

## THE RIGHT TO A FAIR TRIAL IN THE WAR ON TERROR

*Joseph Margulies\**

Thank you very much. I'm really pleased to be here. I love Seattle, and I always say that when the sun is shining, Seattle is the prettiest city in the country.

Our objective is to talk with you about the contours of the administration's post-9/11 detention policy, and we've decided to organize our remarks in this way. There are four components to this policy. If we're talking about fair trial norms, what you will see is that the administration manipulates these four components to ensure that a trial will never occur.

Those four components represent four different categories of prisoners. First, there are prisoners in Department of Defense (DOD) custody, principally at Guantánamo and Afghanistan. I'm contrasting now war on terror captives and Iraq captives, and the reason I make that distinction is because in Iraq, the administration takes the position that the Geneva Conventions apply, so that provides a separate set of rules that ostensibly operate in Iraq. There is no question that in many respects we are not complying with the Geneva Conventions in Iraq, but there is a difference between abuse that takes place because there are no policies, and abuse that takes place in spite of policies. And in Iraq, they say they are complying with the Geneva Conventions and in many respects, that's true. In Afghanistan and in Guantánamo, by contrast, the DOD is not holding people in compliance with the Geneva Conventions, because they claim the Conventions do not apply in the war on terror.

The second major component of the administration's detention policy involves CIA detentions. Presently, there are approximately 30 people in CIA custody in facilities scattered throughout the world, the precise locations of which are unknown.

The third component of the administration's detention policy is "extraordinary rendition," sometimes provocatively called "rendition to

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torture.” This is the practice of picking people up in one country and transferring them to another country for the purpose of interrogation and detention. So unlike the traditional practice of bringing them back here for a trial, which is the practice of rendition to justice, rendition to torture sends them to third countries where they will be interrogated.

The fourth component of the detention policy is the military commissions. When the administration first announced its intention to use Guantánamo as a place for military detentions, the expectation, apparently held in good faith on the part of the administration, was that they were going to subject a number of the people at Guantánamo to military commissions, or war crimes trials. They were very explicitly thinking back to the legacy of Nuremberg and, at least, what we now perceive in popular sentiment as the extraordinarily successful war crimes trials of World War II, not just in Nuremberg, but in the Japanese theatre as well. The expectation was that they were going to hold a great number of military commission proceedings. But for a variety of reasons these commissions did not come to pass. Presently, there are only ten people who are potential candidates for military commission proceedings, and no trials have gone forward.

Before I continue, however, I want to take a moment to echo what Professor Bazylar said in his remarks, and I say this to you as lead counsel in *Rasul*. I say this to you as someone who has been involved in the Guantánamo litigation, and other dimensions of the post-9/11 detention litigation. I say this to you as a person who drafted the petition in *Rasul*, who filed it in February of 2002, who has worked on it more or less full time as a pro bono endeavor until it cost me my private practice, and I closed that and joined the faculty of the University of Chicago. I say this to you in the spirit of de Tocqueville, who in *Democracy in America*, reminded us that we do not listen to our enemies; we only listen to our friends, and so it is our friends who must be most candid with us.

Any intimation, any suggestion, any even oblique proposal that what the administration is doing in its detention policy is similar in quality or in kind, in extent or in degree, with the Holocaust, or the system of Soviet gulags, simply cannot be maintained. Any suggestion that those things are akin to what is happening today is not simply a-historical. It is extraordinarily misguided. It is the most certain way to guarantee that you will marginalize whatever otherwise valid critiques you are inclined to make. The suggestion that Guantánamo is the gulag of our times, the suggestion offered by Senator Durbin on the floor of the Senate that this is something we would've expected from Pol Pot, is certain to make your message utterly lost in the noise that follows.

