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Bob Dylan





Disgrace *at* Guantanamo Bay

or Have You Ever Done Thirty Days?

By Thomas P. Sullivan¹

Embazoned in my memory is a rhetorical question I heard years ago, put by a judge in the Criminal Court of Cook County. In response to an Assistant State's Attorney's demand that a lengthy sentence be imposed on a forlorn defendant, Judge Julius Miner looked down from the bench and asked, "Mr. Prosecutor, have you ever done 30 days?"

Thirty days, one month, a twelfth of a year. The 380 or so men at our prison on the Guantanamo Bay Naval Base have not done 30 days, but five years, more than 1,800 days. None has yet had a hearing at which evidence has been presented to warrant incarceration.

The Strange Beginning Process

You volunteer to represent several prisoners, who are assigned on a random basis by the Center for Constitutional Rights in New York City. You receive several names and numbers, and contact the point person at the Department of Justice for permission to visit your new clients. You thereupon enter a bureaucratic never-never land.

Before being permitted to file an appearance on your clients' behalf (most have habeas corpus cases pending in the D.C. District Court), or visit them, you must undergo a telephonic briefing by a DOJ representative, during which you are cautioned not to discuss the case in a room unless the blinds are drawn (my office is on the forty-first floor with an unimpeded view of Lake Michigan), move offices when discussing the case, and similar admonitions reminiscent of a John le Carré spy novel. You must sign a lengthy protective order acknowledging, among other things that it is a serious criminal violation to reveal anything you are told by your client without having the information written and cleared through a screening procedure described below. And you must obtain a "secret" security clearance.

With that, you are then allowed to visit the "secure facility" near Washington, D.C., to view classified material relating to your client. You nervously read the contents, then alternate between amazement and amusement as you realize that not only is there little or nothing very secret in the files, it's often only the prisoner's own statements made when he was questioned by U.S. personnel, with innocent explanations as to why he was present in Afghanistan or Pakistan, for example, and what he was doing before being taken into custody.

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To capture in a single expression the process of obtaining permission to view the alleged classified evidence and visit a client – it’s zany – and the zaniest part is that the DOJ lawyers, although polite, appear to take the process seriously. I can’t help but speculate about their backgrounds, where they came from, what they were taught as children, what law school they attended, and other impertinencies. Or do they simply have a more refined sense of humor than I?

The Combatant Status Review Tribunals – Due Process Trampled

You’re now ready to visit your client at the prison. But before I describe that process, let me explain how the clients got there . . .

In my opinion, most judges and practicing lawyers would be appalled and dismayed to learn how the prisoners were brought to Guantanamo and why they are still “detained” there. Most of us raised in the United States and trained in the law assume that we do not lock someone up indefinitely unless the person has been indicted for a serious crime, or that evidence has been presented to establish that he is dangerous, or that some other justification has been established in a judicial proceeding, perhaps roughly similar to a probable cause bond hearing. The reality at Guantanamo is just the opposite.

In brief outline, here is what happened to each prisoner which has formed the basis for incarceration lo these five years:

- Most of the Guantanamo prisoners were not taken into custody by U.S. forces or captured on a battlefield. Rather, they were sold into captivity by the Northern Alliance and Pakistani warlords, who were paid bounties of \$5,000 and more for every alleged Arab “terrorist” they turned in. U.S. military regulations require that a hearing be held in the field close to the time and place of capture whenever there is doubt about a prisoner’s identity. Military personnel wanted to hold these hearings for those taken into custody during the conflict in Afghanistan. Officials in the White House vetoed that standard practice; we do not know why.
- In June 2004, the Supreme Court ruled that the Guantanamo prisoners were entitled to hearings before an impartial judge, under the writ of habeas corpus, to determine whether there was a reasonable basis for detaining them. Nine days after that decision, the

Department of Defense put into place a unique administrative process, called Combatant Status Review Tribunals, or CSRT.

