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Clinton's Guantanamo

How the Democratic president set the stage for a land without law.

Brandt Goldstein (op-ed)

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The last several weeks have provided much giddy vindication for Democratic critics of the Bush administration, with the president now squarely on the defensive for his aggressive anti-terrorism policies. Congress, infuriated over new reports of warrantless surveillance of U.S. citizens, has refused to renew the Patriot Act. Our allies in Europe are outraged about the CIA's alleged use of "black site" detention facilities there, and European leaders have pressured Secretary of State Condoleezza Rice into promising that the United States does not engage in torture. Nowhere, however, has the White House policy retreat been more evident than in Sen. John McCain's legislation banning inhumane and degrading treatment of detainees in U.S. custody at Guantanamo Bay and around the world. Despite months of fighting to carve out an exception for the CIA, President Bush felt obliged to endorse the ban without qualification once the House, following the Senate, adopted it by an overwhelming margin.

But Democrats, who've grown ever bolder in their attacks against what they consider a lawless executive branch, shouldn't saddle up their high horses just yet—at least when it comes to condemning the abuse of prisoners on Guantanamo. True, the Bush administration's record on that score has been nothing short of shameful. Our government has, with its actions there, harmed apparently innocent people, alienated loyal allies, created a rallying cry for jihadists, and increased the dangers to our own troops if they're ever captured. What's overlooked in the smug condemnations, however, is that the Clinton administration helped pave the way for this current mess.

We sometimes forget that during the Clinton presidency, the United States ran an extralegal detention camp on Guantanamo—and went to federal court to defend its right to do so. The camp during the Clinton years was by no means the nightmarish operation it is now; certainly, there weren't allegations of torture. But Guantanamo under Clinton produced its own share of suffering and abuses—and perhaps most important for today, the court decision that shut it down was eventually wiped off the books, thanks to legal maneuvers by the Clinton Justice Department.

A smidgen of history: Our first Guantanamo detention camp was established in the late stages of the George H.W. Bush presidency. The detainees there weren't terror suspects, but 300 innocent Haitian refugees seeking safe haven from the military regime that ousted Haiti's democratically elected leader, Jean-Bertrand Aristide, in September 1991. These refugees—brought to Guantanamo after the U.S. Coast Guard intercepted their vessels on the high seas between Haiti and Cuba—faced a terrible predicament. In interviews with U.S. immigration officials, they'd all proved a legitimate fear of political persecution were they to be returned to Haiti. Under U.S. policy, they should have been promptly flown to the American mainland (as were a number of other Haitians). But then this small group of men, women, and children also tested positive for HIV. Fear of AIDS was still extreme at that time, and the Bush administration refused to let these hapless refugees into the country. So, instead they were detained in a remote corner of Guantanamo with no prospect of release.

All this would only seem to give Democrats more ammunition to criticize the president today: like father, like son. But of course, the Bush dynasty was interrupted by Bill Clinton in 1992—and his record on Guantanamo was an ugly one. Despite signals on the campaign trail that he intended to shut down the camp, Clinton changed his

mind. As a result, the refugees remained, even after he assumed office, in leaky barracks with poor sanitation, surrounded by razor wire and guard towers. They responded with a hunger strike, and after raucous protests against their confinement, a number were thrown in the naval brig as if they were criminals. (Here's a videotape of a crackdown against the Haitians while Bush I was still running the camp.) Worse still, federal authorities refused to release the sickest Haitians, even though military physicians on Guantanamo lacked the means to treat them.

The Clinton White House justified this atrocious conduct in terms that sound strikingly familiar today. Justice Department attorneys maintained that foreigners held by the United States at Guantanamo Bay have absolutely no legal rights, whether under the Constitution, federal statutes, or international law. According to this logic, the Clinton White House was free to treat the detainees however it pleased. (There was some plagiarism here. The Clinton folks took this argument from the Bush administration lawyers who'd first defended the camp.)

The Haitians were luckier than today's detainees; American law students and human rights lawyers took up their cause, and more than a year after the camp was established, the case finally came to trial in a federal district court in Brooklyn, N.Y. The judge ultimately rejected Clinton's position and issued what now seems, with the benefit of hindsight, like a critically important decision. The Haitians on Guantanamo, he ruled, were entitled to constitutional due process, including the right to a lawyer, the right to proper medical care, and the right not to be held indefinitely without charge. The judge reasoned that because Guantanamo Bay is under the "complete jurisdiction and control" of the United States, prisoners there had to be accorded certain fundamental constitutional rights.

