The Guantanamo Bar Association

Texas Habeas Team Takes on the Government in Detainee Case

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Murray Fogler admits he was naive -- that he had no idea what he was getting into.

He is a high-dollar commercial litigator in the boutique Houston firm of McDade Fogler, a former partner in Fulbright & Jaworski and a fellow in the American College of Trial Lawyers. Sure, he had logged in some pro bono hours, but at 52, he had never handled a writ of habeas corpus, never even represented an indigent defendant.

Still, it seemed like the right thing to do -- volunteering to represent a detainee being held incommunicado at the U.S. Naval Base in Guantanamo Bay, Cuba (GTMO). After all, the U.S. Department of Defense had detained Salem Muhood Adem as an enemy combatant for about three years without benefit of counsel, formal charges or adequate legal recourse. And with the War on Terror of indefinite duration, the federal government claimed it could hold all detainees indefinitely.

To Fogler, this seems almost Kafkaesque: "Regardless of their alleged complicity in terrorism, detainees should be entitled to meaningful due process."

Not so, says the government, which has denied that these foreign nationals are entitled to any constitutional protection from civilian courts. The War on Terror is a new kind of war with a new kind of enemy that requires new kinds of rules. Victory will not be achieved by defeating a national army within a certain geographic boundary. The enemy is networks of international terrorists whose weapons include the suicide bomb and whose targets include innocent civilians. The law of war applies to them -- not the law of the land.

"To suggest that hundreds of individuals captured on the battlefields of Afghanistan should be extradited, given lawyers and tried in civilian courts is to apply the wrong legal paradigm," said U.S. Attorney General Alberto Gonzales in a speech before the American Bar Association on Feb. 4, 2004.

The government decided that under the law of war both al-Qaida and Taliban detainees fell into a category of captive known as "unlawful enemy combatants." With this status, they were not entitled to the privileges afforded prisoners of war under Article 4 of the Third Geneva Convention. They could be subjected to interrogation without end and be held without charges until the cessation of hostilities. Otherwise detainees might return to the battlefield; intelligence that might be gleaned from them would be lost.

The detainees "are among the most dangerous, best trained, vicious killers on the face of the earth," U.S. Secretary of Defense Donald Rumsfeld told the media in January 2002. Yet in the four years since their confinement, only a handful of detainees have been charged with war crimes and are scheduled to be tried before military commissions. Among the more than 500 detainees held at Guantanamo without charges, most claim that they are innocent civilians wrongfully taken captive.

Although the U.S. Department of Defense (DOD) says it will not comment on pending detainee cases, DOD spokesman Lt. Col. Mark Ballesteros says that, "To date, 180 detainees have been released, and 76 have been transferred to other countries. The United States has no desire to hold detainees longer than necessary."

In early 2002, detainees first challenged the lawfulness of their confinement, filing writs of habeas corpus in Rasul, et al. v. Bush, et al. and Al Odah, et al. v. Bush, et al. The cases were consolidated, and the detainees got no relief from the U.S. District Court or the U.S. Circuit Court of Appeals in Washington D.C. In each case, the government maintained that the courts had no jurisdiction because Guantanamo was under Cuban sovereignty and the courts had no business reviewing what it claimed was the lawful exercise of the president's war powers.

In its 2004 decision in Rasul, the U.S. Supreme Court rejected the Bush administration's jurisdictional arguments and granted detainees the right to challenge the legality of their confinement through habeas pursuant to 28 U.S.C. §2241. "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority," wrote Justice John Paul Stevens for the court's 6-3 majority. But the extent of those habeas rights remained an open question.

With the courthouse door ajar, the Center for Constitutional Rights, the New York-based legal advocacy organization that helped represent Rasul, made a full-court press to field attorneys for detainees. "When we first filed the writ, we couldn't even get local D.C. counsel -- it was too close to 9-11," says Joseph Margulies, a coordinating attorney with CCR who led Rasul's habeas team. "By the time the Supreme Court granted cert, everybody wants to get involved."