- Before the CSRTs were called into session, every prisoner had already been determined to be an “enemy combatant.” We have yet to learn how these decisions were arrived at. Who was involved in making the findings – neither the prisoner nor his representative was involved or informed? What evidence was presented? What rules of evidence were used? The “enemy combatant” findings were reached secretly through an ex parte, unknown process.
- Several years ago, each prisoner was brought before a CSRT. The hearings were held to determine whether the prisoners had been correctly classified as “enemy combatants” in the prior secret proceedings. The CSRT consisted of three officers and a Tribunal President, none of whom was identified by name, rank, serial number or otherwise. The prisoner was accompanied by a “Personal Representative,” whose function was to advise and assist him in responding to the tribunal’s inquiries. He was a functionary of the tribunal. He was not a lawyer, and did not act as the prisoner’s advocate. He made no arguments on the prisoner’s behalf. Also present were a person denominated in the CSRT unclassified summary as “Recorder,” and an interpreter needed because most prisoners neither spoke nor understood English, the language in which the proceedings were conducted.
- Then the “allegations” (sometimes referred to as “accusations”) were read – a few terse declarative sentences – and the prisoner was asked to respond. No evidence or witnesses were presented to support the charges. The prisoner had no opportunity to confront witnesses or view documentary evidence. If he asked for detail of the charges, the President responded that he had not prepared and had no information about them. The tribunal was allowed to consider classified evidence, but refused to disclose its content to the prisoner. He was not given an opportunity to call witnesses.
- The following examples are taken from actual CSRTs transcripts:
 - “Recorder: While living in Bosnia, the Detainee associated with a known Al Qaida operative.
 - “Detainee: Give me his name.



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“Tribunal President: I do not know.

“Detainee: How can I respond to this?”

“Recorder: Detainee is a close association (sic) with, and planned to travel to Pakistan with, an individual who later engaged in a suicide bombing. [Name] possibly is the Elalanutus suicide bomber.

“Detainee: Where are the explosives? What bombs?

“Recorder to Tribunal President: Sir, I don’t believe I can answer in this session.

“Tribunal President: I certainly cannot answer because this is the first time I have seen this evidence. It is my understanding that anything remaining concerning this individual [name] is in the classified session.”

“When the Tribunal President explained Exhibit R-2 [the FBI redaction letter], the Detainee stated if they are classified, what if they are incorrect? The Detainee was concerned over his fate if the documents presented were not correct. He wanted to see the classified documents.

“Tribunal President: The classified information cannot be shown to you due to national security reasons. By you participating today, we want to hear your story as well (sic). We haven’t seen any information prior to this. We will take everything into consideration.”

“Tribunal President: As to the second request, you asked us to check with the Saudi police in Riyadh. It could prove you were on a humanitarian mission while on leave.

“Detainee: Yes.

“Tribunal President: I denied that request as well, because an employer has no knowledge of what their employees do when they are on leave.”

When this procedure ended, the open session was closed, the prisoner removed, and the CSRT held a closed hearing. We have no idea what then occurred, because the summaries of the closed sessions are not included in the portions of the CSRTs provided us.

Each year since the CSRTs were concluded, hearings as to each prisoner have been held by an Administrative Review Board, known as the ARBs. Once again the prisoners were allowed to attend with an assigned Personal Representative, but without personal lawyers, and permitted to make any statement they wished. Then the Board went into an undisclosed closed session.

To summarize: In these proceedings, the unrepresented prisoners had the burden of refuting unsupported, hearsay allegations from undisclosed sources, which the tribunal presumed to be true. The CSRTs and the ARBs replicate the deservedly discredited Star Chamber, through which King Charles I of England retaliated against the Puritans during the 1600s. I can assure the readers they were a total sham.²

Some may believe that these glaring due process deficiencies will be corrected when the prisoners are brought before the commissions established in the Military Commissions Act of 2006, which provide many of the protections afforded defendants by the Federal Rules of Criminal Procedure. Here’s the hitch, and it’s fraught with irony: the government has announced that just a few prisoners will be charged (so far ten) – those who are reputed to be the very worst of the worst.³ All the others will continue to languish in their cells without hope of release except through the grace of their captors.

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² Upon request, I will send the materials I submitted to the Senate Judiciary Committee on September 25, 2006, which includes official summaries of four CSRT hearings produced by the government under the Freedom of Information Act.