In response, the Clinton administration finally shut down the camp and allowed the Haitians to come to the United States. At the same time, though, the administration managed to undo the new precedent recognizing due process rights for foreigners on Guantanamo. In negotiations with attorneys for the refugees, the Justice Department agreed that it would not appeal the ruling, but only if the lower court decision was vacated—that is, erased from the books. The refugees' lawyers agreed to the deal because they feared they would lose if the case went to the Supreme Court, which had already intervened in favor of the government at earlier stages of the litigation. As a result, the judge's landmark decision that due process applies on Guantanamo doesn't exist anymore, technically speaking.

Why did the Clinton Justice Department insist on snuffing out the precedential value of the Guantanamo ruling? In later interviews, Clinton national security officials explained that they feared future refugee crises in the Caribbean and couldn't afford a court precedent that might limit their options for handling the situation. Using words that have a prophetic ring today, one official commented that White House advisers wanted "maximum flexibility" on Guantanamo, "confident that they would do the right thing but not wanting to be forced by the law to have to do so."

Flash-forward to late 2001, shortly after the 9/11 attacks. While U.S. forces were rounding up terrorist suspects on the battlefield in Afghanistan, the current Bush administration asked Justice Department lawyers to identify any legal constraints against detaining those suspects at—you guessed it—Guantanamo Bay. The lawyers concluded that the detainees would have no right to challenge their detention in court. And sure enough, their legal memo noted that the 1993 Haitian decision on due process had been vacated and was of no concern. Less than a month later, the first terrorist suspects arrived on Guantanamo in heavy shackles and orange jumpsuits. (For those of you who like to play Who's Who: The co-author of the Guantanamo memo was former Justice Department attorney John Yoo, who also co-wrote the so-called torture memo of August 2002. Yoo, oddly enough, was a classmate of the law students at Yale who helped litigate the Haitian case.)

Was the Clinton effort to vacate the Haitian case central to the Bush administration's decision to reopen Guantanamo as a detention camp? No. Certainly, any ruling that the due process clause applies to foreigners on Guantanamo would have been a thorn in the administration's side, and lawyers for the detainees would

presumably have relied on it in brief after brief. But even if the Haitian precedent were still on the books, it probably would have had little influence on the White House. It was, after all, only a trial court ruling, meaning no higher federal court would have been bound by it. So, the Bush administration could simply have argued that the case was wrongly decided and need not be followed. As events actually played out, the Justice Department's 2001 legal memo focused largely on a couple of Supreme Court cases—particularly the *Johnson v. Eisentrager* ruling about German war criminals held by the United States in Europe—in predicting that the court would give the back of its hand to detainees held on Guantanamo.

The great irony is that both the Bush administration in 2001 and the Haitians' lawyers in 1993 seem to have guessed incorrectly about the Supreme Court. Indeed, a majority of the justices apparently agree with the district court in the Haitian case that at least some elements of the Constitution apply on Guantanamo. In 2004, the court ruled in *Rasul v. Bush* that terrorist suspects confined at Guantanamo do have the right to challenge their detention (under the federal habeas corpus statute). And in a striking footnote that may be the most important part of the opinion, the court wrote that it is "unquestionably" a "violation of the Constitution or laws or treaties of the United States" to use Guantanamo to indefinitely detain people who aren't trying to blow us to pieces. In short, President Bush cannot lock up people on Guantanamo based on unsubstantiated claims that they're terrorists, and President Clinton shouldn't have warehoused innocent HIV-positive Haitians there, either.

The Haitian case may have predicted the views of a majority of the justices, but its real impact—had it remained on the books—wouldn't likely have been in court. Rather, it would have been in the broader public debate it could have sparked. Media coverage about the precedent might have ensured that the ugly history of a Guantanamo without legal constraints—Bill Clinton's Guantanamo—became part of the national discussion. And the broadly debated cautionary tale of what went wrong there more than a decade ago might have helped rein in our current leaders before so many mistakes were made. As it was, though, Clinton lawyers got the case wiped off the record—and unfortunately, it seems, from our collective consciousness.

Brandt Goldstein is the author of Storming the Court (Scribner 2005), the story of Yale law students and human rights lawyers who shut down the first Guantanamo detention camp.