I was speaking with some of the other people in attendance here yesterday, and I am astounded at how a-historical, how mindless, and how

utterly ignorant the administration seems to be of the lessons of history, and how they have ignored the lessons of episodes like the Korean War. That period was the progenitor of many of the interrogation techniques that are now being used. They were first developed by the Communists in North Korea and used against U.S. troops, and the echo of that experience is now replicated in places like Afghanistan and Guantánamo. The fact that the administration is so indifferent to that history, so indifferent to the history of Viet Nam, where torture was widespread, so indifferent to the experience of other Western democracies like France in Algiers after the Second World War, is deeply disturbing. And for us to be similarly a-historical and to suggest that the Holocaust is similar in kind or quality to what is going on at Guantánamo is simply wrong. I have been to Guantánamo, and I have sat in one of those rooms with a man who was shackled hand and foot, and tried to explain to him how we were going to get him out, and to suggest that that is similar in kind to the Holocaust or to Soviet Gulags is simply offensive. No one should suggest that. We should not take much comfort in the fact that we are better than Joseph Stalin; I would suggest that should never be the test. What we should focus on is not whether we are as bad as the worst that world history has ever produced, but rather whether we are as good as this country has produced, and in that there is very little dispute.

Let's talk about the administration's detention policy. There is a tendency to think of the detention policy in terms of its legal justifications, as though the legal justifications sprung forth from the mind of Minerva without some policy explanation supporting it. That's misguided, and it seems to me especially important at a lawyer's conference to talk about why the law developed to serve this policy preference. So when you have the discussion about what it is that the administration does, you understand what the ostensible justification is, what the ostensible logic behind it is, and you can engage the debate at the level which it's offered to you. And it requires that you understand this. The administration perceives 9/11 fundamentally as an intelligence failure. In their estimation, it is not principally a crime, and it will not be responded to principally as a law enforcement matter. It is an intelligence failure – a failure to comprehend a dark, deep, impenetrable enemy. That is their perspective.

Driven by that perspective, the administration believes that we respond to intelligence failures differently than we respond to a crime. The prosecution of a crime requires that you establish culpability within an existing set of rules for an event that took place in the past. In our system we're going to have a public trial, and the rules that gird the development and presentation of the evidence of that crime protect against abuse because we have a belief that a trial cannot be fair unless the evidence is of a certain rigor, a certain integrity. And so we surround it with rules about voluntariness of confessions and representation by accused, and open and

public proceedings, because that's what we require in order to have confidence in judicial resolutions.

But that is not the administration's orientation. Their orientation is that we are not trying to solve an event that took place in the past. Instead, we are trying to prevent an event that may take place in the future. We do not care about criminal proceedings. There may be some criminal proceedings that come up, but that is almost coincidental, and not the intended consequence. What we are trying to do is ascertain the extent and existence of Al Qaeda and its various permutations. We are trying to figure out where it is and what its plans are. It's a many-headed Hydra, and we want to know what it represents and how to prevent future acts from taking place here and elsewhere.

I will suggest to you that this is not an inherently irrational view. If you separate yourself now from the more offensive and loathsome facts about the implementation of this view, some of the things that have gone wrong, you will see there's nothing inherently wrong with approaching it, at least in part, as an intelligence problem. So given this proposition, the overriding goal of the administration in the war on terror is to assemble all the information they possibly can. And of course, that is what the NSA wiretapping program is. It is a matter of vacuuming up intelligence signals including thousands and thousands of communications in the form of e-mails and various other forms of electronic communications. They claim this is necessary in order to learn more about this dark and impenetrable and foreign foe. This may or may not lead to prosecutions. However, that is not their interest. They're not interested in that at all.

And another piece of this information gathering, and the most worrisome piece, from my professional perspective, is interrogations. Interrogations are a way to get information. Does the administration get this information involuntarily? Perhaps. Why? Because we don't care about whether it will ever be used in court. You simply want to get points of data, and we will later determine whether it is reliable and admissible. First you've got to get the data. That's their orientation; that's their perspective. So when you think about the administration's detention policy, when you think about Guantánamo and Afghanistan and rendition, and CIA facilities, you think about counterintelligence interrogations. This is all, in their estimation, about counterintelligence interrogations.

From their perspective, the key to a successful counterintelligence interrogation is to create an environment of utter despair. All of you should study a famous CIA interrogation manual, known as the Kubark Manual, which is really the font from which all that you saw at Abu Ghraib emerged. The Kubark manual was unearthed after a long and acrimonious Freedom of Information battle between the CIA and wonderful reporters from the Baltimore Sun, who finally, in 1997 got this 1963 manual. The Kubark

Manual distilled the lessons of research, funded by the CIA, into coercive confessions. This research asked how an interrogator can get people to confess without using some of the more loathsome practices that had been used throughout history. This produced a theory of what we now call “touchless interrogations,” or “touchless torture.” In the Kubark Manual, this research distilled a set of practical lessons for CIA agents in the field, and in that way, Kubark became, as one very experienced observer in this whole matter described it, the Bible of coercive interrogations. If you read Kubark, you will hear the echo of Abu Ghraib and other places.

