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Burrelles Luce

Justices to review a key habeas corpus case

Do detainees get judicial review?

By Marcia Coyle
STAFF REPORTER

WASHINGTON—In any battle to preserve that most fundamental constitutional guarantee—the privilege of the great writ of habeas corpus—there may be no better standard-bearer than Seth P. Waxman.

A former solicitor general of the United States and now partner in and head of the appellate practice in the Washington office of Wilmer Cutler Pickering Hale and Dorr, Waxman has navigated the labyrinth of habeas corpus rules as a pro bono attorney in death penalty cases. He has testified in Congress and advised lawmakers in both parties when they sought changes in the federal habeas statute. Whether in the courtroom or the bill-drafting room, Waxman, according to colleagues and others, has always worked to ensure that the guarantee does not

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become an empty shell.

On Dec. 5, Waxman will argue in the Supreme Court what is perhaps the most important habeas case in modern history. He will tell the justices that the Military Commissions Act of 2006 violates the suspension clause of the U.S. Constitution insofar as it bars Guantánamo Bay detainees from access to the writ of habeas corpus. *Boumediene v. Bush/ Al Odah v. U.S.*, nos. 06-1195 and 06-1196, respectively.

"I first met Seth when he was an associate at Miller Cassidy and I was running a coalition to save habeas in state criminal cases," recalled Virginia Sloan, head of the Constitution Project. "He got involved because the American Bar Association had issued a call for lawyers to take death cases, and he did."

From that point on, she added, "he has been totally committed on the issue of habeas, on courts being available to hear claims of people that they are being held illegally."

On Dec. 5, Waxman, in a sense, will be standing atop a pyramid of lawyers whose base has grown exponentially since the government began using the Guantánamo Bay Naval Base as a prison for detainees in the war on terrorism. The variety within that base is well reflected in the main briefs and the more than two dozen amicus briefs supporting the detainees, which were coordinated by Jonathan Hafetz, an attorney with the Brennan Center For Justice at New York University School of Law, and Gary Isaac and James Schroeder, partners in the Chicago office of Mayer Brown.

Veterans and novices

There are veterans in the detainee litigation: Thomas Wilner, partner in the Washington office of New York's Shearman & Sterling and Michael Ratner of the Center for Constitutional Rights in New York have been in the fight for detainee access to the federal courts from the beginning. They shepherded to victory a case that will be a key part of the justices' deliberations: *Rasul v. Bush*, 542 U.S. 466 (2004), which held that federal courts had jurisdiction under the federal habeas statute to hear the detainees' habeas corpus petitions.

Many law professors, some handling individual detainee cases and others lending their expertise in international law, human rights law or federal jurisdiction law, are participating, including Neal Katyal of Georgetown University Law Center. Katyal won the last detainee case to come before the justices: last term's *Hamdan v. Rumsfeld*, 126 S.Ct.

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2749 (2006), which held that the military tribunals established by President Bush violated the Uniform Code of Military Justice and the Geneva Conventions.

And, there are newcomers and novices, such as the law students in the recently created National Security and Human Rights Clinic at the University of Texas School of Law who helped brief the international law issues in the case.

David J. Cynamon, partner in the Washington office of Pillsbury Winthrop Shaw Pittman and lead counsel in *Al Odah*, said his legal team took over representation of the Kuwaiti petitioners in May 2006 from Shearman & Sterling when it appeared that the detainees' habeas petitions would go forward in the lower courts because of the *Rasul* decision.

"Nobody could have perceived that this would all blow up and we're right back in the constitutional soup, " recalled Cynamon.

In deciding who would argue the consolidated cases, Cynamon said, the lawyers tallied their high court argument experience—"which was zero"—and Waxman's experience—about 50 cases. "It took us about a nanosecond to decide."

Waxman will face off against one of the most talented solicitors general in recent years, Paul D. Clement. The government has less than a handful of amicus briefs supporting its position, but that is not unusual because the government itself is a formidable and respected party to any case.

