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# PROFESSIONAL RESPONSIBILITY

## DUE PROCESS AND THE ROLE OF LEGAL COUNSEL IN THE WAR ON TERROR

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“WAGING THE WAR ON TERROR IN THE SUPREME COURT”

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**Prof. Rotunda:** Just a few words — just a little explanation here — I’m not representing the government. I don’t agree with everything the government is doing. I’ll just give my own views for what they’re worth.

I start off with something this panel reminded me of when I was asked to speak here. Many years ago I was having tea in the Russian Tea Room at Hotel Leningrad when the city was called Leningrad. I was chatting with an East German. We talked about various things, and then I asked him, “What was the best time of your life?”

He said, “Oh, that’s easy, when I was an American POW in World War II.” He said, “They fed me. They clothed me. They kept me warm. They detained me in Utah. They taught me English. They gave me a certificate of English when I left at the end of the war.” They gave him many things, but not a lawyer.

We captured hundreds of thousands of German and Japanese prisoners. None of them had lawyers until a few of them were prosecuted for war crimes. Only the war crimes defendants received counsel. We have now the POWs — really the “detainees” — in Cuba. I guess I’ll call them POWs for short. They are not POWs under the definition of the Geneva Convention, but I will call them POWs so we do not have to argue about the point. After all, the POWs in World War II — and they really were POWs — had no right to counsel and no right to *habeas*.

The detainees are different than regular soldiers. Regular soldiers wear uniforms, carry guns openly, and do not pretend to surrender and then kill you. These Guantanamo detainees are really “unlawful combatants.” They lose certain rights. We still can’t torture them, for example, but they do lose rights. For example, real POWs have a right to be housed together

and to cook their meals together. Can you imagine giving these people butcher knives and letting them congregate as a group?

These detainees might be compared to spies. Spies don’t wear uniforms. They conceal their weapons. We might think of them as heroes if they’re our spies. If we catch them on the other side, we have, under the laws of war, the right to execute them, whereas you cannot execute a POW who surrenders.

We invited Steve Gillers, a professor of NYU to come here, but he wasn’t able to come, but I want to refer to an op-ed he wrote in the *New York Times* in December of 2001. He said, talking about these military tribunals, he said that the debate over President Bush’s orders establishing these tribunals has missed an important fact. Defense lawyers will be unable to practice in these courts. Why? Because you must be a member of at least one state bar. Every state bar has ethics rules requiring competent representation for criminal defendants. Their lawyers, and I quote from Professor Giller’s article, “may not lend their prestige and skills to a sham process that mocks the constitutional role in ensuring fair trials for their clients.” Perhaps, Kathleen Clark can tell us whether she thinks that Steve Gillers was acting as a wee bit of hyperbole.

Let us turn to a quote from the Arab news of March 2, 2004 in response to the bombing in Spain, that said, “The U.S., on the other hand, initially rushed to blame the attack on Al Qaeda.” By the way, this was March 12, before we found out that, in fact, they were involved. This article then said, “That has been their reaction to every attack everywhere in the world, a catch-all device for anything from this invasion of Iraq to this increasing undermining of civil liberties at home.”

I think this is a hoot that the Saudi Arabian official newspaper is concerned about civil rights in the United States. God love them. It would be a little bit like Nazi Germany saying the Americans don’t treat their Jewish Americans right.

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I ran across another interesting article, from the *Sunday Telegraph* in London. I tried to find references to it in the United States. There was a brief reference in Fox News. I couldn't find it any place else. Headline: "I had a good time in Guantanamo," says inmate, released Afghan prisoner, 'good food, water, enjoyable life. They taught me to speak English. They treated us well. We had enough food. I didn't mind being detained. They took all my old clothes, and they gave me new clothes." In fact, they gave him a little party when he left, a send off, and urged him to continue his studies.

He said he was improperly detained in Guantanamo because he was just a farmer. The U.S. government says that he was captured while studying in an extremist mosque, captured while preparing to obtain weapons. The Department of Defense thought he was dangerous. The DOD processed him and concluded, after the year-and-a-half that he was there, that he no longer was a threat.

Was this shocking? Talk to the people imprisoned in World War II. Better yet, talk to the people imprisoned at the start of the Hundred Years War, because when did they get off? We're told that this is different than other wars. It's not declared. I guess this war is like the Korean War or the Vietnam War, both of which were not declared and had POWs. In fact, the U.S. Civil War was never declared, and it was the bloodiest war in our history.

