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## Former U.S. Judges Enter Fray Over Guantanamo Detentions

Gibbons, Orlofsky and Sarokin argue for right of habeas review

By Jim Edwards

Three former federal judges from New Jersey have filed U.S. Supreme Court briefs opposing the detention, without judicial review, of 660 men at the Guantanamo Bay Naval Base in Cuba.

One of the trio, John Gibbons, former chief judge of the Third U.S. Circuit Court of Appeals, will argue for the petitioners on the merits. The other two, Stephen Orlofsky and H. Lee Sarokin, put their names on an amicus brief by former judges who believe the federal judiciary needs the power of habeas review over people held by the U.S. government.

The consolidated cases Gibbons will argue — *Rasul v. Bush*, 03-334, and *Odah v. U.S.*, 03-343 — will force a final answer to a hard question: whether U.S. courts have the jurisdiction to consider habeas corpus challenges to the detention of foreign nationals captured in the post-Sept. 11 fighting in Afghanistan.

Gibbons' firm, Gibbons, Del Deo, Dolan, Griffinger & Vecchione in Newark, has been at the forefront of several challenges to executive power exercised in the name of national security. The firm has litigated challenges to secrecy in the U.S. immigration courts and the use of New Jersey jails to hold Muslim detainees. It also has handled a habeas case for "enemy combatant" Ali Al-Marri and provided criminal defense to Saudi students arrested for allegedly cheating on

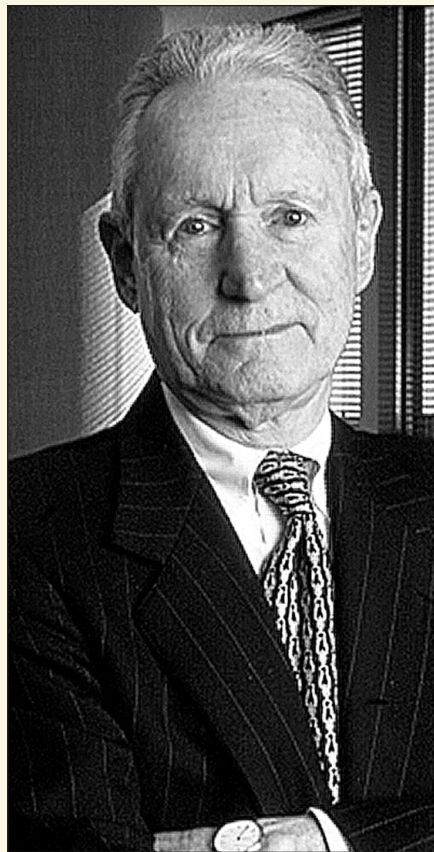


PHOTO BY CARMEN NATALE

**FAMILIAR TERRITORY: John Gibbons' firm, Gibbons, Del Deo of Newark, has been at the forefront of several challenges to executive power exercised in the name of national security.**

English tests to stay in the United States.

All of the other post-Sept. 11 cases making their way through the courts have implicated the rights of

those accused by the government or the rights of U.S. citizens to observe or scrutinize the government's national security activities.

In *Rasul*, by contrast, the main issue is about the right of judges even to hear the cases. A ruling favoring the Bush administration's detention efforts at Guantanamo Bay would carve out a new area of law into which judges would be forbidden to tread — something the Supreme Court does not often contemplate.

Gibbons was reticent last week when asked about his case. "The lawyers who've been handling the cases in the D.C. Circuit approached me and asked me to get involved, probably because I was one of the retired judges who filed an amicus brief in support of the petition for cert," he says.

Those lawyers include Thomas Wilner, a partner at Shearman & Sterling in Washington, D.C., and Prof. Anthony Amsterdam, who runs the Capital Defender Clinic at New York University School of Law. Gibbons declines to discuss the case further, citing deference to the court. He was assisted on the brief by Gibbons, Del Deo associate Gitanjali Gutierrez.

Gibbons will represent British citizens Shafiq Rasul and Asif Iqbal and Australians Mamdouh Habib and David Hicks. Rasul, Iqbal and Habib were arrested in Pakistan after Sept. 11, 2001; Hicks was arrested fighting in Afghanistan.

Hicks, a Caucasian Muslim convert, has become a cause celebre in Australia, where his father Terry leads a campaign called "Fair Go For David." The father has delivered chocolate and Vegemite — a salty yeast extract that Australians put on their sandwiches — to his son in Guantanamo, and has locked himself in a cage on Broadway in

Manhattan to draw attention to his son's plight.

Interestingly, Terry Hicks admits his son trained with the Taliban military in Afghanistan, and is merely asking for a visible, meaningful trial.

Orlofsky, who retired in 2003, says he's not as interested in the merits of the detentions as he is in the issue of judicial review. When the government began detaining fighters and suspects after Sept. 11, he realized that habeas was bound to be a key issue.

"Although I didn't have any [Sept. 11] cases, that issue was going to come up because of where the government decided to detain these people, clearly a location selected to avoid judicial review," says Orlofsky, a partner with Blank Rome in Cherry Hill.

Guantanamo Bay belongs to Cuba, but is used by the United States under an unusual permanent loan arrangement.

Orlofsky had become interested in habeas questions when, in 2002, he was asked to decide the case of a Cuban criminal suspect whom the government was attempting to deport.

The government moved the man from New Jersey to Louisiana and argued that the New Jersey court therefore lacked jurisdiction. Orlofsky disagreed and ruled in April 2002 in *Chavez-Rivas v. Olsen*, 194 F.Supp.2d 368, that his court retained the power of

habeas corpus review. His ruling was not appealed.

Orlofsky was roped into the effort before the Supreme Court by former American Bar Association President Jerome Shestack, now chair of the Wolf, Block, Schorr & Solis-Cohen litigation department in Philadelphia.

The other former judges on the amicus brief with Orlofsky and Sarokin are Nathaniel Jones of the Sixth Circuit, Abner Mikva of the D.C. Circuit, William Norris of the Ninth Circuit and Harold Tyler of the Southern District of New York. The brief also includes three lawyers in private practice — including Shestack — who held a variety of government positions.

Sarokin, now of counsel to Lasser Hochman in Roseland, did not return a call seeking comment.

If the former judges are to win their case, they must get past the government's main argument, which leans heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). That precedent states that U.S. courts lack jurisdiction over aliens detained outside of American sovereign territory.

In *Eisentrager*, a group of German soldiers were caught spying for the Japanese in China after the Nazis surrendered at the end of World War II. They were tried in China by a U.S. military tribunal and convicted of

breaking the laws of war, then transported to Germany to serve their sentences in an American prison.

The court rejected their habeas petition, which argued that they should be allowed to seek review and appeal of their cases in federal court in the District of Columbia.

"These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States," Associate Justice Robert Jackson wrote. "The Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."

The government's case against judicial review has so far been argued successfully in the D.C. and Ninth circuits by Deputy Solicitor General Paul Clement. Guantanamo — like China — is geographically beyond federal jurisdiction, Clement has shown. He did not return a call for comment, and nor would he be likely to, says Justice Department spokesman Charles Miller.

The solicitor general's brief in opposition is due Feb. 17, Gibbons says. ■



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