

## Jenner & Block's Katya Jestin on the 'Shame' of Lingering Gitmo Cases and Leaning on Science for Office Policies

"We have people sitting around with no charges for years," Jestin said of some Guantanamo detainees. "I don't know how that fits in a country where we have a rule of law, it's not democratic. It's not right."

BY JACQUELINE THOMSEN

When the Senate Judiciary Committee recently held a hearing on closing Guantanamo Bay, Jenner & Block co-managing partner Katya Jestin was one of the few witnesses called to testify before lawmakers.

For years Jestin has represented Majid Khan, one of the detainees at Guantanamo, who earlier this year gave graphic and distressing testimony about the extent of the torture he experience while held at a CIA black site, information that had never been previously disclosed. All but one member of the military jury that heard Khan's testimony asked for clemency to be granted in his case, calling his torture "a stain on the moral fiber of America."

Jestin, speaking while working remotely from home in New York, talked to National Law Journal about the Senate hearing and why she thinks the Biden Justice Department should get more involved in settling Guantanamo cases. She also shared what it was like to be a new managing partner at the start of the pandemic and how Jenner & Block is leaning on scientific experts to decide new office policies. This interview has been edited for length and clarity.

*Question: You spent years representing Majid Khan, the only known American legal resident to be detained at Guantanamo Bay. During his sentencing in October, he described in pretty graphic detail the torture he experienced while at a CIA black site, and you described in your Senate testimony some of the difficulties*

*that you faced in trying to get witnesses to testify about that experience at his sentencing. Why do you think it's important to get this information about his torture, which hadn't been publicly disclosed before, out in the open?*

**Answer:** It really is in service of accountability. We are not a nation that tortures prisoners. This was a sharp deviation from who we are as a country in terms of our democratic roots and our adherence to the rule of law and our adherence to international conventions. I quoted John McCain in my oral opening testi-



**Katya Jestin, Jenner & Block co-managing partner.**

Courtesy photo

mony at the Senate because he was so strong on this issue. I think it is important that there's sunlight and that fellow Americans understand what happened, and that there's some measure of accountability and transparency about it so that we can make sure it doesn't happen again.

**Q:** *One issue you discussed during the hearing was the need to move prosecutions of Guantanamo detainees from before military commissions and to Article III courts. Can you talk a little bit about why you think it's important to have these cases tried, or at least housed in federal courts rather than in military commissions, and why haven't we seen that happen yet?*

**A:** I think we're kind of in a situation which I would describe as, we are where we are. And by that I mean, I don't see anything happening in terms of really being able to ever transfer these cases into Article III courts. That was tried, it didn't happen for political reasons and it's a real shame. Federal courts have indicted around 1,000 terrorism-related cases since 9/11, and the military commissions have basically accomplished nothing. So the federal courts are really well-equipped to handle these cases, to prosecute them well and fairly. And we have a Bureau of Prisons system that is well-equipped to house people convicted of serious crimes, including terrorism.

But I think we're kind of past that point. I think Colleen Kelly spoke so beautifully at the hearing—she's the sister of a man who was killed on 9/11—about the need to engage in pretrial resolutions of the cases that are pending in the commissions, whether that is accomplished through pretrial agreements between the military commission's prosecutors and the defense counsel down there, or using Article III courts as a way to do it. However they can figure that out, that's what needs to happen because these cases are not any closer to trial than they

were at the time they were charged. It's just a way of getting some closure for Colleen Kelly and people like her, the 9/11 families and other victims of terrorism, so that they don't have to think about this anymore. It's so unfair to them. It is such a shame, it's just a shame.

**Q:** *It almost seems like, because it's been so long since 9/11 and since Guantanamo Bay opened, it kind of feels like it's fallen out of the public conversation. Were you hopeful that by participating in this hearing, it would shine more of a spotlight on this topic and a reminder to other Americans that this is still happening?*

**A:** I think any publicity that can remind folks that this is still around and we need to do something about it is helpful. We have people down there who've been cleared for transfer. There's a consortium of intelligence agencies that participate in the periodic review process for people who are there without charges and there are 13 men who've been cleared for transport who are just sitting there. At the same time, those men are pursuing habeas cases which the government is objecting to. It's like the right hand doesn't know what the left hand is doing. And we have people sitting around with no charges for years. I don't know how that fits in a country where we have a rule of law, it's not democratic. It's not right.

But it's so interesting because I was on the Acela back to New York City after the hearing with my 18-year-old son, and a woman on the train asked what we had been doing in D.C. And when we told her, she said, "Oh, is Guantanamo still open?" A lot of people think it's closed, a lot of people think that this is something that's part of our history and not part of our current circumstances, which is really a shame.

**Q:** *How did you prepare for this hearing?*

**A:** I had a moot with my really smart colleagues, which was humbling. The written testimony was a team effort. I have a great team, I've been working with the Center for Constitutional Rights on this representation from the very beginning. My co-counsel, Wells Dixon, and I and the rest of our team worked hard on trying to think about all the different issues that could come up.

