

Cases Against Detainees Have Thinned

Algerians' Habeas Corpus Hearings Will Begin With Fewer and Lesser Charges

By DEL QUENTIN WILBER
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The six Algerians were scooped up in Bosnia and shuttled to the U.S. military prison at Guantanamo Bay in early 2002. Days later, President Bush proclaimed in his State of the Union address that the men had been plotting to blow up the U.S. Embassy in Sarajevo.

The case would seem to be an easy victory for the Bush administration, which is preparing to defend the men's lengthy detentions in landmark federal court proceedings scheduled to begin this week.

But the government is backpedaling.

The charges of plotting to blow up the embassy have been dropped. Other allegations, made by a witness whom federal prosecutors called a liar in court filings five years ago, have dissolved. The government now justifies the detentions on far narrower grounds: It says the men were planning to travel to Afghanistan to fight U.S. forces.

Lawyers who have represented Guantanamo Bay detainees say those developments could not have occurred without the prospect of habeas corpus hearings looming over the government. For the first time since Guantanamo Bay, Cuba, opened six years ago, the government must justify a captive's detention before an impartial federal judge with no connection to the military, which enforces the detainees' confinement.

"We've always said that when the government's lawyers have to stand up and defend their so-called evidence in front of a judge, many of their allegations on paper are going to crumble to dust," said Shayana Kadidal, an attorney for the Center for Constitutional Rights, which is representing many of the detainees.

The government recently also has withdrawn allegations that another detainee is linked to a high-

profile "dirty bomb" plot. Together, the legal moves raise questions about the government's claims over the years that it has disrupted imminent terrorism threats.

A Justice Department spokesman declined to comment.

Scott Silliman, a former military prosecutor and attorney and a professor of national security law at Duke University, reviewed the government's public court filings, which were heavily redacted. He said he was "surprised at how weak the government's case" is against the Algerians. But, Silliman noted, the Justice Department is holding a potentially powerful weapon in reserve.

The government told U.S. District Judge Richard J. Leon that lawyers also had filed a set of secret documents that he should review only if he "determines that the weight of the evidence otherwise supports" the Algerians' release.

Robert Kirsch and Stephen H. Olesky, attorneys for the Algerians, have reviewed other classified documents in the matter and said they want access to that information. Legal experts say filing such secret evidence is unusual but not unprecedented.

The six Algerians won their access to federal court in June, when the Supreme Court granted all Guantanamo Bay detainees the right of habeas corpus — literally "present the body" — in its ruling in *Boumediene v. Bush*. Lakhdar Boumediene is one of the Algerians.

It was the third Supreme Court victory for detainees in a legal battle they have waged collectively for years.

Leon is overseeing the cases of 24 detainees. A second federal judge is pushing to hold hearings in the cases of eight detainees. A third judge is overseeing the cases

brought by about 150 detainees to work out common legal and factual issues before sending them to other judges.

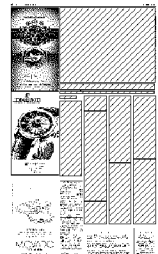
Legal scholars and the detainees' attorneys acknowledge that the hearings probably will not lead to quick release of the captives, regardless of the strength of the government's evidence. They note that the Justice Department is vigorously appealing a federal judge's Oct. 7 order in a separate case that freed 17 Chinese Muslims at Guantanamo Bay to come to the United States.

"No matter how fast the judges hold hearings, you are looking at a year or two of litigation, appealing and contesting rulings," said Robert Chesney, a national security law professor at Wake Forest University.

As Justice Department lawyers and attorneys for the detainees have sparred in court over the past few months, some judges have looked skeptically on government claims. A few weeks ago, the government withdrew accusations that a detainee was plotting a dirty-bomb attack in the United States. A federal judge said Thursday that he was suspicious of the government's motives for withdrawing those allegations. The withdrawal came just weeks after he had ordered the Justice Department to turn over exculpatory evidence to the detainee's attorneys.

In the case of the Chinese Muslims, the government did not even present evidence to the federal judge to justify the detentions after its facts and legal theories were sharply criticized by an appeals court in another proceeding.

Leon is expected to hold hearings for the six Algerians over six days beginning Thursday, the detainees' attorneys said. The judge has told the government that it must prove by a preponderance of



the evidence, the burden in civil cases, that the detentions are justified.

The detainees' attorneys said their clients will be able to watch some of the proceedings and testify by video or audio links.

In a pertinent ruling Monday, Leon said he would use a 2004 military definition of "enemy combatant" that was later approved by Congress. To continue to hold a detainee, the government must prove he is "an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces, that are engaged in hostilities against the United States or its coalition partners," Leon said. "This includes any person who has committed a belligerent act or has directly supported hostilities of enemy armed forces."

The six Algerians were living in Bosnia — five also had dual Bosnian citizenship — when they were arrested by Bosnian authorities in the weeks after the Sept. 11, 2001, terrorist attacks at the request of the U.S. government. U.S. officials alleged that the men had ties to terrorists and were plotting to attack U.S. interests in the region.

Over the next three months, Bosnian authorities investigated the men's backgrounds but found no links to terrorism, according to

court filings by Alija Behmen, who at the time was Bosnia's prime minister.

The Bosnian Supreme Court ordered them released on Jan. 17, 2002, ruling that there was not enough evidence to hold them. The Bosnian Human Rights Chamber issued a separate decision saying the men could not be deported.

