Teach-In Chapter

by

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NOTE

On October 5, 2006, the "Guantánamo Teach-In" took place at Seton Hall University Law School and was transmitted by Internet to auditoriums at more than 200 colleges, seminaries, and law schools across the country. Some of the speakers at the event were attorneys who represented Guantánamo detainees, but most were professionals whose usual practices, professional ethics or personal judgments had been significantly challenged by policies and proecdures employed at Guantánamo. (A list of the speakers and topics can be found at the end of this essay.) Mark Denbeaux and I served as co-chairpersons of the event. We received invaluable assistance from Joe Margulies, Baher Azmey, and CharlesSullivan.

1. PRELIMINARIES

The idea for a Guantánamo Teach-In grew from frustration.

The first inmates began to populate Guantánamo Naval Base in January 2002. By the end of the year the number surpassed 600. Some had been picked up on the battlefield in Afghanistan but most had not. The vast majority were "suspected terrorists" from the Middle East, South Asia, China, Yugoslavia and even Great Britain. Most had been, in essence, kidnapped from foreign soil and flown to Guantánamo without any competent determination of wrongdoing or guilt. Many were bodies delivered in exchange for substantial bounties offered by the United States, easy bargains made by to those eager to settle long-standing feuds or rid themselves of personal or

family enemies.

The first inmate's Petition for a Writ of *Habeas Corpus* was filed in 2002. *Habeas Corpus* is a time-honored legal procedure by which a prisoner (or a friend or relative on the prisoner's behalf) has the right to seek a judicial determination of the legality of his detention. The government opposed the Petition, not on the ground that there was sufficient legal evidence to justify confinement but because Guantánamo was beyond the jurisdictional reach of the American legal system. Neither the Constitution nor the laws of the United States applied to inmates at Guantánamo, the government argued, shifting attention from the merits of the detainees' complaint of wrongful incarceration to its claim that they had no right to contest their confinement at all.

The Supreme Court issued its decision in June, 2004 (*Rasul v. Bush*), turning down the government's position that the Guantánamo inmates were outside the reach of law. The Court held that those detained (or others on their behalf) could indeed bring Petitions for *Habeas* hearings in the Federal District Court in Washington, D.C. Within a short period of time, more than one hundred volunteer lawyers brought petitions for perhaps twice that number of inmates. But it soon became clear that the President and his Attorney General were not about to abide by the Supreme Court's ruling and would do everything it could to prevent hearings from taking place, and by spring, 2006, four years after the first legal filings and two years after the Supreme Court's decision in *Rasul*, not one *Habeas* hearing had been held.*

If more than a hundred lawyers armed with a Supreme Court ruling were unable to force the Bush Administration to obey the law, it seemed to me that an additional approach could be taken. This was the genesis of the Teach-In. My thought was simply that if the administration could ignore the pleas of lawyers and disobey orders of the courts, it could not as easily withstand the opinion of the public.

What the public lacked was information. There had been little discussion of the legal issues in the media and when questions were raised, deference was given to Rumsfeld's self-justifying quote that the men detained at Guantánamo were "the worst of the worst," with no further journalistic inquiry as to how that was known to be true. Even among my acquaintances and those who shared my political views, many of them lawyers, few knew the degree to which the administration had transgressed centuries-old legal standards of due process at Guantánamo.

My hypothesis that a Teach-In could provide information and mobilize public opinion was based, of course, on a number of untested and likely implausible assumptions. The first was that a significant number of college and graduate students would be interested in learning more about the situation at Guantánamo. The second was that once aware, the students would become so offended or enraged by what they learned they would insist that the government alter its course and honor the law. The third was that the government could not withstand the force of this outcry and would be compelled to change its ways.

Such assumptions are common. Anyone who plans an event of public dissent imagines that the course of history can be changed if everyone possessed his level of passion and that everyone *would* share his passion *if* they had the information he had. While this is almost never the case, such illusions are necessary. Few protests would occur were they not indulged.

But the Teach-In was not intended to be a protest. Its purpose, we decided, was to disseminate information, to educate. Students were to be the audience and the "teachers" would be those who knew something about the topic. Joe Margulies, one of the attorneys who argued the *Rasul* case, Baher Azmy, and Mark Denbeaux were able to locate and persuade "the best of the best," those with incomparable knowledge and experience in the fields of law, medicine, psychology, religion, and human rights to participate in the event. On a separate track, Mark and I

spent months finding and convincing professors, students and university administrators of the value of hosting the Teach-In on their campus. By the date of the event we had signed up over 200 schools where perhaps twenty to fifty thousand students heard all or part of the day's proceedings in auditoriums connected to Seton Hall's Internet simulcast.