³ But consider what happened to the first case, involving David Hicks, sentenced to seven years, who is expected to be returned to his native Australia and serve nine months. A second hitch is that even if a prisoner is acquitted at a commission trial the government may decide to continue to hold him indefinitely as an “enemy combatant.”



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A Visit to the Prison - Depressing!

What is there to say about the prison we are operating at the Guantanamo Bay Naval Base? I've been there four times in the past 15 months, and I can testify that it is a depressing place, surrounded by wire fencing topped with razor sharp coils, everything double gated, locked, locked and locked again. Soldiers proliferate, mainly very young American men and women, looking serious and dressed in camouflage-patterned uniforms and bloused boots, most carrying side arms or rifles. It's a downright depressing place.

Getting there is not half the fun. O'Hare to Ft. Lauderdale, then on to one of two small prop plane carriers, Air Sunshine and Air Lynx, with a dozen or so seats. There is no toilet on board, an important amenity at my stage of life. When you check in for the three and one-half hour flight you're weighed along with your luggage to determine if the plane will have to stop to refuel at Exuma in the Bahamas. The plane may not enter Cuban air space, so you fly to the easternmost end of the island, make a right turn and descend to the naval base airport. Reverse on the way back home.

You land on the leeward side. No prison there, unsupervised movements permitted, but few amenities such as a restaurant or grocery store. You stay at a former CBQ - combined bachelors' quarters - at an unbelievable government room rate of \$20 per night. Four twin beds in each two room "suite," although there are so few customers that each lawyer is frequently housed alone.

In the morning a bus takes you and your Arabic interpreter (usually \$1,000 per day plus expenses) to the landing at the bay, where a ferry loaded with cars and trucks waits to make the 20-minute crossing. Your fellow travelers are chiefly workers from the Philippines and Jamaica, and Army personnel. On the windward side you always travel by bus or van, accompanied by Army or Navy personnel. No electronic devices allowed; cell phones don't work. Women lawyers are garbed in long, loose fitting clothing. You are first taken to an office to be photographed and given a badge to clip on your shirt. Then you are driven to McDonald's for whatever you are able to stomach, and to purchase food and drink for your clients, no meat. (You may also have brought with you baklava purchased from a specialty vendor in Detroit.) Your driver takes you to the camp where your client is being held for the interview.

You wait outside the gate. The female lawyers don head scarves. Everywhere you see chain linked fences and razor wire. A uniformed guard opens the gate, motions you and your interpreter in. Inside the compound the soldiers' name tags are covered. The guards run a scanner over your body, front and back with arms extended, rifle through your wallet, review your papers, and confiscate items deemed inappropriate for lawyer visits (e.g., news articles, magazines), and anything that may be used as a weapon (e.g., paper clips, staples, straws, combs). You are then escorted by armed personnel to a small room inside what looks like the van of a semi-trailer.

Your client awaits, one leg shackled to the floor, seated behind a table. He is bearded, swarthy, and normally doesn't speak or understand more than a few words of English. If you haven't met before - and often even if you have - he suspects that you and your interpreter are secret agents for the government come to pry information from him. After traditional amenities, and repeated assurances that you are there to help him, you discuss the state of the legal and political efforts underway to have him and the others prisoners returned home. There is a problem here: there is no real news to report, at least no good news about having him repatriated. The conversation consists chiefly of you trying, usually without discernable success, to explain why no progress has been made to get a hearing before a tribunal that will require the government to explain why he has been held in jail for five years. (My thoughts during the interviews keep turning to Judge Miner's question.) You try to curry favor by offering McDonald's and baklava, which often go untouched. Your self-serving protestations of loyalty to him ring hollow. You find it difficult if not impossible to respond to questions about why, when our government preaches liberty and fair dealing for all (the Army's motto, prominently displayed throughout the base, is "Honor Bound To Defend Freedom"), we confine citizens of other countries, mostly Islamic, for years without hearings, and why our Congress and courts not only fail to afford relief, they affirmatively take steps to bar it!

