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Pro Bono – Law Firms

Defending Our Freedom: "If They Can Do This To The Guantanamo Detainees, They Can Do It To Me."

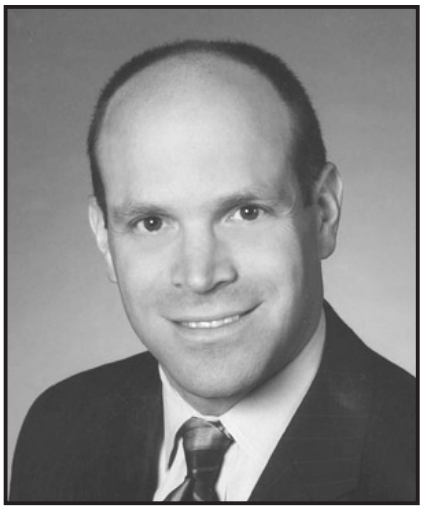
The Editor interviews the ***Hon. John J. Gibbons*** *and* ***Mark A. Berman****, Directors, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.*

Editor: Would each of you gentlemen tell our readers something about your professional background and experience?

Gibbons: After graduating from Harvard Law School in 1950, I served a clerkship with this firm and joined it as an associate when I was admitted to the bar. I practiced with the firm until January of 1970, when I was appointed to the United States Court of Appeals for the Third Circuit. I served on the Third Circuit for 20 years, and during the last three I was Chief Judge. When I left the bench I became a full-time academic as a Richard J. Hughes Professor of Law at Seton Hall University School of Law. In April of 1990, the firm approached me about a fellowship program they were founding and asked if I would join them as a supervisor of the program. Today, this program has three full-time fellows who spend two years working exclusively on pro bono causes, primarily in human rights and constitutional law. Since I was both a full-time teacher and a full-time lawyer, my wife suggested that I do one or the other. Since mid-1997 I have been exclusively practicing with the firm.

Berman: I earned a masters degree in international law from the Fletcher School of Law & Diplomacy and a law degree from Columbia. I clerked for the Hon. Leonard I. Garth of the United States Court of Appeals for the Third Circuit and then started my career as a litigation associate at Weil, Gotshal & Manges in New York. About 10 years ago I joined Gibbons because the firm's criminal defense department offered

The Hon. John J. Gibbons



Mark A. Berman

me the opportunity to get into court, and Larry Lustberg, the department's chair, was well-respected in this area. Another draw was Judge Gibbons, of whom Judge Garth had spoken highly during my clerkship years.

Editor: How did you come to be among the lawyers representing the detainees that are incarcerated at Guantanamo Bay?

Gibbons: Shearman & Sterling's Washington office filed petitions for habeas corpus on behalf of a number of Kuwaiti citizens, and the Center for Constitutional Rights in New York filed on behalf of some nationals of other countries. When those petitions were filed, a number of organizations, including a group of former federal judges, filed amicus curiae briefs in support of a grant for certiorari. I was among the judges and acted as spokesman for them. The briefs dealt with a broad cross section of cases supporting our position. They discussed *Korematsu v. United States*, which dealt with the internment of U.S. citizens of Japanese descent during World War II, and Mr. Korematsu filed our amicus brief. William Rogers acted as spokesman for a group of former diplomats. The amici even included a group of Members of Parliament who were interested in the rights of British detainees. When certiorari was granted, the two groups representing the petitioners asked me to help with the Supreme Court briefs and to argue the case.

Berman: My involvement with the detainees is by way of the firm's strong commitment to pro bono cases. In 2003, Larry Lustberg and I assumed the representation of Ali Saleh Kahlah al-Marri, who

Please email the interviewees at jgibbons@gibbonslaw.com or mberman@gibbonslaw.com with questions about this interview.

was charged in an indictment in the Southern District of New York arising out of the September 11 investigation. We were successful in having that case dismissed and returned to Peoria, Illinois, where he was reindicted. Several weeks before trial al-Marri was designated an enemy combatant by the President. For 16 months we were not allowed to meet with him, and during that time Judge Gibbons argued and won the *Rasul* case, which held that detainees in Guantanamo Bay were allowed to file habeas petitions in federal court to challenge their detention. We filed a petition for Ali's brother, Jarallah, who has been held in solitary confinement for over three years at Guantanamo.