Fundamentally, the idea of the Kubark Manual is that a person confesses when you create an environment of, in their words (and even back then, they were mindful of alliterations and trilogies), “dependence, debility and dread.” They want to create this environment of despair, abandonment, confusion, and disorientation that will drive people to believe and fear that unless they cooperate, unless they divulge whatever it is that they know, they will be left in this confusing, anxious, terrifying world forever. And so they come to the conclusion that they must “voluntarily” cooperate. That’s why they use what’s called the ‘stress and duress techniques,’ where the primary objective is to exhaust someone. That’s why they use sleep deprivation and other methods to disorient them, and that is why they will make threats against their family if they don’t cooperate. All of these are techniques that we have seen. It is to create the sense of disorientation, despair and dread until the person just finally succumbs. Is it a world that will ever be acceptable in any courtroom? No. And because they could never get a judge to approve the environment that they’re creating, that is why they will never bring these prisoners to trial.

If that is their belief, then it follows that you cannot comply with the Geneva Conventions because the Geneva Conventions don’t allow that sort of treatment. So the legal world that they developed emerged out of the idea that we need to create a certain type of interrogation environment. That need – that policy preference – eventually produced the memos in January of 2002, stating that the Geneva Conventions don’t apply. Is it good scholarship? Of course not and its purpose is not to be good scholarship. Its purpose is to validate this world they wanted to create. So the torture memo in August of 2002 by Jay Bybee and John Yoo is appalling. They are not necessarily bad lawyers, actually they are pretty bright guys, but they were charged with a mission, and that was to build a legal regime that lets interrogators torture prisoners if they want to. It was a policy judgment for which there was a legal construct supporting it.

Well, that is the world they’ve created at Guantánamo. That’s the world they’ve created in Afghanistan. There’s a limit to their success with this, however, and that limit was imposed by *Rasul*. *Rasul* ultimately said that lawyers would get to go to the base. Well, lawyers are inconsistent

with the idea of the hermetically sealed environment they wanted to create. And that produced a counter-response by the administration: the really important people, the people they care about most, are not in DOD custody. And they probably never will be. The Abu Zubaidahs of the world, the Ramzi Bin al-Shibs, the Khaleed Sheikh Mohammads—they're in CIA custody, and they are in what's called 'black sites.' We don't even know where they are. They were first in Thailand, but when that prison became known, the CIA moved them. Then for a while they were in Afghanistan, but when that facility became known, they moved them again. They were in Guantánamo for a while. But when the Supreme Court granted certiorari and there was some likelihood that they might be subject to scrutiny by federal courts, they moved them once more. They moved them to Eastern Europe; they were apparently in Poland and Romania, although those countries deny this. And when that became known, they were moved again. Now the rumor is that they are in the North African Desert. The CIA black sites are the ultimate refinement of the administration's detention policy. These guys are in absolute isolation. It's not merely solitary confinement; these individuals never see another living soul.

To see just what the interrogation techniques are, look up the words, 'enhanced interrogation techniques.' ABC got a copy of a memo which described the enhanced interrogation techniques used by the CIA. It includes an ascending menu of coercive interrogations, the last of which is water boarding, which, if you understand the policy, you understand what they are trying to do. They needed a memo that says, "this is lawful," and they got it. The memo says that it is okay to strap a guy to a board, invert him so that his feet are higher than his head, wrap his head in cellophane, and pour water on his face to create the misperception of suffocation. That's what the memo calls it: to induce the misperception of suffocation. Well, what it actually does is create the sensation of drowning. Water boarding was done to U.S. soldiers in North Korea, and in fact, has a long history. It is astounding that we have now taken to this form of torture.

In summary, when thinking about the administration's detention policy, and even though we are lawyers, I encourage you not to focus on the legal justifications because legal justifications are insignificant. Focus on the policy, the policy to put people beyond the reach of the law.

Thank you.