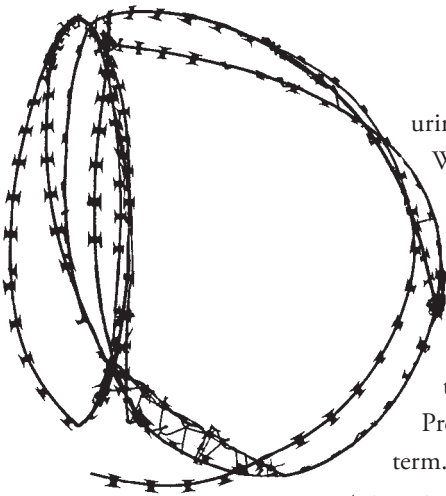


# Report from Guantánamo

BY ROBERT C. WEAVER JR., '72 B.A., '75 J.D.



uring his Commencement address at Washington Hall to the Notre Dame Law School Class of 1975, Edmund Stephan, then chairman of the University's Board of Trustees, spoke thoughtfully about lessons of Watergate, a term newly coined to embrace the imperial abuses of President Richard Nixon's second term. Acknowledging that the perpetrators were mostly lawyers, he reminded his audience that Watergate's heroes were also lawyers, that thanks to good lawyering, Nixon was driven from office, his subordinates sent to prison, and, in *US v. Nixon*, the Supreme Court affirmed the principle that not even the President is above the law. It was an exciting time to be a law student, especially for one whose interests did not naturally turn to trust and estates.

With me in the audience that morning was my classmate Paul Fortino. Both trial lawyers, we took markedly different career paths after graduation. However, more than 30 years later, we have joined forces in the representation of a number of "enemy combatants" imprisoned at Guantánamo Bay Cuba (Gitmo). In the annals of lawless abuses by the executive branch, Gitmo will surely find its place alongside Watergate.

Guantánamo Bay was acquired by the United States as a perpetual leasehold at the conclusion of the Spanish-American War. The base has had little strategic military significance for decades. But in

2001, when the Department of Defense was looking for a place to establish a five-star interrogation facility beyond the meddlesome purview of the media, human-rights advocates, and the US courts, Guantánamo Bay answered very well.

The swift defeat of the Taliban and Al Qaeda in Afghanistan in the fall of 2001 resulted in the capture of hundreds of Islamic fundamentalists. Initially, they were kept shackled in ancient prisons in places like Kandahar, where the conditions were filthy and primitive. Beginning in the spring of 2002, approximately 500 of them were hooded, handcuffed, drugged, and flown to newly constructed prison facilities at Guantánamo. Most have remained confined there in maximum-security cells ever since, although only a handful have actually been charged with any crime.

Two are clients of mine. They are both young Syrian men, handed over to our military forces in the fall of 2001 by bounty hunters. Orders entered in their cases that restrict the use of information from their files and the security obligations assumed by all lawyers who act on behalf of Gitmo prisoners prohibit disclosure of much about their circumstances. Nonetheless, although President Bush recently ordered 14 alleged major terrorists transferred to Gitmo from secret prisons elsewhere, most Gitmo prisoners present no such danger. In 2001, my clients were young and unemployed and easily emboldened by the hateful fervor of some Islamic clerics. A substantial number of the Gitmo prisoners, including both of my clients, never fired

Gitmo is a menacing environment calculated not to punish or reform, but to frighten.



a shot at anyone, never possessed a weapon, and had no terrorist training.

Still, in 2001, all prisoners captured in or near Afghanistan were regarded by the administration as potential intelligence assets. Their cases were immediately taken over from the military by the President's lawyers, who declared all detainees to be "enemy combatants," a classification that lacked definition; relied on that classification to deny prisoners protections under international treaties, including the Geneva Conventions; made allowances for torture; and deemed Guantánamo Bay to be foreign soil beyond the reach of US courts, and, therefore, a perfect place for unrestrained interrogation.

Gitmo is a menacing environment calculated not to punish or reform, but to frighten. Prisoners are a world away from anything or anyone they know, and their religion, upbringing, and culture make them uniquely vulnerable. Interrogations are still conducted, even though it is generally acknowledged that little useful information can be extracted from the prisoners after their many years in custody. My clients are generally confined to small, maximum-security cells. If they protest, say, by spitting or by throwing urine, they are placed in solitary confinement. The space provided for my meetings with them is small and hot. We sit at a table in a windowless room where they are chained to the floor. With the assistance of my interpreter, we talk with each other as we bake in the heat.

The Bush administration reasons that since the "war on terror" is limitless, so, too, may be the incarceration of enemy combatants; and since the war is global, enemy combatants may be apprehended anywhere and deposited at Gitmo. So, by the summer of 2002, there most of them were, branded as terrorists but charged with no crime, routinely shackled and interrogated, completely at the mercy of Department of Defense personnel who often made and violated the rules as they went along.

