, an attorney involved in the litigation. "The downside to having a notification period is that there may be some additional delay in release. Better to suffer that and have a full hearing in federal court than just to let government transfer [a detainee] wherever they want."

In August 2004 and March 2005, the Pentagon transferred Powell's clients, all from France, into French custody. Powell did not receive any advance notification. Neither did the government's own lawyers at the Justice Department.

Powell says the lack of notice was not a critical issue in his case.

"I was not dealing with a situation where my client could be released to a country where he might meet a really bad fate, so we were more concerned about getting him out of Guantánamo however we could," he says.

But lawyers for some detainees fear that the government may send their clients from Guantánamo Bay to countries where they could be tortured.

The practice of transferring terror suspects into foreign custody for interrogation and prosecution is known as rendition. While precise figures for rendition are hard to come by, the tactic has reportedly been used frequently since the Sept. 11, 2001, terrorist attacks.

At last week's hearing before Judge Kennedy, Hunt, the DOJ lawyer, flatly denied the assertion that the United States would send prisoners to countries where they might be tortured.

"We have obtained assurances before they are released that it is more likely than not that they will not be tortured in a country that they go to," Hunt said. "In fact, it has happened where we have not been satisfied with the assurances that a foreign government has given the United States, and we have not transferred those detainees."

Still, several press reports and first-person accounts have accused the U.S. government of handing over terror suspects to foreign countries where they have subsequently been mistreated.

In a civil suit pending in the U.S. District Court for the Eastern District of New York, Canadian citizen Maher Arar claims that, after his arrest at John F. Kennedy Airport in New York, he was turned over to Syrian authorities. For the next 10 months, Arar says he was imprisoned in a tiny cell and regularly beaten. Arar, who returned home in October 2003, has not been charged with any crime. U.S. government officials have not denied the allegations, but insist that they acted within the law.

For his part, Kennedy appeared determined to preserve the court's jurisdiction over the prisoners. Once transferred to a foreign government, a prisoner's claims in U.S. federal court would become moot.

Georgetown University Law Center professor Neal Katyal, who represents a Guantánamo Bay detainee in a separate case, says federal judges are acting appropriately to protect the court's ability to hear the cases.

"Now that the Supreme Court has said that the federal court has jurisdiction to hear these cases, it strikes me that the courts have to be very sensitive to government maneuvering that would frustrate that jurisdiction," he says.