At the end of the visit, you promise to write and keep the prisoner informed, and to continue working on his behalf to correct the injustices visited on him and his fellows. The prisoner responds with polite, understandable skepticism. The interview closes on this unhappy note.

The guards confiscate the notes you have taken. To have later access to them, and to use the information in court papers or share it with your partners, security personnel must first read and approve them, a process that, according to DOJ security personnel, results in loss of the attorney-client privilege.

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The Physical Conditions at Guantanamo Bay

Those who are inclined to belittle the protestations of do-good lawyers who represent the prisoners would do well to visit the prison and see first hand the conditions in which these men are held. Most of them are kept in 24/7 isolation, without proper medical attention, or decent food, or diversions such as radio, television, books, newspapers, magazines, or reading material other than the Koran. By design, most have no contact with fellow prisoners, and only limited opportunities for exercise. They are housed in rectangular cubicles, actually small cages measuring from 6x8 to 7x10, with a raised concrete slab and mattress for a bed, a toilet and wash basin. The walls are made of fine wire mesh which impairs distance vision if looked through for extended periods. In most of the camps, physical contact among prisoners is prohibited, and oral communication is restricted to shouting to those celled next to or across from the prisoner. In Camp Six the walls are not porous, resulting in total isolation. All movements of prisoners require two armed guards, with the prisoners chained hand and foot. Mail from home is spasmodic, often delayed for many, many months while being translated and censored for unauthorized content, and heavily redacted.

My Personal Conclusions and Opinions

My impression of the prisoners I've met, shared by the other fine lawyers for prisoners with whom we've spoken, is that most of these men are not terrorists, should not have been imprisoned in the first place, and if sent home would resume peaceful, productive lives, albeit damaged by the inhumane experiences they have endured during the past half decade. But good or evil, these men are entitled to have their captor – the United States government – establish before a fair tribunal a valid reason for their imprisonment. They have not received that kind of hearing, and it appears they will not in the foreseeable future.

The ways we are treating these men, and the conditions in which they are confined, are demeaning and cruel, not to mention totally unnecessary. Their "housing" resembles the cellblocks reserved for the most unruly prisoners in state and federal prisons, and their isolation is patterned on how we isolate those on death row.

So far as I am able to discern, what keeps prisoners from sinking into madness is a deep-seated faith and a passionate belief

in their religion: Allah has willed them to be imprisoned. When He wills, pursuant to His divine purposes, He will set them free. In the meantime, they take it day by day.

In the past I have described the situation at Guantanamo Bay as a national disgrace. But those words grossly understate my feelings. The prison is widely perceived to be an example of the wretched way we treat those of the Islamic faith. As a result we have brought ourselves into disrepute in many parts of the world. We have wreaked havoc not only on the prisoners and their families, but also on our well deserved reputation for respecting the rights of others, and affording all persons fair hearings and due process of law, regardless of religious beliefs, skin color or national origins, and without regard to the nature of the crimes with which they are accused.

There is ominous potential for future danger flowing from the administration's conduct. In October 2001, the President gave as a reason for sending troops into Afghanistan that Taliban leaders had not complied with his demand that they "return all foreign nationals, including American citizens, unjustly detained in your country." He and his advisors apparently believe the rules are one-sided in our favor, placing us in the role of international bully. The situation calls to mind what Shakespeare's Cassius said of Caesar, "Why, man, he doth bestride the narrow world like a Colossus."

If dedication to fair play does not motivate our leaders, they ought to consider how, through our attack on Afghanistan, we have established an international standard for redressing unjust imprisonment of citizens, and that the tides eventually turn in the affairs of nations as well as of men.

We have covered our nation in ignominy, and made prisoners into martyrs. I fear our children and theirs will pay a heavy price for what has occurred at Guantanamo Bay.

Send Us Your E-Mail

The Association is now equipped to provide many services to its members via e-mail. For example, we can send blast e-mails to the membership advertising up-coming events, or we can send an electronic version of articles published in *The Circuit Rider*.

We are unable to provide you with these services, however, if we don't have your e-mail address. Please send your e-mail address to changes@7thcircuitbar.org.