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The Guantanamo Bay Bar

By Corine Hegland

- The detainees' attorneys range from high-powered partners to low-paid public defenders.
- They care most about whether the Pentagon is answerable to any law.
- On March 22, this little army will be in federal court fighting to keep its cause alive.

On June 28, 2004, the Supreme Court decided, in *Rasul v. Bush*, that 14 enemy combatants held by the U.S. military in Guantanamo Bay, Cuba, could challenge their imprisonment in a federal court.

The next day, Barbara Olshansky's office voice mail crashed before 9 a.m. She grumbled under her breath as she waited for the always cranky system to reboot. Then, when she realized that it had collapsed under a load of 51 new messages, she began to cry.

Olshansky is the deputy legal director at the Center for Constitutional Rights, a 40-year-old New York City advocacy group that started out challenging Jim Crow laws in the South. She's a passionate old-school leftist with a head full of curly hair who had filed *Rasul* in 2002. In the two years since then, she had discovered that arguing on behalf of potential terrorists was a lonesome business.

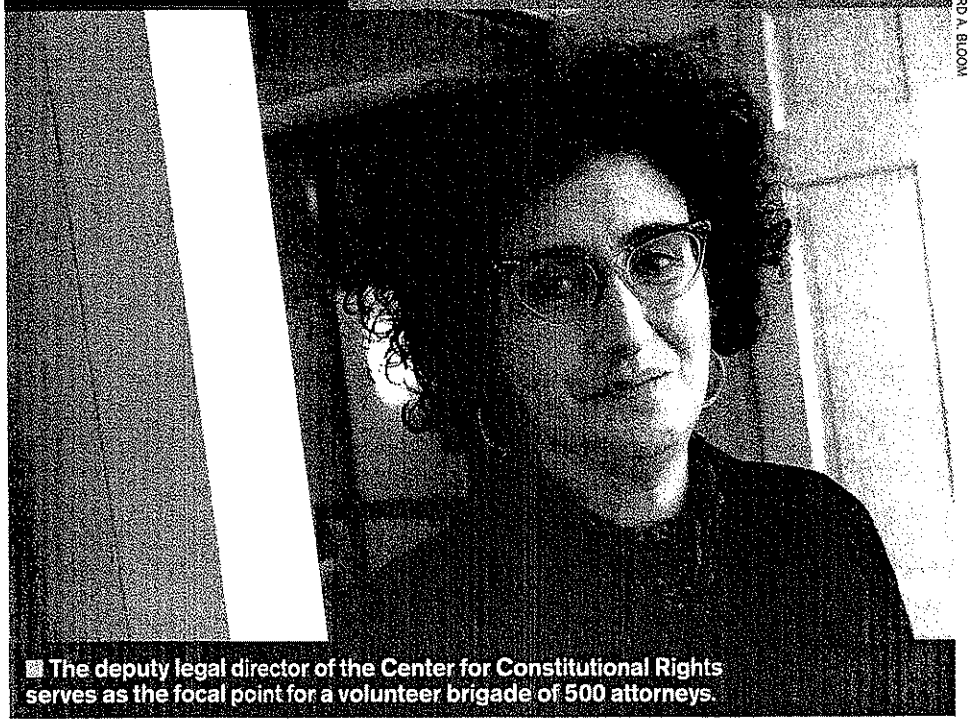
She and a circle of law school professors, a couple of death-penalty lawyers, and a starched-shirt law firm, Shearman and Sterling, had taken up the cause, which they say wasn't really about terrorists so much as whether any law—the international Geneva Conventions or the U.S. military or civilian codes—governed the Pentagon's ability to take prisoners. But old friends at New York City law firms, frightened over the possibility of another 9/11 attack, had declined to help, and death threats to the center had rolled in, occasionally with alarming details. "I know your office is on the seventh floor," said one caller.

The June 29, 2004, calls, fortunately, were different. Less than 24 hours after the Supreme Court's ruling, 51 lawyers from around the country had telephoned to ask how they could help the men in Guantanamo. Olshansky took down the names and numbers and shot out of her office door. "We have an army!" she screamed at her startled staff. "We have an army!"

Today, Olshansky's army is one of the strangest legal teams ever to hit U.S. courts. She counts more than 500 attorneys, mostly volunteers, mostly without experience in habeas corpus cases, in its ranks. Everyone, from 30 fellows from the American College of Trial Lawyers—the crème de la crème of the litigation world—to junior associates, solo practitioners, and 50-odd federal public defenders, has joined the detainees' lawyers group, the more mirthful members of whom call themselves the Guantanamo Bay Bar Association.

When Olshansky filed *Rasul* in 2002 on behalf of Shafiq Rasul, a British detainee whose family had asked for help, the

Barbara Olshansky



RICHARD A. BLOOM

The deputy legal director of the Center for Constitutional Rights serves as the focal point for a volunteer brigade of 500 attorneys.

prison was a black hole: No civilians, save the sworn-to-secrecy International Committee of the Red Cross, were allowed to speak with the prisoners, whose very names were classified. But lawyers can't represent anonymous men, so two people, private lawyer Clive Stafford Smith and the center's Tina Foster, journeyed through the Middle East, holding press conferences and contacting human-rights groups there to flush out the families of the detained. Late in 2004, when the lawyers were finally granted permission to visit their clients at the base, prisoners with lawyers began passing along notes with the scribbled names of other prisoners who wanted legal help. Olshansky and her staff collected the names and doled them out to new volunteers while running training sessions for newcomers, coordinating a listserv for online communications, and commenting on motions and filings. More than 300 of Guantanamo's almost 500 detainees now have petitions in the federal courts, where they argue that they've been wrongfully imprisoned as enemy combatants.