We are told we don't know when the war on terrorism will end. On December 8, 1945, did we know when World War II would end? Did we even know who the victors would be? We certainly didn't know on December 8<sup>th</sup>. In fact, a year later it looked like we were going to be losing.

The United States still hasn't declared war, in an official sense, on Al Qaeda, but they declared war on us in 1996. Bin Laden issued what he said was a declaration of holy war against the United States. You can find it on the Bin Laden web posting. He used the phrase "declare war" and said the war would continue until all military forces withdraw from Saudi Arabia, stop the support of Israel, so on, and so forth. I suppose the war will continue until Bin Laden can drape the Statue of Liberty in a burqa.

The Government created these military tribunals to prosecute war crimes, and frankly, they do not have the same protections as the Article III courts. In fact,

there are not even Article III judges who preside over them. The rules on hearsay are relaxed. The defendants do have protection of double jeopardy. They do have counsel, the right to call witnesses, etc.

We have to realize that the rules provided for the military tribunals for the people captured in the theater of war are much trickier than the rules that most of the rest of the world uses in their civil tribunals. For example, we don't have appeals by prosecutors, but all of Europe allows prosecutors to appeal a verdict of not guilty. Most of the rest of the world thinks our rules on hearsay, on double jeopardy, on the Fifth Amendment, on the presumption of innocence, are nuts, but we still keep those rules for these war crimes tribunals.

Other countries don't offer these protections at all. In fact, if the people we've captured that come from Qatar, Oman, Kuwait — are sent back to trial in their own country, they will find fewer protections than they will get in the United States military courts. These are roughly the same rules we had at the end of World War II. People with no sense of history have some kind of feeling these tribunals are somewhat unusual. They are not.

We have to realize that at the end of World War II, we had about 200 cases tried in Nuremberg before international war crimes tribunals. In addition, we had about 1,600 cases of German war crimes and Japanese war crimes tried by the American military tribunals without any international input. The French and the British tribunals tried an equal number — about 1,600 each — of war crimes under procedures that are about the same as we have today.

We do live in perilous times. We should be concerned about our civil liberties. Yet, we all know that we can talk about this quite openly. Anyone can criticize the war effort. People can file law suits on behalf of the detainees. Yet, there are those who have argued that one reason that the prisoners cannot get fair trials is that they are represented by military lawyers.

At the oral argument in the detainee cases to be heard by the U.S. Supreme Court, former Judge Gibbons, representing some of the detainees, will be facing off against Solicitor General Ted Olson. Olson argues that the American courts don't have the authority to second guess the status of foreign citizens who have been captured in the theater of war.

Gibbons called this position “frightening.” Yet, throughout history, civil courts have not second guessed the status of foreign citizens captured in the theater of war. He’s old enough to remember World War II. I’m old enough to read about it and old enough to remember the Korean War or the Vietnam War, all the wars we’ve had since then, declared and undeclared. In fact, no major country has declared war in an official way since World War II, but we know we’ve had all kinds of wars. The first Gulf War wasn’t declared.

In all of our past conflicts, we’ve had military tribunals with defendants defended by military counsel. I think they’ll do a very competent job for the people they’re charged with defending. I think Commander Swift’s vigorous defense counsel will show that. Yet we constantly hear the argument that the process is completely unfair and unconstitutional. Or, in the words of former Judge Gibbons, “frightening.”

Two years ago, I wrote an article and examined the principle of monitoring detainees. Two major points about monitoring: first of all, there is actually case law. For example, Noriega was monitored. The court said that that’s okay. The detainees are told they’re going to be monitored. There is a Chinese wall or screen between the people doing the monitoring and the prosecution team. Noreiga was monitored, he was tried and convicted, and the conviction was upheld. There is nothing new under the sun, and monitoring of particularly dangerous prisoners is not new.

I have a different suggestion for what the Government could do if it found that it could relax the standards of monitoring. The Government might decide to forgo monitoring if the detainee hired an attorney who has security clearance and can be completely trusted. Most people don’t realize this, but when Moussaoui was first indicted, one of the lawyers charged with representing him, picked by his mother, was the French attorney who was defending, and engaged to, Carlos the Jackal. They met in prison. I would have thought prison is not a good place to pick up women, but he was assigned this French woman and she picked him as her husband-to-be. If you’re going to have the attorney for Carlos the Jackal representing you, I can’t be shocked about the Government position that you should be monitored. The Government cannot trust Carlos the Jackel’s “significant other.”