CCR's recruiting efforts included soliciting help from the American College of Trial Lawyers. The first Texas attorney to answer the call was Murray Fogler, who signed on in January 2005.

Fogler felt he was in good company. "Blue chip firms such as Shearman & Sterling and Covington & Burling were already involved," Fogler says. "None of these lawyers are pro-terrorism. They are just against holding detainees indefinitely without a reason and without due process."

Fogler wasted little time getting started, but knew nothing about his client or circumstances of his capture. Fogler knew only that Adem had requested an attorney based on a letter that detainee Bisher Al-Rawi wrote to his lawyer that listed Adem among 12 detainees who "want legal assistance and representation."

Fogler began to educate himself, sharing information from other detainees' attorneys who referred to themselves collectively as the Guantanamo Bar. Their habeas pleadings alleged that their clients were not unlawful enemy combatants but rather innocent civilians detained by mistake. Fogler tracked much of the same language in Adem's petition, which Fogler filed on April 8, 2005, before U.S. District Judge Richard Roberts in Washington, D.C.

Because of time constraints Fogler realized that he would need "extra legal heft." He turned to Rachel Clingman, a friend and partner in Fulbright whose pro bono committee signed off on Clingman teaming up with Fogler.

"Murray is a terrific lawyer, but I had my doubts," Clingman says. "I thought about how this would affect my family, my practice, what repercussions there might be representing an unpopular client." But when Fogler phoned a second time, she agreed to assist him.

Of course, there was only so much they could do: Because of conflicting decisions within the D.C. district courts about the reach of Rasul -- one court held the decision authorizes enforceable due process rights, another court held it did no such thing -- all writs were stayed pending an appeal.

In the meantime, Fogler and Clingman applied for and received security clearance to visit their client in Guantanamo. They operated under a protective order, which set out cumbersome procedures for counsel access to detainees. And Fogler viewed classified information about his client, which he agreed never to reveal publicly without permission of the court.

Yet more than a year into their representation, Fogler and Clingman have yet to meet their client. The government opposes the visit, alleging the pair has no authority to represent Adem's habeas interests. It has moved for an order to show cause why the petition should not be dismissed for being improperly filed.

Although U.S. Department of Justice (DOJ) spokesman John Nowacki declines to comment on pending cases, including Adem's, Fogler shows no such hesitancy. "It's the government's motive to obstruct as much as they can," he says. "They don't want us to meet with our client. They just want these cases to go away."

The government just might get its way. In November, Congress passed the Detainee Treatment Act of 2005, which strips the federal courts of habeas jurisdiction in detainee cases. Within days of President George W. Bush signing the legislation, DOJ attorneys filed notices of their intention to move for dismissal of all pending habeas writs in detainee cases -- a move the Guantanamo Bar opposes, in part, on the ground that Congress never intended the legislation to apply retroactively.

Fogler and Clingman are not surprised that the government is taking this posture -- well, not anymore. "In the beginning, we were amazed that the government lawyers didn't see the case the way we did -- as a matter of constitutional rights," Clingman says. "But their position is that the courts cannot impose substantive rights on the military. As long as there's a war on, they feel the executive branch can do what it wants."

From the Get-Go at GTMO

Lawyers who have been working on detainee cases since the U.S. military first transported foreign nationals to Guantanamo, say that whatever success they have achieved has come in the face of relentless governmental intransigence.

"Under no scenario would the government give us the names of people in Guantanamo, so we could find them lawyers," says Barbara Olshansky, CCR's deputy legal director who served on the habeas team in Rasul. "The reasons they gave vary, but it's usually something about security."

In the government's defense, AG Gonzales told the ABA, "The stream of intelligence would quickly dry up if the enemy combatants were allowed to contact outsiders. . . . For these reasons we have urged that interrogations of captured enemy combatants should be allowed to proceed, as they historically have, uninterrupted by access to counsel."

