

Reprinted with the permission of the New Jersey Lawyer, Inc., copyright 2004

His day in court Taking on Bush

By Earl Ainsworth



Photo by Bill Levy

Newark attorney John J. Gibbons may well be among the fortunate few for whom age is a process of addition rather than subtraction.

In fact, give him a case in which he sees the rule of law being trampled or the public interest shafted, and Gibbons at 79 is raring to go.

And he'll be doing just that April 20 in the nation's capital when he argues before the U.S. Supreme Court on behalf of more than 600 foreign citizens who've been held indefinitely and without legal representation at Guantanamo Bay Naval Base in Cuba.

Put it this way: The former federal judge whose demeanor is generally low-key is pumped up over the treatment those prisoners have received from the United States and how he believes the constitution is being pummeled along the way.

He can be most succinct in his characterization of issues and shows it when, with clear disdain, he brands Guantanamo a "no-law zone."

Specifically, he sees the constitution effectively under increasing attack these days, with time-honored individual rights

being waylaid in the name of national security but dressed up as the USA Patriot Act.

For him there are certain truisms, including the wisdom of Lord Acton's dictum: "Power corrupts and absolute power corrupts absolutely."

That may well be behind his attack mode when he puts his convictions – and vast experience – before the high court as a point man for a growing legion of legal scholars who believe President Bush and the executive branch have made a power-grab seldom witnessed in American history.

In an *amicus* brief on the Guantanamo Bay matter, Gibbons and like-minded retired judges take exception to the government's position that foreign nationals imprisoned there for allegedly fighting against U.S. forces in Afghanistan are beyond the reach of *habeas corpus* and that the judiciary may not inquire as to the government's justification for holding them.

Though the government position that foreign prisoners may be detained indefinitely without access to lawyers or the courts was affirmed by the District of Columbia Circuit Court of Appeals, which said it had no jurisdiction over foreign nationals, a flurry of *amicus* briefs helped prod the Supreme Court to grant *certiorari* in the matter.

And, Gibbons, former chief judge of the 3rd U.S. Circuit Court of Appeals and name partner at 175-lawyer Gibbons, Del Deo, Dolan, Griffinger and Vecchione, was tapped by his retired judicial colleagues to spearhead a case likely watched by much of the world.

"I am uncomfortable with no-law zones," he says, contending the Bush administration is, in essence, trying to create just that with its rationalization for the Guantanamo Bay detentions.

That Gibbons believes the president is

overstepping his constitutional authority is no surprise to any who have followed Gibbons' career and positions on social issues.

Historic perspective

He's spent 54 years in the legal trenches and his well-developed sense of history is apparent.

He recalls, for example, when the Supreme Court slapped down Harry Truman for seizing the nation's steel mills during a national strike. And when Richard Nixon was rapped on the knuckles by Congress after he perpetrated a policy of warrant-free government wiretaps.

Those power-grabs were over-reactions to national crises, says Gibbons, comparing that to today's Guantanamo Bay imprisonment policy as an over-reaction to terrorism.

He doesn't stop there, noting the current situation is even more egregious.

The April face-off against the government will mark his second trip before the high court in three years.

In 2001, he argued the Virginia death penalty case *Williams v. Taylor* and prevailed, preventing the convict's execution.

Gibbons, Del Deo has had a solid record of public-interest law since Gibbons rejoined the firm in 1990. It has filed briefs opposing the death penalty and challenging aspects of the Patriot Act, including immigration policy secrecy.

He's worked both sides of the bench. From 1970 to 1990, he served on the 3rd U.S. Circuit Court of Appeals, three years as chief judge.

The list of notables who have joined him in a total of 17 *amicus* filings is impressive. They include retired New Jersey Judges Stephen M. Orlofsky and H. Lee Sarokin, the late Sen. Paul Simon of Illinois, and recently retired Navy Judge Advocate General Donald Guter.

Beyond his judicial qualifications, he has a personal angle, too. It was a young

John Gibbons who spent the last part of his World War II Navy hitch at Guantanamo Bay.

If the years between sweating in the Cuban heat and sweating the Guantanamo case have taken anything off his game, no one could tell. He listens to questions often with a slight smile, takes lengthy pauses before responding and those verbal replies bear more than a little resemblance to written judicial opinions.

Spend a morning in his office and one sees Gibbons fully engaged. His corner office in Newark's Legal Center buzzes like the command center it is for the Guantanamo operation. He's chin-deep in paper, but tears himself away when partners Michael Griffinger and Lawrence Lustberg poke their heads into his office about other firm business.

He admits to "slowing down" to 40- and 50- hour weeks.