If the Teach-In was not a protest, it was a dissent. As in judicial opinions, a reasoned dissent has strength because it provides legitimacy to views contrary to prevailing policy. Dissent should not be merely tolerated; even some dictators do that. To be tolerated is to some degree to be patronized. In a democratic society, dissent should not be considered a simple irritant. It is a constituitive element of the democratic process. Free speech guarantees it, but self-government demands it. It is the mechanism by which decision-makers are informed that they are not infallible; the process by which a polity educates itself and becomes mature in the sense that Kant remarked that Enlightenment means no longer being in a state of self-imposed social immaturity.** I remember being impressed by a speaker at an anti- Vietnam War rally forty years earlier who said that our dissent would not bring an end to this war but might help prevent a subsequent one. Preventing future wrongdoing seemed like a reasonable expectation. We could not know if the Teach-In would assist in hastening the demise of Guantánamo or contribute to the end of lawlessness in Washington, but helping to prevent the next Guantánamo seemed like a reasonable expectation to me.

*By the date of the Teach-In, October, 2006, no hearing had been held. By the date of this writing, September, 2007, no hearing has been held, though some of the responsibility for this delay is now shared by Congress.

** Kant's actual words were: "Enlightenment is man's emergence from his self-imposed nonage."

2. BALANCE

The question of balance had to be addressed. How much program time, if any, ought to be given to arguments in favor of the government's policy? Such issues are usually cast as matters of fairness, but fairness assumes an even playing field upon which all participants abide by the rules. But the task of the Teach-In was to inform as many as might listen that the physical and legal circumstances under which the detainees at Guantánamo are forced to live are themselves unfair.

Arguments in favor of the Bush Administration's approach to Guantánamo, moreover, *already* prevail. Other than the court-ordered visits of attorneys, required by the *Rasul* decision, everything that takes place at Guantánamo does so because the government wants it to occur exactly the way it does. Every coercive interrogation, every deprivation of sleep, every over-chilled room happens because the government determines that it will.

In normal criminal cases the government can be expected to play by the longstanding rules of due process, such as providing notice of charges, speedy trial, right to counsel, non-coerced testimony, exclusion of secret evidence, evidence proving guilt beyond a reasonable doubt, and punishment (after a finding of guilt) which is neither cruel nor inhumane. At Guantánamo, the Bush Administration has been making up the rules as it goes along and none of them comply with the minimal due process standards recognized by domestic and international law. None but a handful of the hundreds of detainees, imprisoned for as long as five years, have even been charged with a triable offense. In such circumstances I didn't think we were obligated to share our platform with others to balance our objections to this highly unbalanced situation.

This may not be a convincing resolution or even a fair understanding of the question of balance. An argument could be made that I have distorted the issue by simply blaming the government for creating a legal structure at odds with Anglo-American jurisprudence, while a truly balanced program might demand an equal number of participants to explain why the government's

approach is nevertheless justifiable or necessary. This we did not do. On the other hand, not every participant was a critic; some were concerned with the ethical demands of their profession (news reportring, mental health) in a highly unusual setting and others were willing to give the Administration the benefit of many doubts.

The right to have a *Habeas* hearing does not mean the right to be set free. It means only that the keeper of the prisoner—the Department of Defense in these cases—is required to explain to an independent judge why incarceration is justified. If the explanation is accepted by the judge as reasonable, that is, if there are legal (and not merely political or speculative) reasons to justify the detention, it may continue until further legal process occurs; if not, the prisoner must be freed. *Habeas Corpus* is thus a fundamental check upon the power of the King (or the executive branch in the American context); it restrains him from jailing whomever he wishes unless there is sufficient cause to do so. No legal system can be considered just if a procedure does not exist in which a judge may disagree with the King. Its absence is the definition of tyranny.