On March 22, Olshansky's little army will be in the U.S. Court of Appeals for the D.C. Circuit fighting to keep its cases—and its cause—alive. Last November, Congress passed a bill forbidding the courts from hearing habeas claims from Guantanamo Bay prisoners. The Justice Department subsequently asked the courts to dismiss all of the pending cases.

The detainees' attorneys contend that Congress never intended to kill cases already in the system. They've got one of the bill's co-sponsors, Sen. Carl Levin, D-Mich., backing them with an amicus brief.

Divining congressional intent, though, can be a tricky business. Sen. Lindsey Graham, R-S.C., another co-sponsor of the bill, filed a separate amicus in February backing the Bush administration. He argues that evaluating enemy combatants is a job for soldiers, not civilian judges. "I respect the lawyers for aggressively representing their clients," said Graham, but "they're not going to take over a military function." The habeas suits and the lawyers' visits to Guantanamo were wreaking havoc on the military's ability to administer the camp and get information out of the prisoners, he said.

While arguing that the bill should properly kill the pending cases, Graham also says that it gives detainees another avenue into the courts by allowing them to contest their enemy-combatant designation before a federal appeals court. Judges, he said, should be looking over the military's shoulder without usurping its responsibility. Adding the courts to the mix offers the detainees protections "above and beyond what the Geneva Convention requires," according to the senator.

Critics, including the detainees' attorneys, say that a narrow reading of the legislation lets the prisoners challenge only the *process* by which they were designated enemy combatants, the dotting of i's and crossing of t's, not the underlying facts of their case. Graham agrees with that interpretation. "I don't want a federal judge making a military decision," he said.

When asked about Graham's contention that the new legislation offers protections beyond the Geneva Conventions, Olshansky sighed. "I wish I could talk to him." If the U.S. was truly following, much less surpassing, Geneva, she wouldn't be in court in the first place, she added. But in the administration's haste to contend that neither Al Qaeda nor the Taliban fell under Geneva accords, she said, it forgot about the very first Geneva requirement: Sifting soldiers from civilians. "If we followed the Geneva Conventions, we could have kept [the combatants] and we would not have lost a thing," Olshansky said angrily. "We wouldn't have become torturers in the eyes of the world, we wouldn't have lost our moral compass, and we would have made sure our own soldiers were safe."

More than half of Guantanamo's prisoners aren't accused of fighting the United States, much less of participating in terrorist activities, according to Defense Department records reviewed by both *National Journal* and Seton Hall Law School. *(See NJ, 2/4/06, p. 20.)* Under Geneva, it's hard to make a good case that those men belong in prison. "The only people you hold until the end of hostilities are people who were combatants," said retired Rear Adm. Donald Guter, the Navy's top judge advocate general through June 2002, who is now the dean of Duquesne University Law School.

According to Guter, Guantanamo wasn't intended to hold noncombatants; it was simply supposed to provide a safe place for interrogating prisoners captured during the war in Afghanistan. Before settling on the Navy base in Cuba, the Defense Department considered interrogation facilities ranging from domestic U.S. military bases to Navy ships at sea, all rejected for fear of running afoul of the courts. Then one day a Navy admiral said, How about Guantanamo Bay? "I hate to say it, but Kemosabe here," said Guter, acknowledging that he himself had made the suggestion, although he probably wasn't the only one.

He knew that the Pentagon wouldn't formally apply the Geneva Conventions to the prisoners, Guter said, but he and the other military attorneys were told not to worry, because "we were the U.S., and we would comply with Geneva anyway." At the time, nobody focused on what would happen if the prisoners came not from the battlefield, as anticipated, but from third parties, such as Pakistan, and therefore would lack the prima facie case for combatant status implied by a battlefield capture. The current court battle, he said, is the predictable, if unforeseen, result of ignoring the conventions. "In hindsight, I shake my own head," Guter said.

Two of the first firms to jump into Guantanamo, Shearman and Sterling and WilmerHale, will be making the detainees' case before the appeals court next week. The Shearman and Sterling brief points out that during the Persian Gulf War of 1991, when the military was following Geneva rules, it held 1,196 field hearings on the combatant status of prisoners. About 75 percent of the hearing panels concluded that the prisoners were not combatants and promptly released the men. Regarding Guantanamo, "if they'd only followed the regulations, most of these people wouldn't be there, and there never would have been all of these judges," said Shearman and Sterling's Thomas Wilner.

But Sen. Graham, himself a former military lawyer, says he's satisfied that the military has a good system for holding individuals who represent threats to the United States while releasing those who do not. "There may be people caught up in this who were misidentified, and that is a very bad thing. But no process is 100 percent perfect," he said. "We're trying to strike a balance between treating people fairly, living up to justice, and protecting ourselves against an enemy that knows no balance."

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