What was frustrating at the hearing is that I felt we were offering some pragmatic thinking about how to move forward, and the hearing itself became very political about this kind of false syllogism: Dangerous terrorists are in Guantanamo, therefore everybody in Guantanamo is dangerous. It was just this effort, I think, to elide over the kind of pragmatic, real-life situation we're in. It was just frustrating because we really saw it as an opportunity to focus on the issues at hand and think about a way forward.

**Q:** *I recall this one exchange between you and Sen. Thom Tillis, where he pointed out the crimes your client pleaded guilty to and you said, yes, but he has also cooperated pretty thoroughly with the U.S. government and came to repent his crimes and tried to remedy it. And then Tillis responded, effectively, OK, but he still did all of that.*

**A:** I used to be a Mafia prosecutor and our stock and trade was in developing cooperators. And if you believe in cooperators as a useful tool in criminal investigations and prosecutions, there's a real programmatic reason why cooperators need to be rewarded. Because if you don't reward cooperators, and you don't accept the premise that people can change and reform and rehabilitate and actually become full-fledged cooperators, then you can really damage your cooperation program programatically from

an international perspective, in terms of how we look at international terrorism and how we want to develop information about plots against the United States. It's people like my client who are really important to develop and there has to be a system that rewards that and recognizes the value. Otherwise, you will not be able to develop that kind of information. From a national security perspective, it makes no sense.

**Q:** *Switching gears, you became managing partner at Jenner & Block in January 2020. Obviously, the pandemic started just a couple months later. What was that like, having to start in a new leadership role during a completely unprecedented situation?*

**A:** I think for everyone, it was challenging. We were very fortunate because we have an incredibly talented IT team, so our transition to work from home was seamless. The other thing I'm really grateful for is that Jenner is a firm, I think, unlike most other law firms, that is so deeply defined by its culture. That was so important in 2020 and it remains so now.

I think people are just tired. This is hard and it's not ending the way it was supposed to. So I think our culture has really been a buoy. We have such a really strong tradition of collegiality and teamwork and feeling of a shared mission because it's just one of those law firms that's filled with super smart lawyers' lawyers, you know what I mean? They're obsessed with the profession and love having wonky conversations about legal stuff. I actually think, in a weird, silver lining kind of way, that the pandemic brought everyone in the firm closer together.

**Q:** *You told me earlier that the law firm is moving offices in New York. When the firm was thinking about the new space, were you thinking about how many people are actually going to be in the office*

*and what kind of culture you can facilitate moving forward, things along those lines?*

**A:** We are thinking in our various offices, what are the most important things about being together? Kind of eschewing just the old way of doing things, thinking that the most important things about being together are the community and our culture, learning how to work collaboratively and that kind of mind meld that you get with your teams when you work together in person. Learning how to mentor as effectively as possible and just building those relationships that carry you through your career. That is what I think everyone's been missing. We've tried to create more common space to foster and facilitate those interactions. We've never been a closed-door law firm, you know the muckety-mucks with their doors closed, and it's always been a very community spirited law firm. We're just adding more community spaces, thinking about the types of activities that can foster those types of relationships so that they can be built more intentionally and more efficiently since people will have added flexibility in terms of working from home. But we definitely want to make sure we capitalize on the time we're together as efficiently and effectively as we can.

**Q:** *You mentioned that we all thought this would be ending at some point and it isn't the way we thought it would. With the latest variant of COVID coming to the U.S., is the firm taking another look at office reopening plans or offering more flexible options for lawyers?*

**A:** One thing we've been really clear on, and I really think our people have really appreciated this, is we have a COVID task force. We have outside medical experts and we really

have not spared our resource dedication to this issue, because we will never ask our people to do something that is contrary to scientific thinking. We've also asked everybody for a little grace and a little grit with this new variant. Our offices have been open on a voluntary basis since last summer, June 7th, and folks have been going in. I've been doing it a ton, I have to say it's such a relief to go in. I've traveled out to Chicago, the office there is buzzing with activity, it's so lovely and energizing. I've been to D.C. a few times. So people are definitely going in. I think in terms of our full-fledged return to the office, we're just watching carefully because we want to make sure that people feel safe and good about it. And we're being totally driven by the science. We're in a kind of wait-and-see mode and we've been nimble and flexible this whole time. and that's not going to change.

**Q:** *Is there anything else you'd like to add?*

**A:** Back to the Guantanamo hearing, there was no debate over the fact that the military commission system is a failure, no debate. I don't think there's anyone who could credibly or seriously put forward an argument to the contrary. That was something about the hearing that was revelatory to me, no one was defending the commission system. I think one thing in the hearing that came out, that there was a lot of force behind from the panelists for the Democrats, was DOJ needs to get involved. Where was DOJ at the hearing? I don't know, I think they just didn't send anybody which I find outrageous, and they need to get involved because they have the expertise that could get these cases resolved. I think DOJ could get involved and if there was some sort of call to action by the Biden administration to make that happen, I think we could see this cleared up.