3. THE VIET NAM PRECEDENT

The idea for the Viet Nam War Teach-In was born at the University of Michigan and spread to a handful of Mid-Western universities in spring, 1965. This was long before the era of Internet and cable television, and each school had to create its local roster of speakers from within and outside the academy. I was then a student at the University of Chicago, which participated in the first event and presented well-known critics of the War. The following year saw the first national Teach-In, when a televised debate was broadcast with pro-and-con panels from Washington.

Hans Morgenthau, a Chicago professor and dean of the “realist” school of international

relations, then in his 70's, participated in the televised event. Morgenthau was in many ways a curious ally in the anti-war movement. Realism had a rather hard-edged pedigree, as far as conceptualizing and defending our national interest as it was understood in the Cold War period. But to Morgenthau, involvement in the Viet Nam War seemed to serve our interest less and less as the fighting continued. To prolong our engagement, he argued, diminished our nation's prestige and credibility. Military victory could only be achieved at the expense of the destruction of a nation and the risk of war with China or Russia, not to mention the degeneration of values at home. This was the realism of a higher order, which did not mechanically conflate the use of military power with national interest. There is no true parallel between Johnson's and Nixon's Viet Nam War and Bush's "War on Terror," but one detects a similarity in the tenor of the two times, and the necessity for self-assessment which a Teach-In may occasion. Morgenthau wrote during the former conflict:

> When a government composed of intelligent and responsible men embarks upon a course of action that is utterly at variance with what the national interest requires and is bound to end in failure, it is impossible to attribute such persistence in error to an accident of personality or circumstances. Nor is it possible to make such an attribution when the preponderant weight of public opinion – political, expert, and lay – for years supports such a mistaken course of action. When a nation allows itself to be misgoverned in such a flagrant fashion, there must be something essentially wrong in its intellectual, moral, and political constitution. To lay bare what is wrong is not an idle exercise in ex post facto fault-finding. Rather, it is an act of public purification and rectification. If it is not performed and accepted by government and people alike, faults, undiscovered and uncorrected, are bound to call forth new disasters, likely to be different from the one in Vietnam but just

as detrimental.

"To lay bare…" Precisely what a Teach-In ought to do.

4. INFORMATION AND ISOLATION

Isolation, in a penal institution, serves two functions. It punishes, by depriving prisoner his liberty, and it prevents him from causing further damage by removing him from society. Detainees at Guantánamo suffer a dual injustice. First, their liberty is taken without having been convicted of a crime and, second, they are not only removed from society but denied any information about it.

Consider the cognitive scope of the detainee. He knows where he is (though he was not told where he was being sent at the outset) but knows almost nothing about the world since the date of his capture. He cannot write or receive messages from his family. He does not know if his relatives are well or ill or dead or if they know anything about him. His surroundings are suggestive of nowhere. He is subject to prolonged periods of solitary confinement and the deprivation of sleep. He is sometimes shackled, hands and feet, to the floor. He may endure prolonged barrages of light and noise. He has not read a newspaper or magazine, or seen or heard a news program for perhaps five years. He has not spoken to anyone with contacts outside the prison other than his interrogators, who are also his keepers.

I do not suggest that the denial of information is the same as physical torture. But they are separate forms of torture. Isolation of this magnitude is a transcendental form of punishment. It is a social death.

One can imagine the Administration's reaction to the breach of its wall of isolation when, as a consequence of the *Rasul* decision, it was compelled to grant attorneys access to the

detainees.* There are a number of topics a client and his attorney must discuss if legal representation is to be effective. But the government doesn't want the detainee to speak *to* anyone except his interrogators, and the amount of information it wants kept *from* the detainee is infinite; the government wants the Guantánamo inmate to know nothing. Any ability he has to communicate information to the outside will reduce the government's ability to render him helpless, frightened, and humiliated, which is to say wholly vulnerable to his interrogators' suggestion and control. Thus, there exists an almost continuous battle between the Guantánamo lawyers and the Department of Justice regarding the proper scope of attorney-client communication. There are written directives, called protective orders, which bind the attorneys, and which, if transgressed, render them liable to a finding of contempt of court and criminal prosecution. This is no small matter.