Alternatively, a court might hire masters of the court to engage monitoring, rather than using employ-

ees of the Department of Justice or Department of Defense. These monitors might be retired FBI agents who know the language and know the code words, because the detainees are going to be talking in code. Or, the detainees might retain attorneys that have security clearance and who we know will be loyal to the United States.

There already is a fair amount of law in the lower courts and suggestions in the U.S. Supreme Court that support the constitutionality of monitoring. Maybe the opponents of monitoring are correct and the U.S. Supreme Court will some day hold that it is unconstitutional, but the case law now says it isn’t. The proposition that we should monitor in necessary cases is reasonable. It is not a frivolous or shocking position, although the opponents are constantly crying wolf. The possibility of monitoring is not a taking away of our civil liberties. If we can’t engage in monitoring, if the Court decides to change the law, the court will invalidate monitoring and the Government will obey the ruling. Such a situation will not prove that the Government is violating civil rights; it will merely show that the system works.

One other point on the question of detainees securing witnesses on their behalf. I think it was a mistake to try Moussaoui, the alleged 20<sup>th</sup> hijacker of 9-11-2001, in a civil court. In fact, I said this at the time. I normally don’t try to give predictions, because of it provides evidence of my fallibility, but I did predict at the time that we try him in the military courts, because this is a military matter.

We should not be trying to manipulate or change the civil rules to prosecute these people. If you remember when the Afghan war first started, there was video tape of American soldiers in the dead of night going into Afghanistan to do what? To steal documents. Not to kill women and children, not to capture members of the Taliban, but to steal documents. We’re not quite like our enemy.

These documents provided useful information about our enemy. Would these documents be admitted in a civil case in the United States? I doubt it. It would be difficult to prove the documents’ authenticity and the chain of command. The fact that we obtained these document *without a search warrant* would affect their admissibility. And, of course, the military does not give *Miranda* warnings before it captures an enemy combatant.

Consequently, these types of cases should be tried as military cases, and leave the civil courts in the business of trying cases that are not related to the laws of war.

We certainly should be careful to protect our civil liberties. We have to have a proper perspective. There are those who object to fingerprinting aliens who enter our country. They wonder if the restrictions are necessary in this particular context. But, most Americans don't know that the lack of a fingerprint requirement—something that our foreign friends, as well as libertarians in this country are upset about enacting—was what enabled Khalid Sheikh Mohammad, who was a tactical mastermind of 9/11, to use an assumed name to get a visa to enter the United States in July, 2001. He was under U.S. indictment for other terrorist attacks, but we didn't have a fingerprint, so he just walked into our country. Now we require fingerprints. A Brazilian judge is all ticked off about that. He wants to have fingerprinting of American visitors to his country. God love him. I don't mind being fingerprinted. Thank you very much.

**Prof. Clark:** The title of our panel is “Due Process and the Role of Legal Counsel in the War on Terror.” First, I'm going to talk about due process and what due process means in the context of sensitive or classified information, looking specifically at the application of that concept to the Moussaoui case. Second, I'll address the question of how the ethics rules apply to the military tribunals.

First of all, on the question of due process and sensitive or classified information: Forty years ago, the Supreme Court clarified, declared that due process requires that in any criminal proceeding, a defendant must have access to the exculpatory information that's in the possession of the government. It would be fundamentally unfair for the government to prosecute someone while withholding information that could help that defendant prove that he was innocent or show that he was less culpable in a way that would be relevant for punishment.

Fundamental fairness requires that the government turn over to the defendant exculpatory information. Sometimes that exculpatory information is classified. In other words, the Executive Branch has decided that the information is sensitive, perhaps because it reveals clandestine operations.

Arguably, separation of powers prevents federal judges from ordering the Executive Branch to declass-

sify information. Many people accept that only the Executive Branch gets to decide what information it has to protect for national security, and therefore what information it will withhold from the public. In general, judges do not assert that they have such power to order the Executive Branch to release classified information.

Nonetheless, due process still requires that if the Executive Branch has exculpatory information that it refuses to declassify and release, the government cannot proceed with the prosecution. If the Executive Branch believes it cannot declassify exculpatory evidence, then a court must dismiss the charges. That is what happens in cases where the due process guarantee of fairness conflicts with the Executive Branch's need to keep classified information confidential.

The Classified Information Procedures Act, which was passed by Congress 25 some years ago, simply provides an orderly way of dealing with this issue. In that statute, Congress did not change the due process standard. In fact, Congress does not have the power to change what the due process clause requires.

