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The Nation

Prisoners May Face 'Legal Black Hole'

■ Lawyers for 16 terrorist suspects at Guantanamo Bay want hearings on whether they're being lawfully held. U.S. says detainees have no rights.

By Henry Weinstein

On Monday, a federal appeals court in Washington, D.C., will take up one of the most vexing legal questions to arise in the aftermath of the Sept. 11 terrorist attacks: Is it possible for the U.S. government to keep 600 suspected terrorists held at Guantanamo Bay, Cuba, in custody forever?

Sixteen prisoners from Kuwait, Britain and Australia contend that they are being held in territory far from any combat zone in violation of the U.S. Constitution and the Geneva Conventions. They have asked federal courts to give them hearings to determine whether they are being lawfully held.

If U.S. courts fail to step in, the detainees will fall into a "legal black hole," where they could be forever, said Minneapolis attorney Joseph Margulies, who represents several detainees.

Added his co-counsel, Michael Ratner, president of the Center for Constitutional Rights: For all the legal rights the detainees currently have, "these guys might as well be on the moon."

That is as it should be, Justice Department lawyers retort. Keeping the detainees locked up serves "the vital objectives of preventing combatants from continuing to aid our enemies and gathering intelligence to further the overall war effort," the government lawyers argue.

Turning aside the prisoners' pleas will ensure that "enemy litigiousness does not jeopardize the war effort or bring aid and comfort to the enemy,"

Justice Department lawyers said in a brief filed with the appeals court.

And officials agree that the detainees' stay in Guantanamo could be a very long one.

The Geneva Conventions require that, after a war, captured soldiers should be returned home. But those treaties were not designed for situations like the current war on terrorism in which one of the combatants — Al Qaeda — is not a nation and is not likely to sign a formal peace treaty ending hostilities, government lawyers say.

Does releasing the prisoners "make sense in this kind of a conflict, where the individuals in question who are being detained are members of terrorist organizations?" John C. Yoo, a deputy assistant attorney general, asked in a speech at the College of William & Mary Law School.

"Does it make sense to ever release them if you think they are going to continue to be dangerous, even though you can't convict them of a crime?"

If the men involved were being held in the U.S., it would be much easier for them to get a federal court to consider their cases. But Guantanamo Bay naval station, which the U.S. leases from Cuba, is not a part of the U.S. Because of that, the captives have no right to have their cases heard in any U.S. Court, government lawyers argue.

So far, the government has been winning that argument.

In July, Colleen Kollar-Kotelly, a federal district judge in Washington, ruled that the detainees don't have the right to a hearing of any sort.

Their status, she ruled, is governed by a 1950 case involving the fate of 21 Germans captured in China at the end of World War II and convicted of espionage by a U.S. military commission.

After their convictions, the 21 prisoners were returned to Germany and put in a U.S. military prison there. Their lawyers filed a legal motion known as a writ of habeas corpus asking the U.S.

courts to review what the military commission had decided.

By a 6-3 vote, the Supreme Court turned them down. There has never been a case in which a court used habeas corpus "on behalf of an alien enemy, who at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction," Justice Robert H. Jackson wrote for the court majority. "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

Justice Hugo L. Black, writing for the dissenters, said the decision "denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared."

That is precisely what the Supreme Court's opinion means, Kollar-Kotelly said. Because the detainees are being held "abroad" by the military, U.S. courts have no power to review their cases, she ruled.

The detainees might have "some form of rights under international law," but those rights would have to be negotiated between diplomats from their countries and U.S. officials, the judge said.

So far there is no sign that diplomacy will aid the almost 600 detainees, who hail from 40 nations and speak 17 languages.

Of the 16 whose cases are coming before the appeals court, two — Mamdouh Habib and David Hicks — are Australian citizens; two more, Shafiq Rasul and Asif Iqbal, are British; and 12 are Kuwaiti.

Ratner and Margulies were hired by the families of the British and Australian detainees, but have not been able to meet with the prisoners they represent. Family members of the 12 Kuwaitis have hired Thomas B. Wilner, an international lawyer with Shearman & Sterling, a prominent Wall Street firm. Wilner said he has not been able to talk to any of the captives.

According to their lawyers, the Kuwaitis were volunteers doing charitable work in Afghanistan or Pakistan when they were captured by bounty hunters after last year's terrorist attacks on the World Trade Center and the Pentagon and turned over to the U.S. military.