Recently, the government asked the federal courts to further tighten the terms of the protective orders, claiming that certain dictates were ambiguous and permitted prohibited information to reach the inmates. In support of the government's request, a statement was filed by a Naval Commander, Staff Judge Advocate Patrick McCarthy, who was responsible for overseeing the implementation of the protective orders at Guantánamo. "Some provisions of the Protective Order," he wrote, "are vague or do not fully address a particular situation. These 'gaps' have led to situations… which potentially compromised the security of the camp," He describes one such incident when:

> …on or about January 24, 2006, a detainee was observed by guards and heard to be reading from "The Torture Papers: The Road to Abu Ghraib," which was labeled "legal" by hand on the page edges…The book contained a number of documents related to investigations into the military operations of the United States in Iraq, to include information related to the investigations at Abu Ghraib. (We) confiscated the book,

> as it was a serious threat to the security of the camp. Such materials could incite detainees to violence, leading to a destabilization of the camp.

Commander McCarthy did not claim that an attorney was responsible for the book's presence in the camp. The volume in question, assuming the detainee had the complete edition, is a 1,249 page book published by Cambridge University Press which contains memos and policies that circulated among lawyers and officials at the White House and the Departments of Defense, Justice and State, proposing and discussing justifications for the coercive treatment and torture of detainees under American control in Guantánamo, Abu Ghraib, and elsewhere. It is significant because it provides a horizontal look into policy-making of the highest order, disclosing arguments and documents calculated to re-conceive if not transgress established domestic and international law prohibiting the torture of prisoners. Contrary to the implication of the Commander, no portion of the book refers to "military operations of the United States in Iraq," other than the operation of the infamous prison there. Commander McCarthy's declaration that the presence of this information inside the facility "could incite detainees to violence" or lead to a "destabilization of the camp" is speculative, and his use of the subjunctive makes it difficult to contest the point. Reading the documents might just as easily instill fear and obedience, it seems to me, as incite violence and disorder. But it seems unlikely that reading a memo written in 2002 which authorized the coercive treatment to which a detainee may have been personally subjected in 2004 would be much of a recipe for violence in 2006. **

The Commander's speculation is, in any event, disingenuous. *Anything* could incite violence. The point of his statement, and more significantly the point of the government's policy, is not to prevent violence but to keep the detainees in continuous, total isolation. Isolating a

prisoner from contact with the world of facts (Is my mother alive? Does anyone know what is happening to me?) is more certain to destabilize the individual than access to government information is likely to destabilize the institution. Isolation is not a tactic used at Guantánamo to achieve order (though it will achieve that) but a strategy whose primary purpose it is to diminish the humanity of people detained there.

* Shafiq Rasul himself was unaware of the case which bore his name until he was released, without explanation, and returned to England one month before his case was argued in the Supreme Court.

** The fact that this book was mentioned as an example of contraband is most curious. One would think the writings of Sayyid Qutb, a theorist of the Islamic Brotherhood, or the sermons of a radical cleric would be the type considered potentially inflammatory. But the book in question is about *our* policy, revealed in surprising detail, touching upon international human rights law, Geneva Convention standards regarding the treatment of prisoners, and our attempt to re-conceive the definition of torture.

5. ASYMMETRIC WARFARE

The term "asymmetric warfare" was first used in reference to Guantánamo immediately after three inmates committed suicide in 2006. Guantánamo's commander, Rear Admiral Harry Harris, said of the men who hung themselves with clothing and bed sheets, "I believe this was not an act of desperation, but an act of asymmetric warfare against us."

Asymmetric warfare can be used to describe any hostility, ancient or modern, in which the weaker force employs guerrilla or terror tactics to inflict death and injury upon the more powerful on a scale that exceeds its relative conventional weight. Perhaps Admiral Harris thought he might use a fashionable phrase to explain what was asymmetrical to him: the fact that there was so much international concern about a bunch of terrorists who did not deserve even the degree of decency with which they were being treated.

What Admiral Harris (and Secretary Rumsfeld and Attorneys General Ashcroft and

Gonzales) did not understand—or did not want the public to understand—is that human rights (and their denial) have political and moral dimensions that are independent from military objectives. The first concern of virtually every international treaty on the conduct of war is the humane treatment of prisoners. Once combatants are removed from hostilities they are required to be treated as human beings rather than armed enemies, and while they may not be given their freedom until hostilities end, they are not to be tortured, denied basic amenities or otherwise degraded. The United States has never, until 2001, excepted itself from these international obligations. Indeed, after the Second World War, the United States conducted trials in the American occupied sector of Germany in which Nazi officers and civilians were found guilty and severely punished for their treatment of Soviet prisoners in open violation of international treaties. It was the Germans' unwillingness to distinguish between the prosecution of war and the treatment of captives tjat caused Americans to judge their conduct not as acts of war but war crimes.