How does this apply to Moussaoui? It's relevant to Moussaoui in an unusual way. In the Moussaoui case, the relevant classified information is not in the form of a document. Instead, the information is in the form of individuals who are in the custody of the United States. These are individuals who have been interrogated by United States intelligence officers. They have told those intelligence officers that Moussaoui, the alleged 20<sup>th</sup> hijacker, had nothing to do with September 11<sup>th</sup>.

The Ashcroft Justice Department has charged Moussaoui with being involved with September 11<sup>th</sup>. Moussaoui admits to being a member of Al Qaeda, but says that he was not involved in planning for September 11<sup>th</sup>, and did not even know about it. Three witnesses in U.S. custody have confirmed to their interrogators Moussaoui's version of these facts.

Whether Moussaoui was involved in September 11<sup>th</sup> or not makes an enormous difference. It will determine whether he will get life imprisonment for involvement in Al Qaeda, or death for involvement in the deaths that occurred on September 11<sup>th</sup>. The District Court judge looked at this situation and told the government, “If you do not make these witnesses available for Moussaoui, I will have to take some kind of action to defend his due process rights.” The govern-

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ment chose not to make the witnesses available.

The action the judge chose to take was not to dismiss all charges, but instead to dismiss that portion of the indictment related to September 11<sup>th</sup>. The government can proceed with charges that Moussaoui is part of Al Qaeda. But if the government refuses to make available those witnesses who could help him disprove the September 11<sup>th</sup> charges, then the government cannot charge him with September 11<sup>th</sup>. Without the September 11<sup>th</sup>-related charges, Moussaoui would no longer be death eligible.

The government appealed the District Court's decision to the Fourth Circuit. The case was argued in the beginning of December. And for five months now, the Fourth Circuit has not yet ruled.

The government has made a couple of different arguments here in the Moussaoui case. One argument was that anything these witnesses say would be classified. The judge's response was essentially that mere classification is not a good enough reason to deprive someone of his due process rights. The judge's conclusion is consistent with the Classified Information Procedures Act.

The second government argument is that the District Court does not have the power to compel the production of these witnesses because they are enemy aliens who are outside the United States. The District Court's response was essentially that it did not matter where these witnesses are located. She has power over the trial in her courtroom, and has an obligation to make sure that this defendant gets a fair trial in that courtroom. She has power over Executive Branch officials, and can tell them that if they're going to try Moussaoui for September 11<sup>th</sup>, they have to make the exculpatory information that they have in their possession available to him. That's the situation with Moussaoui.

Now, how is this relevant to Guantanamo? In Guantanamo, it appears that the prosecutors themselves will not even know the exculpatory information that is in the hands of other government officials, such as intelligence officers. It also appears that defendants will not be able to get access to exculpatory witnesses or other exculpatory information.

In fact, there are a number of provisions in the Military Commission orders and instructions that suggest that defendants are not even going to get access to any classified information at all. The government

plans to try these defendants using information that the defendants will not be allowed to see.

Despite those rules, President Bush claims that these defendants will be given a full and fair trial. But one cannot get a fair trial if the government is withholding exculpatory information. It does not matter whether it is the prosecution that is withholding it, or the police force that is withholding it, or an intelligence agency that is withholding it. If the information is exculpatory, and if it is in the hands of the government, the government needs to turn it over to the defendant for the defendant to get a fair trial.

One last comment: The Defense Department seems to be asserting that the lawyers involved with these commissions are not bound by their state ethics rules requirement. There is a provision in Military Commission instruction Number 1, Section 4 asserting that the instructions themselves define the extent of these lawyers' professional responsibility. Compliance with the instructions is compliance with their professional responsibility.

Yet compliance with the military instructions may conflict with state ethics rules. Several years ago, when Congress passed the McDade Amendment, it indicated that federal government lawyers are bound by state ethics rules. If state ethics rules require either prosecutors or defense lawyers to take action that is prohibited by the Military Commission instructions, the Military Commission instructions claim that they trump the ethics rules. But Congress indicated otherwise in the McDade Amendment.

**Prof. Rotunda:** So you agree with Steve?

**Prof. Clark:** What I am saying is that it is not yet an issue. There may well be a conflict between what the ethics rules require and what the Defense Department requires. The Defense Department has asserted a kind of supremacy on this issue, but Congress has indicated that the state ethics rules have supremacy. So we will have to see what happens.

Thank you.