But under pressure from the U.S. government, Behmen said, Bosnian authorities handed them over to the U.S. military on Jan. 18. Just days later, Bush proclaimed in his State of the Union address that "our soldiers, working with the Bosnian government, seized terrorists who were plotting to bomb our embassy."

Besides withdrawing the bombing accusations, Justice Department lawyers also have pulled back on charges that one of the men trained at a military-skills camp in Afghanistan to fight in Bosnia's civil war in the early 1990s and worked for a charity that was later designated a terrorism sponsor by the U.S. government.

Those allegations were made by a felon sentenced to 10 years in prison on federal racketeering charges. In 2003, prosecutors wrote in court filings that the man, Enaam M. Arnaout, former

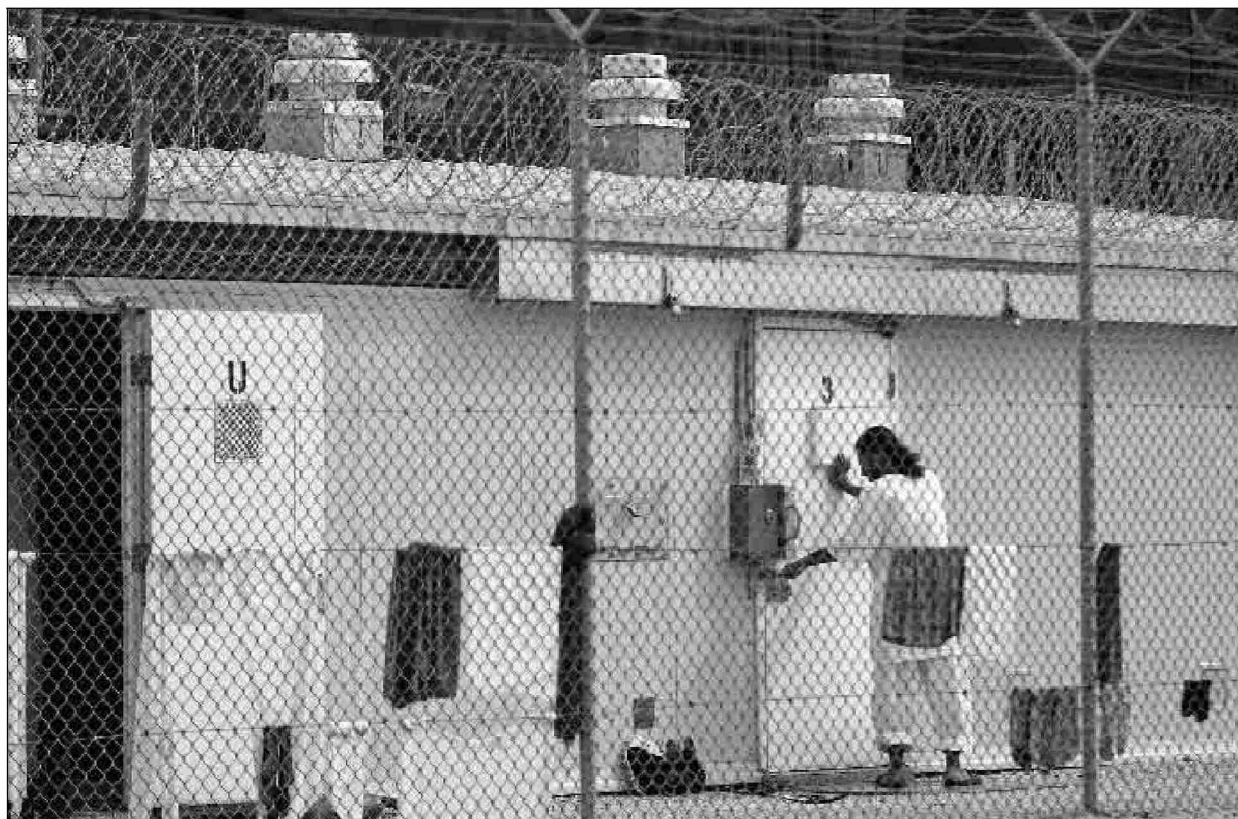
director of an Islamic charity who is alleged to have ties to Osama bin Laden, was not reliable and "lied openly and notoriously" about his conduct.

"The government's much broader, far-reaching allegations are starting to collapse," said Kirsch, one of the lawyers representing the Algerians in federal court.

By dropping the bomb-plotting accusation and Arnaout's statements, the government has been left to argue that one of the men, Belkacem Bensayah, was an "al-Qaeda member, facilitator and financier" and had "significant ties to other members" of the terrorist group, according to federal court filings. The government has alleged that the other Algerians had ties to Bensayah and that some worked for charities later accused by the U.S. government of having ties to terrorist groups, according to the detainees' attorneys and government documents.

U.S. authorities have said in military court that Bensayah "had conversations" with al-Qaeda operative Zayn al-Abidin Muhammed Hussein, better known as Abu Zubaida — who was subjected to waterboarding and other harsh interrogation techniques while in CIA custody — and made 70 phone calls to Afghanistan after the Sept. 11. attacks.

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BY CHIP SOMODEVILLA — GETTY IMAGES

Six Algerian men who have been held at this military prison at Guantanamo Bay, Cuba, since 2002 will soon challenge their detention in civilian federal courts.