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Detainee fight gets bigger, costlier for long-battling Boston law firm

Six Algerian terrorist suspects held at Guantanamo Bay for more than six years without charges have won the right to petition for release, increasing the stakes for their pro bono defenders



Hadj
Boudella



Belkacern
Bensayah



Mohamed
Nechla



Lakhdar
Boumediene



Mustafa
Ait Idir



Saber
Lahmar

By Farah Stockman
GLOBE STAFF

WASHINGTON — The WilmerHale law firm, one of the largest and most respected in Boston, has a reputation for championing unpopular causes: President Nixon during impeachment. The US Army during the McCarthy hearings. Even defending serial killer Ted Bundy.

But the firm's past efforts pale in comparison with the free legal assistance that it has given to six Algerian terrorist suspects held without charge at Guantanamo Bay. Since 2004, lawyers with the firm have provided 35,448 billable hours of legal help, worth an estimated \$17 million, making this case the largest pro bono effort in the 90-year history of the firm.

"We understood back in 2004 that this was about as important as anything we could take on," said Stephen Oleskey, a Boston-based partner who has helped lead a team of up to 30 lawyers to challenge the US government for holding the detainees indefinitely without trial. "This was clearly a legitimate effort to solicit lawyers to help out with a significant constitutional issue."

Two weeks ago, the effort paid off when the Supreme Court ruled in favor of



BILL GREENE/GLOBE STAFF

Robert Kirsch (left) and Stephen Oleskey lead a team of lawyers from WilmerHale who defend suspects at Guantanamo Bay.

WilmerHale's clients, stating for the first time in US history that Congress had improperly suspended their constitutionally guaranteed right to challenge their detention. The ruling, which allows detainees to petition federal judges for their release, was

even more significant because the justices had originally turned down the case. They took it up after lawyers requested a rehearing, the first such reversal since 1947, according to legal specialists.

Now, as critics of the recent Supreme

Court ruling are devising ways to undo it with new laws or even Constitution amendments, lawyers at WilmerHale are preparing for an even longer, more expensive fight to get their clients released.

"I don't think we ever envisioned it would be as large as it has become," said Robert Kirsch, another leading partner on the team.

While many Massachusetts firms aspire to donate 3 percent of their lawyers' time, during which lawyers are paid to do work for those who can't afford it, WilmerHale set a goal of five percent, giving away an average of one hour out of 20.

Not all law firms have such a legacy. WilmerHale is the amalgamation of two storied firms that merged in 2004. Both the Boston-based Hale and Dorr, formed in 1918, and the Washington-based Wilmer Cutler Pickering, had histories of courting controversy. In 1954, Hale and Dorr partner Joseph R. Welch defended the Army, pro bono, from the overzealous anticommunist crusader, Senator Joseph McCarthy, resulting in the famous exchange in which Welch asked McCarthy: "Have you no sense of decency, sir?" In 1974 partner James St. Clair left the firm briefly to defend President Nixon during Watergate.

For its part, Wilmer Cutler Pickering made lawyers available for free legal counsel to South African lawyers during the apartheid era, as well as to serial killer Ted Bundy.

The two law firms had just merged when partners got a call in July of 2004 asking them to aid Guantanamo Bay detainees, who had just been granted access to legal representation by a Supreme Court ruling. In a matter of hours, Kirsch and Oleskey had gotten permission to take a case.

"They got involved long before it became fashionable," said Clive Stafford Smith, director of the British legal aid society Reprieve, who made the call to recruit the firm.

Defending terrorist suspects in the wake of the Sept. 11, 2001, attacks was so unpop-

ular that lawyers for John Walker Lindh, the so-called American Taliban arrested in Afghanistan, removed their law firm's name from the case out of fear that their offices would be attacked. In recent years, conservative commentators and a Pentagon official have publicly questioned why wealthy firms would aid America's alleged foes.

But by 2005, the Center for Constitutional Rights, a New York-based group coordinating the defense of hundreds of Guantanamo Bay detainees, had convinced dozens of firms, solo practitioners, and federal defense counsel that constitutionally protected liberties must be defended.

The lawyers, known informally as the "Guantanamo Bay Bar Association," won partial victories in federal courts and even the Supreme Court. But after rulings in their favor, Congress passed new laws to keep the detainees in custody. "We never knew it would be this fight to the death," said P. Sabin Willett, a Boston-based partner at Bingham McCutchen, who assembled a team of about 10 lawyers to represent a group of ethnic Uighurs from China at Guantanamo Bay.

So far, the Bingham team has dedicated roughly 10,000 lawyers' hours since the spring of 2005, making it the firm's second-largest pro bono commitment during that period, after a death penalty case.

A team led by Charles Carpenter, a Washington-based lawyer with Pepper Hamilton, has averaged roughly 4,000 lawyers' hours on behalf of two detainees. He also said the case has been harder than anticipated.

"In the ordinary lawsuits that we have, you can win," he said. "But here we have an opponent that goes to get the law changed. It makes it time-consuming."

Another large firm, Shearman & Sterling, has logged 4,054 pro bono hours defending 12 Kuwaiti detainees.

But few, if any, law firms have logged as many pro bono hours as WilmerHale, according to lawyers coordinating the defense

of the detainees, who said the complexity of their case and the Supreme Court appeal led to the large time commitment.

WilmerHale's Guantanamo clients are six Algerians, who were arrested in Bosnia at the request of US authorities, who accused them of plotting an embassy attack. After a Bosnian court let them go for lack of evidence, the men were seized in their homes and taken to Guantanamo Bay, where they have been held for more than six years without charges. Two weeks ago, the Supreme Court ruled that they have a Constitutional right to petition a federal judge for release.

The case has taken lawyers to Bosnia, the European Court of Human Rights in France, and on nearly a dozen visits to Guantanamo Bay — each costing about \$20,000 for translators and travel.

By the time the Supreme Court ruled in their favor, lawyers at WilmerHale who earn between \$200 and \$1,000 per hour had logged 35,448 hours on the case, surpassing the 29,000 hours they spent on a 1970s-era discrimination case and the 28,000 hours on a 1999 death penalty case.

"This is by far the largest in the history of the firm, I think," Oleskey said, adding that he included the years before the merger.

Now, lawyers are preparing for federal hearings that could free their clients.

Meanwhile, an Arizona congressman, John Shadegg, and Senator Lindsey Graham, a South Carolina Republican and close adviser to presumptive Republican presidential nominee John McCain, have vowed to pass new laws to keep the detainees in custody.

So WilmerHale's lawyers predict that they will spend more years and more money. Despite the huge investment, Oleskey says that the controversial case is not bad for business. "We think our [paying] clients feel that if we can vigorously represent people in Guantanamo . . . we would probably do a pretty good job representing them," he said.