Contrary to what some defenders of the administration's policies have said, no lawyer for the detainees has argued that anyone should have been read Miranda rights after being captured on the battlefield. Raising the false specter of Miranda was one of several calculated efforts by the administration to garner support for stripping US courts of habeas corpus jurisdiction and us of our ability to represent our clients. Nor do the detainees' lawyers argue that the United States cannot detain persons captured in Afghanistan or punish those fairly convicted of war crimes. We do adamantly maintain, however, that our clients may not be jailed without the oversight of our courts, because doing so is contrary, not merely to long-standing principles of Anglo-American law, but to basic notions of human dignity.

A foothold for judicial review of the administration's internment policies was established by the Supreme Court in June 2004 when, in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, it held that habeas corpus

Law is our touchstone, and we rightfully expect adherence to it. With Gitmo, administration lawyers have aided and abetted a deplorable assault on the rule of law by systematically violating it when it becomes inconvenient and abandoning it altogether for matters they regard as more important.

jurisdiction does apply and that enemy combatants must be granted “a meaningful opportunity to contest their detention before a neutral decision maker.” American lawyers—including a number of the Judge Advocate General officers who have courageously put their careers at risk—heeded that call and urged our courts to address the question left unaddressed in *Hamdi* and *Rasul*: May a foreign national be held in a maximum-security prison for the rest of his life, in territory over which the United States has exclusive jurisdiction, on the authority of the President alone, without ever being charged with a crime, and without meaningful judicial review?

The administration’s response has been manipulative. First, Department of Defense officials, ignoring their own precedents for courts-martial and special military tribunals, invented “military commissions” to adjudicate the cases of the 10 enemy combatants actually charged with war crimes. Last summer, in *Hamdan v. Rumsfeld*, the Supreme Court held that the military commissions violated basic due process requirements and struck them down. The President and Congress answered just before the fall elections with the Military Commission Act (MCA), which did not cure the defects of the military commissions but did attempt to eliminate all habeas corpus relief. We are currently asking the US Court of Appeals for the District of Columbia to determine whether the MCA is constitutional. But what is lost in the

administration’s noise is that the MCA did nothing to address the plight of the overwhelming majority of the enemy combatants who have never even been charged with a war crime—all but 10 of the approximately 450 still imprisoned. Their legal protections are even fewer than they used to be. Once a year, an Administrative Review Board (ARB), consisting of three military officers, reviews each uncharged man’s file to determine whether he satisfies the definition of enemy combatant and poses a continuing threat to the United States. The enemy combatant may not review much of the information used by the ARB, and he may not have the assistance of a lawyer. Allegations in the file that are the product of torture and abuse may be relied on by the ARB. The prisoner bears the burden of proving he is not an enemy combatant, a vague term that has no fixed meaning in law. Not surprisingly, many of the prisoners have refused to participate in this charade.

Understandably, it has been difficult for my clients to comprehend that an American would travel so far to assist them for no fee. I spent my initial visits dispelling fears that I might be another government inquisitor posing as a lawyer. Subsequent visits had elements of eighth-grade civics lessons, as I explained the separation of powers doctrine and asked them to trust that an equally powerful court could check our sovereign, President Bush. The Supreme Court’s *Hamdan* decision in June has been helpful here. But when my clients ask if their cases



will ever be heard and whether their confinement will ever end, I can only offer hope. They then turn to Allah. My clients have been imprisoned at Guantánamo for nearly four years. The court processes meant to address their particular circumstances of confinement grind on. I have watched their physical and emotional health worsen.

Much has been written about this administration's arrogant disregard of other cultures in pressing its war against terrorism. To the extent that that is true, it is a lesser offense than its willful abuse of our own culture, which is based on the rule of law. Law created us. We invest enormous resources in the enactment, enforcement, and interpretation of laws designed to preserve our way of life in a rapidly changing world. We look to law as the expression of our collective morality. Law is our touchstone, and we rightfully expect adherence to it. With Gitmo, administration lawyers have aided and abetted a deplorable assault on the rule of law by systematically violating it when it becomes inconvenient and abandoning it altogether for matters they regard as more important. The Military Commission Act that the President and his lawyers crammed through Congress in the fall is more of the same, and, because of that, many career military lawyers don't support it.

In a time of war there is an inevitable tension between law and necessity. Nonetheless, we have always found a way to protect the nation's security while preserving our liberties. For the Gitmo lawyers and their clients, we return to our courts to reestablish that balance.

—

*This piece is adapted from a longer article that appeared in Commonweal on October 6, 2006.*

—

**Bob is a shareholder at the Portland, Ore., firm of Garvey Schubert Barer, practicing white-collar criminal defense and complex business litigation. He is married to Hannah Callaghan, '75 J.D., who has been a lawyer with Legal Aid Services of Oregon for 30 years. They live in Portland.**