We cannot know for certain what motives propelled the Guantánamo suicides. Handwritten notes the three left behind were never disclosed by their keepers, but the fact that they occurred simultaneously suggests a political purpose. Even if the motives were solely psychological, occasioned entirely by personal pain or despair, the "message" was nonetheless political because the solemnity of the acts could not be perceived by an outsider other than that conditions they endured at Guantánamo overwhelmed their desire to remain alive.

It is likely that the suicides were calculated to be political statements of the gravest sort. The detainees were expressing, when all other methods of expression had been forbidden, the fact that conditions were so hopeless that their existence was less important than the international attention their extinction would bring to bear upon the situation.

The suicides were far from acts of war, asymmetrical or otherwise. Suicide bombers in Sri

Lanka, Iraq or Israel takes with them to death as many people as possible. But the Guantánamo detainees harmed only themselves. They were not conducting military maneuvers but appealing to the moral sense in others who, upon learning of the suicides, might conclude that *something must be wrong*. They raised memories of the monks in Saigon who immolated themselves in stunning acts of protest, which contributed measurably to the moral sensibilities of a world audience that something was not right in Viet Nam.

Neither the psychological nor the political message was what the Bush Administration or Guantánamo officials wanted the world to hear, of course, and the immediate Orwellian labeling of the suicides suggests that in the Administration's view *any* undesired response to its inflexible logic of the "War on Terror" is to be considered an act of war as well.

It was a task of the Teach-In to rectify the language used by the government that had wrestled words from their meaning.

6. "THE PRINCIPLE LIES ABOUT LIKE A LOADED WEAPON"

Sixty years before prisoners began to populate Guantánamo, President Roosevelt signed an order authorizing the evacuation and detention of all persons of Japanese ancestry residing in the American Far West. The Executive Order was supported by a military determination that the Japanese posed a threat to our national defense during the Second World War. This was also the conclusion of the "DeWitt Report" named after the General in charge of the relocation.

Among the 120,000 souls ordered to camps in the interior was Fred Korematsu, whose failure to abide by the directive resulted in his arrest and subsequent legal challenge to the Order on constitutional grounds.

In 1944, the Supreme Court rejected Korematsu's arguments that the Executive Order

denied him the due process and equal protection of the law. In a majority opinion written by Justice Hugo Black, the Court stated that "hardships are a part of war and war is an aggregation of hardships."

Justice Robert Jackson dissented. (Jackson would soon take a leave of absence from the Court to fulfill his appointment as Chief U. S. Prosecutor at the International War Crimes Tribunal at Nuremberg.) Jackson's dissent was predicated in large part on the fact that there were gaps of information in the claim that military necessity justified the extraordinary invasion of constitutional principle. His reasons, stated here, are instructive and prescient.

> I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court (majority) holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.…(A) judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself…(O)nce a judicial opinion rationalizes (the) Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies around like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Governments are known to render plausible claims of urgent need into forms of art. It is the task of citizens to judge when the need or the urgency is artifice.

In 1980, Congress established a Commission to review the facts of the Japanese relocation episode. The Commission concluded that the Executive Order and the practical effects of the DeWitt Report were not justified by military necessity but were shaped by "race prejudice, war hysteria and the failure of political leadership." It added: "(A) grave injustice was done." In 1984, a federal court, relying on the Commission's findings, vacated Korematsu's wartime conviction.

In 2004, at the age of 85, Fred Korematsu lent his name to an *Amicus* Brief filed in the Supreme Court in support of Shafiq Rasul. Korematsu died only a few months after the Supreme Court handed down its decision. Though he lost his own case, he was released shortly thereafter, when the war against Japan was over. As an Amicus in *Rasul*, he lived to see justice done, or at least announced, but the inmates of Guantánamo have remained in prison and languished there for a period of time greater than the duration of the Second World War itself, with no relief in sight.

7. CONCLUSION

The Teach-In's purpose was to inform. It is impossible to measure its success.

At press conferences, when asked about our adversaries in the war on terror, President Bush has been fond of saying that we have an obligation to "bring these men to justice." The Teach-In was proposed to explain what justice has meant at Guantánamo.

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