That intelligence stream might also dry up if the detainees were treated as prisoners of war under the Third Geneva Convention. POWs are obliged only to give their name, rank, serial number and date of birth. But the government maintained that al-Qaida -- even the Taliban for that matter -- did not abide by the Geneva Conventions and members were not entitled to POW status, which requires that combatants wear distinctive insignias, have a chain of command, openly bear arms and follow the laws of war.

The identities of 12 detainees, however, did surface in March 2002, after concerned Kuwaiti family members contacted Washington-based Shearman & Sterling about their missing relatives. "They told us their sons and brothers had gone to Pakistan to do charity work," says Kristine Huskey, a Shearman senior associate and member of the detainees' habeas team led by partner Tom Wilner. "We learned that some detainees were sold by Pakistani authorities to the American military, which was paying $4,000 a head for Arab terrorists."

"In Afghanistan, there was a broad roundup of people," adds Olshansky. "The Geneva Convention says you must have battlefield hearings, because you scoop up the farmer and his son as well as soldiers. But the administration decided the Geneva Convention didn't apply."

In its Feb. 13, 2004, fact sheet on Guantanamo detainees, the DOD maintained that the military had conducted extensive multilevel screenings of captives on the battlefield to determine enemy combatant status. "Approximately 10,000 individuals have been screened in Afghanistan and released. Less than 10 percent of those screened have been moved to Guantanamo," according to the fact sheet.

But the detainees' lawyers contend that whatever "informal inquiries" were provided did not comply with Article 5 hearings under the Third Geneva Convention. "There must be a competent tribunal and a process that starts from the presumption that the detainee is a POW," says Margulies, who is now an attorney with the MacArthur Justice Center at the University of Chicago Law School.

Margulies and others believed that Rasul had vindicated the right of detainees to have attorneys pursue their habeas claims. "What good is a remedy without rights†" he asks. But the government refused to roll over on the issue, maintaining that Rasul only resolved the question of jurisdiction; it said nothing about enforceable individual rights.

In June 2004, only a day after the Rasul remand, U.S. District Judge Colleen Kollar-Kotelly held a conference call between all sides in the Rasul and Al Odah (the 12 Kuwaitee detainees) cases, and said she "assumed that the lawyers get to go to the base now." Margulies recalls. The government didn't concede the point, but later said it wouldn't "interfere with the opportunity to go," Margulies says. "They said we could go as a matter of executive grace rather than as a matter of law."

Still, the government wanted "to monitor all visits," says Huskey, "all attorney-client conversations, all our notes. We said "no way,' and the judge agreed with us." But it took several months of legal wrangling before another U.S. district judge in Washington, D.C., Joyce Hens Green, put in place a protective order addressing the security concerns of the government.

According to the order, any information learned by an attorney from a detainee is presumed classified, until it is submitted to an independent "privilege team" and declassified. "I have to put my notes into a sealed envelope, which gets mailed to the privilege team in Virginia," Huskey says. "It takes three to five weeks to get my notes back. I can't even investigate the information until it gets declassified."

It can take up to five weeks to schedule a trip to Guantanamo, which the DOJ must approve. The visits themselves are no cakewalk. "GTMO is nothing like the show tours the military puts on for the press and congressional delegations," Olshansky says. "For 23 hours a day, the detainees live in isolation. I have never seen anything like the severity of confinement in GTMO."

To draw international attention to their treatment, detainees have engaged in hunger strikes and mass suicide attempts. But the government dismisses the hunger strikes as the devious ploys of

the enemy. It holds the same view of detainee litigation. "The Al-Qaida training manual expressly promotes the issue of litigation to thwart our war effort and promote theirs," says DOJ spokesman Nowacki.

The first habeas attorney to visit a Guantanamo client arrived in August 2004. Until several months ago, visits were held at Camp Echo. Now they occur at Camp 5. "Hopefully, they bring you the right guy; sometimes they don't," Huskey says.

There also remains the question of trust. "When we first arrived, our clients didn't believe we were their lawyers. They said their interrogators had dressed up like civilians, and said they were their lawyers. We had to bring letters from family members to gain their confidence."