Hicks, Rasul and Iqbal were captured by the Northern Alliance in Afghanistan and turned over to U.S. custody in December 2001. Hicks' father said his son had joined the Taliban. Habib was detained by Pakistani authorities in October 2001, then taken to Egypt and turned over to U.S. authorities, who brought him to Afghanistan before he was sent to Guantanamo Bay.

Their lawyers argue that U.S. courts offer the men their only chances for a hearing. "If United States courts have no jurisdiction to review the ... detentions at Guantanamo, then no court has jurisdiction to review them," Margulies and Ratner said in their brief to the appeals court.

The lawyers have tried to counter the government's case by arguing that Guantanamo Bay cannot be considered foreign territory.

Under the 1903 treaty with Cuba that allowed the United States to build its base, Cuba has formal "sovereignty" over Guantanamo Bay, but the U.S. military has "complete jurisdiction and control over" everything that happens there, and no foreign country has any power to intervene, Wilner notes. The treaty also states that the lease can only be terminated with the agreement of both parties, which means it can be continued as long as the U.S. desires.

Anyone accused of a crime at Guantanamo Bay, whether a U.S. citizen or not, is brought to a U.S. federal court in Virginia for trial, Margulies and Ratner said.

The appeals court should "avoid the tyranny of titles and ... recognize Guantanamo Bay for what it is: a fully American enclave with the basic attributes of full territorial sovereignty," they told the judges.

Columbia University international law professor Gerald Neuman agrees that the traditional notion of "sovereignty" — a term normally used to refer to the power a country has over its territories — is misplaced when talking about Guantanamo Bay.

"All the practical rights of governance were given away to us in the

treaty," said Neuman, who has written law review articles dealing with Guantanamo Bay. "We do not need [Cuban President] Fidel Castro's permission to do anything there. We are answerable only to ourselves and therefore our Constitution ought to govern what we do there."

But Justice Department lawyers, led by Deputy Solicitor General Paul D. Clement, say that the 1950 Supreme Court decision on which Kollar-Kotelly relied turns on formal "sovereignty," not "de facto control."

After all, they say, in 1950, the U.S. military, which was still the occupying power in West Germany, completely controlled the Landsberg prison.

The Guantanamo Bay case has drawn widespread interest in international law circles and in other nations.

Representatives of the International Committee of the Red Cross have visited the Guantanamo Bay detainees several times to check on their conditions. The organization issued a statement in February saying the captives were entitled under the Geneva Conventions to have a hearing before "a competent tribunal."

The Bush administration disagrees, saying that as "unlawful enemy combatants," not soldiers in regular army units, the detainees have no such rights.

In early November, three senior British judges strongly criticized the U.S. position. The judges were considering a case filed in London by the mother of Feroz Abbasi, who has been held at Guantanamo Bay for 10 months. Zumrati Juma asked the court to order the British Foreign Office to take action on her son's behalf.

"Mr. Abbasi is subject to indefinite detention in territory over which the United States has exclusive control, with no opportunity to challenge the legitimacy of his detention before any court or tribunal," Lord Phillips wrote for the trio of British judges. There "appears to be a clear breach of a fundamental human right," the judge added.

Nonetheless, Phillips said, the English jurists had no power to do anything about the situation.

Wayne Smith, who represented the U.S. in Havana during the Carter administration and is an adjunct professor at Johns Hopkins University, said he thought it was clear that U.S. law does not extend to Guantanamo Bay and "that is why we take prisoners there."

On the other hand, Smith said, he

was troubled by the prospect that the Defense Department is developing "an American Devil's Island on Guantanamo."

And Harold H. Koh, a Yale Law School professor who served as assistant secretary of State for human rights in the Clinton administration, sharply criticized the current administration's policy.

"What is tragic about this is that Fidel Castro does not rule this part of Cuba, but in terms of the rights the detainees are being accorded, it is hard to tell the difference," he said.

But Anne-Marie Slaughter, president of the American International Law Society, said the Guantanamo Bay detentions are an area in which "honestly, there is no clear law."

The cases may point up a need to reexamine how the Geneva Conventions apply to the world after Sept. 11, 2001, said Slaughter, who also is dean of the Woodrow Wilson School of International Affairs at Princeton University. She said international and domestic lawyers need to "extend both domestic law and international law to cover this case."

Times Staff Writer

Photo:

TIME TO PRAY: Detainees held at the U.S. naval base at Guantanamo Bay, Cuba, face toward Mecca during evening prayer in March. Keeping them locked up serves "the vital objectives of preventing combatants from continuing to aid our enemies," the U.S. argues.

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Descriptors

PRISONERS OF WAR;
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