Supporting the government, Richard A. Samp of the Washington Legal Foundation, which has been active in the detainee cases in the lower courts and in the Supreme Court, has filed a brief on behalf of the pro-business legal organization and a number of retired military officers. And Kent Scheidegger of the Criminal Justice Legal Foundation, which participates as amicus in most high court habeas cases, challenges the historical analysis of the writ offered in an amicus brief by many of the nation's leading legal historians.

"This is an enormously significant issue of constitutional law that the court has before it," said national security law scholar Andrew Kent of Fordham University School of Law.

In *Rasul*, he said, the high court was "very explicit" that it was only deciding the question of the statutory scope of habeas corpus.

"This is a different issue," he added. "We're talking about the floor of what the Constitution requires and that Congress cannot take away. Whether these detainees have constitutional rights that Congress must respect is a hugely, hugely significant question."

Constitutional soup

In response to the *Hamdan* ruling, Congress enacted the Military Commissions Act of 2006 (MCA). The act authorized the president to convene military commissions. It also amended the Detainee Treatment Act of 2005 to eliminate expressly federal court jurisdiction over all pending and future habeas petitions filed by or on behalf of enemy combatants held by the United States, regardless of their location.

The act creates very limited review of the military proceedings by the U.S. Circuit Court of Appeals for the District of Columbia.

Last February, the D.C. Circuit, ruling 2-1, dismissed the detainee habeas petitions now before the high court. The panel held:

- The MCA eliminates federal court jurisdiction over the habeas petitions.
- The MCA is consistent with the suspension clause because the clause protects the writ as it existed in 1789, and the writ's history shows that "habeas corpus would not have been available in 1789 to aliens without presence or property in the United States."
- Relying on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the panel said petitioners, as aliens outside the sovereign territory of the United States, have no constitutional rights under the suspension clause.

In the high court, Waxman and his

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supporters argue that the suspension clause prevents Congress, through the MCA, from eliminating the detainees' access to the great writ.

The clause says the writ may be suspended only in cases of invasion or rebellion. Neither of those conditions is present here, they say. And the clause protects the writ as it existed in 1789.

Relying on the *Rasul* decision, Waxman contends the justices concluded there that "the common law writ known to the Framers ran to territories under the sovereign's control, regardless of whether they were formally considered sovereign territory." Guantánamo is within the "territorial jurisdiction" of the United States.

And the petitioners' detention violates the Fifth Amendment right against imprisonment without due process of law—a right they may invoke because of their imprisonment in a territory subject to the United States' exclusive jurisdiction. The MCA's provisions for hearings and limited judicial review, they argue, are not an adequate substitute for habeas corpus.

The government, like the D.C. Circuit, relies on *Eisentrager*: The detainees, "as aliens held outside the sovereign territory of the United States," may not invoke the protections of the Constitution, including those guaranteed by the suspension clause.

Because the common law writ would not have extended to alien enemy combatants held outside the territory of the United States, "either in 1789 or at any later date, petitioners cannot show the deprivation of any interest protected by the Suspension Clause," Clement writes in his brief.

And even if they could show a historical precedent for habeas corpus, he adds, Congress has given them in the MCA a constitutionally adequate substitute for challenging their detention.

Walk through history

The high court challenge sifts through the history of the great writ for answers to a unique situation. There is discussion by the many parties of court cases as early as 1668, and with such odd names as "Case of Three Spanish Sailors" and "Kamaluddin's Case."

An amicus brief on behalf of legal historians brings to light new and recent research by noted historian Paul Halliday of the University of Virginia about the history of habeas jurisprudence in England, the British Empire and America after independence.

In a forthcoming article, Halliday and co-author G.E. White, conclude that Justice Robert Jackson's opinion in *Eisentrager* "as a precis of the Anglo-American history of the extraterritorial application of habeas corpus," ranged "from being an exercise in rhetorical overstatement to being simply wrong."