With habeas counsel now landing on Guantanamo beaches, CCR broadened its outreach effort to find attorneys for all detainees who desired representation. It made numerous requests of Secretary Rumsfeld and high-ranking military officials for immediate access to all unrepresented detainees. No access was granted.

So the CCR relied on other methods to match detainees with counsel. During interviews in Guantanamo, habeas attorneys might learn the names of unrepresented detainees from their clients. "The client would then become a "next friend' for those unrepresented detainees," Olshansky says. "And we would file next friend petitions on their behalf."

CCR now represents more than 250 detainees, Olshansky says. Because of its outreach efforts and those of other human rights organizations and lawyers, all Guantanamo detainees now have counsel -- whether they know it or not.

In its habeas filings, the government takes some credit for this. Beginning in December 2004, the military began notifying detainees of their habeas rights under Rasul. According to the government, these notices have resulted in detainees filing at least 55 pro se petitions.

In a July 7, 2004, background briefing, senior officials from the Departments of Defense and Justice announced that as response to Rasul, the government was implementing its own legal process for detainees. This would take the form of Combatant Status Review Tribunals (CSRTs) -- military proceedings that determine whether a detainee meets the criteria for enemy combatant status.

CSRTs, heard before three commissioned officers, are administrative rather than adversarial; there is a right to confer with a personal representative but no right to counsel, no right to confront witnesses and no right to see classified evidence that will be used against the detainee. The detainee may choose to participate and may view unclassified evidence, but the government's evidence is presumed "genuine and accurate." The detainee must rebut the presumption that he is an enemy combatant.

"Detainees are being asked to fight with their hands and feet tied," Fogler says. "It's half-ass due process."

Though more judicious in her word choice, Judge Green agreed that the CSRTs are too stacked against the detainees to be constitutionally viable. In her January 2005 decision, In Re: Guantanamo Detainee Cases, she held that detainees can challenge the lawfulness of their detentions under the Fifth Amendment and their POW status under the Third Geneva Convention. To make these challenges meaningful, the detainees have the right to counsel and confrontation. Green also found that the government's definition of enemy combatant was overly broad, because it covered individuals who had no knowledge of the terrorist activities of organizations with whom they might have some connection.

Green's decision ran contrary to an earlier D.C. district court opinion in Khalid v. Bush. U.S. District Judge Richard J. Leon agreed with the government's stance that detainees had no enforceable rights under the Constitution or the Geneva Conventions. On appeal, the U.S. Circuit Court of Appeals in Washington, D.C., consolidated these conflicting cases and granted stays in all others.

The stay hasn't stopped Fogler and Clingman from advancing their client's habeas interests, pushing the government to gain access to Adem and the evidence -- classified or otherwise -- against him.

Adem v. Bush

On July 6, 2005, in response to Adem's habeas petition, government lawyers filed a factual return, which included the unclassified portions of his CSRT proceedings held in November 2004.

According to an exhibit, Adem's enemy combatant status was based on information that he was "employed by the Revival of Islamic Heritage Society (RIHS), which was suspected of commingling its legitimate funds with illegitimate funds it funneled to al-Qaida." Adem was captured in Pakistan in a raid on his home, which the government alleged was "a suspected al-Qaida residence."

In his own defense, Adem denied that he knew that the RIHS supported terrorism. He stated that RIHS ran schools throughout Pakistan and Afghanistan; and that his job was to make certain its teachers followed their lesson plans. He claimed he had done nothing illegal and his residence had nothing to do with al-Qaida.

Based on his testimony, along with the classified evidence to which Adem had no access, the tribunal found by a preponderance of the evidence that Adem was an enemy combatant.

"From the factual response, there may be a link between the employer and al-Qaida," defends Fogler. "But there is no proof Adem was connected to the organization's fund-raising activities. It's really guilt by association."

In August 2005, the government granted Fogler access to the classified evidence in the case, which it keeps in a secured facility in Arlington, Va. Fogler, after receiving his security clearance, traveled to the facility and reviewed the evidence, the specifics of which he cannot disclose to his own client without court approval.