Three times a week, the former president of the New Jersey State Bar Association heads to the gym's treadmill and weight room.

"Gotta lift these books!" he quips.

Among the many volumes in his office are those containing the 800 decisions he wrote while on the federal bench.

Unlike other Guantanamo cases that focus on issues like interrogation and military intelligence, the consolidated *Rasul v. Bush* centers on jurisdiction. The government position is the Guantanamo Bay navel base is technically foreign soil, so non-citizens held there have no legal right to U.S. courts.

Gibbons won't talk strategy, but it's a cinch he'll address the applicability of the Geneva Convention and, as in his *amicus* brief, the applicability of the rule of law tracing back to the Magna Carta.

The writ of *habeas corpus*, Gibbons argues, is a fundamental right in ensuring access to the rule of law.

As to the Geneva Convention, the government maintains it does not apply since these detainees are not prisoners of a war declared against a sovereign nation. The administration also holds the detainees may be kept indefinitely without access to courts as an extension of the commander-in-chief's right to wage war. The corollary is that since there is no foreseeable end to the war on terrorism, there is no

foreseeable end to the detainment.

Arguing for the government will be U.S. Solicitor General Theodore B. Olson, who has more than enough reason to take the issue personally. Olson's wife and television personality, Barbara, died aboard the Sept. 11 flight that crashed into the Pentagon.

Gibbons notes many detainees have passed their second anniversary at Guantanamo Bay.

He is blunt.

"After that length of time, I question if there is any utility in interrogating them further – if, indeed, there ever was."

Foreign governments, including the United Kingdom and Australia, reportedly are watching Gibbons. They're said to be looking for a sign whether the world's superpower will have a legal precedent for indefinitely detaining their

citizens beyond the reach of any judicial body.

Though he is a long-standing Republican from the party's liberal Rockefeller wing, he admits finding it difficult some days to stay a Republican as the GOP grows increasingly conservative. Anyway, he says, that's "irrelevant."

So what is relevant?

"I'm a lawyer dedicated to the preservation of the rule of law."

Translation: The constitution trumps partisan politics.

He's a staunch opponent of the death penalty and wears that opposition on his sleeve. He's had that position long before the public and political opinion against capital punishment began softening.

Since leaving the bench, he and the firm have filed *amicus* briefs in nearly every New Jersey death penalty case.

A few years ago, he shared these thoughts with an audience:

"At the beginning of the Supreme Court's October 1999 term, I was scheduled to argue an appeal arising from a death sentence imposed in Virginia. My daughter and her family live in that state, and she explained to my granddaughter, Anna, a fourth-grader, that I would shortly be in Washington trying to prevent Virginia from executing my client.

"Anna asked, 'You mean Virginia is going to kill him?' When my daughter affirmed Virginia's intention, Anna

responded, 'But mom! That's against the Ten Commandments.'

"Anna is right, and my position on the death penalty is that there are no circumstances in which state-ordered killing is morally justified."

Priority

As he approaches his 80th birthday, public-interest law is his highest priority. The firm has three full-time associates devoted to its Gibbons Fellows program, by which they work on *pro bono* issues Gibbons feels are important for the greater good of the law.

His walls are lined with pictures of reunions of Gibbons Fellows, and Gibbons beams like a father when he points to some participants who now teach law at places like Rutgers, Seton Hall, Yale and Duke.

Asked how he sees the upcoming case from a career standpoint, Gibbons is characteristically modest, passing it off as "one more opportunity to work for the rule of law."

It's the same modesty he shows when talking about his plans to continue working because his wife, Jeanne, "doesn't want me hanging around the house too much."

As might be expected, there's a powerful force at work beneath the affable demeanor. Here's someone who can summon resources from a half-century of legal experience – and, if it suits his purpose, look back at a firsthand Navy experience at iguana-infested Guantanamo Bay: Of the many who might have been chosen to argue the case, only John Gibbons can say, "I was there. I can tell you the Cubans who worked for me were under American sovereignty every minute they were inside that fence!"

It begs repeating:

Gibbons may well be among the fortunate few for whom age is a process of addition rather than subtraction.

Reach special projects director Earl Ainsworth at eainsworth@njnews.com



GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

One Riverfront Plaza
Newark, New Jersey 07102
973-596-4500 • Fax: 973-596-0545

One Pennsylvania Plaza
New York, New York 10119
212-649-4700 • Fax: 212-333-5980

The Lutfine House
224 West State Street, Suite 1
Trenton, New Jersey 08608
609-394-5300 • Fax: 609-394-5301

e-mail: firm@gibbonslaw.com • web site: www.gibbonslaw.com