The D.C. Circuit's analysis, they write, is also inaccurate. If, as the Supreme Court said in *Rasul*, the application of the habeas statute to detainees in Guantánamo is consistent with the historical reach of the writ, then the privilege of the writ extends to any detainee in Guantánamo, they write.

If the court wants to understand the use of the writ from 1789 and before, Halliday said, "The homework is in our article."

Habeas scholar Eric Freedman of Hofstra University School of Law said Halliday's research makes a "real contribution" to the legal debate.

"The history should be independently persuasive to the new members of the court.

"Given that habeas extends to this, then the only legal issue is whether this process in the MCA is the substantial equivalent of habeas. On that, it's like calling the flea the substantial equivalent of an elephant," he said.

But Fordham's Kent and others still consider the writ's history and application "a close question.

"If the court finds a constitutional entitlement to habeas corpus for noncitizens outside the traditionally understood boundaries of the United States, then for the first time, the judiciary would have a very significant role in setting policy for military intelligence and other security activities of our government," said Kent.

Not a close question, insisted Pillsbury's Cynamon, adding that it takes only a small step from the myriad of habeas cases to see that the writ applies to the detainees.

"The most pernicious aspect of the

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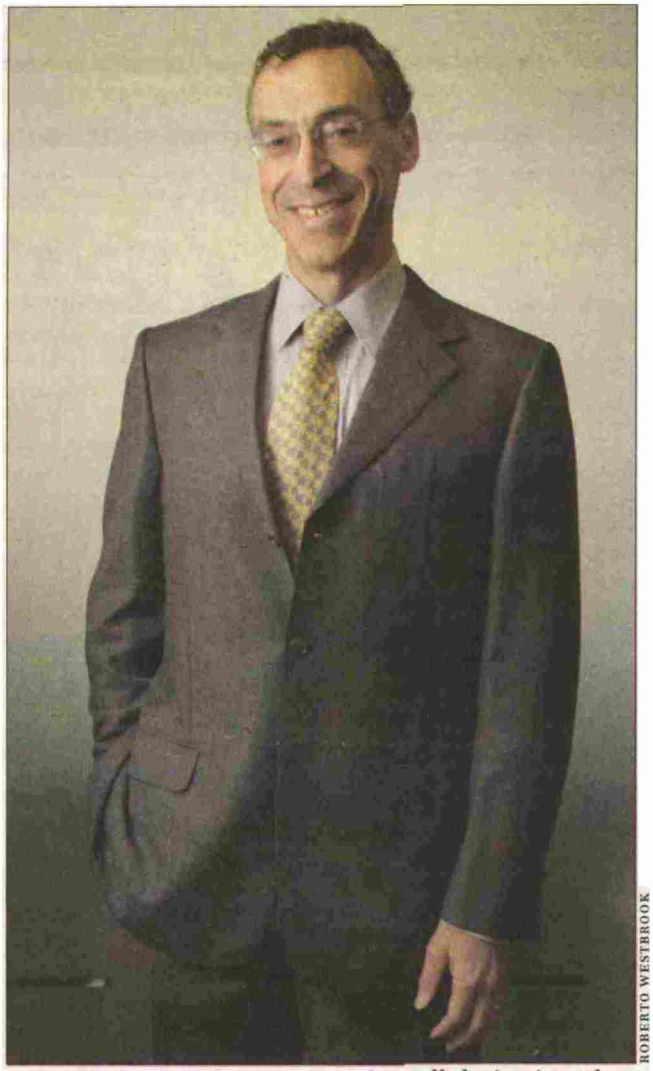
government's argument is it would create law-free zones and that to me is tremendously dangerous," he said. NLJ

ROBERTO WESTBROOK

PAUL D. CLEMENT: *The solicitor general has only a handful of amicus briefs in his corner.*



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SETH P. WAXMAN: *He is expected to tell the justices that the Military Commissions Act is unconstitutional.*

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