Since then, Fogler and Clingman have scheduled three trips to Guantanamo, but the government has repeatedly refused to let them go. In a Nov. 17, 2005, e-mail, Andrew Warden, a DOJ trial attorney, wrote, "You have still not provided any evidence of your authority to represent petitioner Adem," which was required by the protective order "before being permitted access to the detainee." Warden contended that such authority might take either of two forms: a detainee letter authorizing representation or a document from a "proper next friend" who has filed a petition on behalf of the detainee.

Fogler bristles under this contention. "The protective order says nothing about next friends," he says. "It does say you have to provide authority for your representation, but it allows you two visits to obtain written authority from your client."

Fogler says he chose not to file a next friend petition through detainee Al-Rawi who had written a letter listing Adem as a detainee requesting counsel. "Next friend petitions are generally filed by

family on behalf of minors or incompetents," Fogler says. "I believe my detainee's request ought to be given the same dignity as if he had expressed it to me." Besides, adds Fogler, the government generally contests the propriety of petitions filed by purported next friends who are detainees.

In December 2005, Fogler and Clingman filed an "Emergency Motion to Hold the Government in Contempt." The government responded with a "Motion for Order to Show Cause Why Case Should Not Be Dismissed for Lack of Proper Next Friend Standing."

The habeas team has written Adem about its representation, but the government has quarantined the letter, says Clingman, and it remains undelivered.

On Dec. 29, both motions were heard before U.S. Magistrate Judge Alan Kay in D.C. who is designated to hear disputes arising out of the protective order. Each side argued its motion, but the judge has yet to rule.

But nothing stands still for long in the shifting landscape of detainee rights. On Dec. 30, Bush signed into law the Detainee Treatment Act of 2005, a bill passed by Congress that strips the federal courts of jurisdiction to hear detainee writs of habeas corpus. Also known as the Graham-Levin Amendment, the legislation instead vests the D.C. U.S. Circuit Court of Appeals with exclusive jurisdiction to review the decisions of CSRTs and military commissions (in war crimes trials). Although enacted without public hearing, one of the bill's sponsors, U.S. Sen. Lindsay Graham, R-South Carolina, told his Senate colleagues that the act was necessary to prevent the courts from being clogged by the frivolous suits of detainees. In press accounts, Lindsay and the administration contend that the act applies to pending as well as future cases.

Says DOJ spokesman Nowacki, "It is our position that the plain language of the statute eliminates jurisdicition immediately on the date of enactment."

U.S. Sen. Carl Levin, D-Mich, another Senate sponsor, couldn't disagree more. "The administration is wrong," said Levin in a Jan. 4 press release. "Congress specifically considered and rejected language that would have applied the Graham-Levin Amendment retroactively to pending cases."

That hasn't stopped the DOJ from filing Notices of Supplemental Authority in nearly 200 detainee cases (Adem among them), contending that in light of this new withdrawal of jurisdiction, it anticipated filing motions to dismiss "no sooner than the week of January 9, 2006."

The real battle over detainee rights, however, may be waged in Hamdan v. Rumsfeld, a case pending before the U.S. Supreme Court. In mid-January, the government filed a motion to dismiss the appeal based on the Detainee Treatment Act. The case itself tests the limits of executive power by presenting questions about whether the military commissions, set up to try terrorist suspects for alleged war crimes (Hamdan is alleged to be Osama bin Laden's driver), are constitutional and in accord with the Geneva Conventions. But the question of whether Congress can strip a pending appeal from the U.S. Supreme Court by enacting legislation specifically designed for that purpose might have even broader separation-of-power ramifications.

What with the government refusing to allow him to visit his client, and now, with Hamdan raising the possibility he may never be allowed access, Fogler admits that it has been a rough few months. "It gets a little frustrating after a while, but imagine what the attitude of the detainees must be. My client may have given up hope by now. But if I do get to see him, I'll have a lot of explaining to do."