Editor: Can you give our readers an overview of the United States Supreme Court determination in *Rasul v. Bush?*

Gibbons: The government had managed to convince the lower courts that there was no federal court jurisdiction to consider an application for a writ of habeas corpus on behalf of a non-citizen detained in a country over which the U.S. exercised no jurisdiction or control. The circuit court of appeals decision was a straightforward syllogism, with a major premise stating that an applicant can only get habeas corpus if detained in violation of the Constitution and laws of the United States. The minor premise was that non-citizens outside the United States do not have Constitutional rights, and the conclusion, therefore, was that the courts could do nothing. Both premises were false. The language in the habeas corpus statute referring to detention in violation of the Constitution was not put in that statute until the 1870s to enforce the Thirteenth Amendment. The other part of the statute, which dates from well before the Bill of Rights was adopted, says nothing about Constitutional rights. It says that habeas corpus exists to determine the legality of detention *simpliciter*. All that has ever been required is federal detention. The government's fallback position was that the United States writ does not extend to Guantanamo Bay, which, it argued, is under Cuban sovereignty. The Supreme Court rejected this argument.

Editor: And access to counsel?

Gibbons: The Supreme Court implicitly recognized that the detainees had the right to counsel, but when the case was remanded to the district court, the government took the position that counsel had to have secret security clearance and that the matter was so delicate that anything counsel was told had to be turned over to the government. The government was not very good at facilitating clearance, and it took four months for me to receive clearance.

The detainees had no process for a determination of their status. Shortly after the *Rasul* decision, the government put in place a status review procedure which is conducted for each detainee annually. However, the detainees can have a military representative but not a lawyer. There is no question that this process does not satisfy due process or the requirements of the Geneva Conventions or customary international law. That is the issue now pending in the Court of Appeals for the District of Columbia.

Editor: What *is* the status of the detainees?

Gibbons: If they are not military, they are civilians. There is a provision in the Geneva Conventions on the treatment of civilian detainees, and the government has refused to apply it. The government takes the position that American courts cannot enforce the Geneva Conventions because they are not self-executing treaties and no implementing legislation has been passed. That is not a very strong argument. Recently an amicus curiae brief was filed in the DC Circuit on behalf of the World Organization for Human Rights which lays out U.S. obligations to enforce the Geneva Conventions and other provisions of international law.

Berman: Indeed, the reluctance of the government to acknowledge the Geneva Conventions may derive from the fact that the Conventions call for a non-illusory process to determine whether or not a person detained during the course of hostilities is entitled to the rights afforded to those captured during wartime.

Editor: To what extent are the non-United States citizens entitled to protections guaranteed by the United States Constitution?

Gibbons: These rights are afforded to *people* and not just citizens. The due process clause *says* people. The distinction between citizens and non-citizens was decided in a 1990 case, *United States v. Verdugo*, in which the Supreme Court held that in a trial within the U.S. the government could use evidence obtained in Mexico in compliance with Mexican law but without a warrant authorized by a federal court against a Mexican citizen. The government contends that this decision means that no non-citizen has any rights under the Constitution.

Berman: At every step of the way, the government has argued that the detainees have *no* rights. Even after *Rasul*, the government argued in federal court that the holding was limited to allowing detainees to file a petition for habeas corpus in federal court, but that the courts were powerless to provide relief.

Editor: What is your response to those who say that terrorists do not deserve the same rights afforded to others?

Gibbons: For starters, I am not certain that the connection of these detainees to terrorism holds up. Many of them were apprehended far away from places where American troops are engaged in combat. Indeed, some of them were captured by bounty hunters. It is for a court of law to determine whether there is a legitimate reason for detaining them. The idea that their status can be determined solely by military personnel with no legal training and in the absence of any attempt to investigate the facts is preposterous.

Berman: A country that is governed by the rule of law cannot permit even its chief executive to be the sole arbiter of who is innocent and who is not. Our courts have always played a critical role in ensuring that persons accused by the government have a process that compels the government to prove its case.

Editor: Is it possible to adhere to the rule of law and win the war on terrorism?

Gibbons: Certainly. The "war on terrorism" is a term of indefinite meaning. On the one hand, the Executive Branch takes the position that it is a war and that therefore the Commander-in-Chief's powers are not curtailed. On the other hand, the Administration argues that it is not a war when it comes to protections specifically applicable to war, such as the Geneva Conventions. The rule of law is required for everyone's protection. After all, if they can do this to the Guantanamo detainees, they can do it to me.

Berman: I believe that if we do *not* adhere to the rule of law, it will not matter whether we win the war on terrorism. It is the rule of law that guarantees our freedom, and in failing to respect the rule of law we surrender that freedom. Our President has asserted great powers in the present situation, and there are many who believe he has acted wisely in doing so. Irrespective of how you come out on that argument, everyone can contemplate a future President who does not choose to use his authority wisely. It is only the rule of law which serves to prevent the abuse of executive power, now and in the future.