

Making Sense of Camp Delta[†]

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I.

As someone who has devoted almost all of his professional time since September 11, 2001, to challenging the Bush Administration's detention policy, I have watched with some interest as attitudes toward that policy have changed. At first, the prevailing sentiment seemed to be one of indifference to the policy and hostility to the prisoners. Today, however, the policy is a matter of intense public debate, and—at least among informed observers—the prisoners are viewed with at least something approaching sympathy. In general, I view this transformation as a good thing.

Yet though the indifference is gone, what has taken its place is sometimes equally unsatisfying. Discussion about the Administration's detention policy seems to have gotten caught up in the larger swirl of partisan rhetoric surrounding the so-called “war on terror”—an overheated screed that often substitutes for clear thinking both on the political right and left.

On the left there is an eagerness to engage in a muddy and overbroad criticism of the detention policy, which, if you believe all that you hear, amounts to a full-throated and deliberate endorsement of the most horrific forms of torture. And on the right there is an unblinking acceptance of the policy and everything it has involved because, after all, the prisoners are dangerous terrorists who certainly deserve far worse than they may have received. As an educator, I find

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the degeneration of this important debate to be exceedingly unfortunate, and I hope to skirt past the partisan prattle in this Essay.

In the pages that follow, I want to do two things. First, I hope to describe the Administration's detention policy in general, and Camp Delta in particular, from the Administration's perspective. I am not part of the crowd of people who believe the President should be impeached; that members of his Administration should be indicted as war criminals; that John Yoo, the author of the infamous "torture memo" should be disbarred from the practice of law; and that the detention policy is itself an inexplicable assault on the rule of law. While I am certainly no defender of the policy (in fact, my colleagues and I have fought it tooth and nail for more than six years), I think it has a rationale which we must endeavor to understand, because we cannot mount a nuanced critique of the policy without first acquiring an equally nuanced grasp of its purpose. And second, having described what the Administration had in mind with Camp Delta, I want to explore some of the assumptions embedded in the Administration's thinking, so that we may discuss whether, in light of known facts and subsequent events, those assumptions are valid.

II.

Understanding Camp Delta from the Administration's perspective requires that we recognize two things. First, the Administration perceives September 11th as fundamentally an intelligence failure. It is, they believe, a failure by the global intelligence community, and especially the American intelligence agencies, to penetrate al Qaeda, identify its plans, and prevent their execution. And in the wake of this devastating failure, the Administration came to believe that the most important challenge to society was not to prosecute those responsible for the *last* September 11—an essentially retrospective examination into culpability for a past event—but to identify, incapacitate, and interrogate those who would commit the *next* September 11—an essentially prospective examination into the uncertain world of potentialities. Put simply, the Administration views the threat of transnational terror as principally an intelligence challenge, and not

principally a law enforcement challenge.¹ In my estimation, that is not an entirely irrational position for a policymaker to adopt. While it certainly does not justify all that has happened in the service of this position, it is also important that we not confuse ends and means, and at least in my opinion, the end of the Administration since 9/11—to gather intelligence—is defensible.

Let us reflect a bit on what it has meant to denominate 9/11 as an intelligence challenge. The Administration fervently believes that, to prevent the next attack, they need to gather all the information they can from whatever source is available, in order that they may divine the intentions and plans of what had otherwise proven to be a dark and impenetrable foe. The objective, quite simply and again quite rationally, is to create what I call information imbalances. The Administration wants to know everything about al Qaeda, and wants al Qaeda to know nothing about it. Why? Because intelligence is the new coin of the realm. If terrorists know what the Administration is doing, they are better able to manipulate their actions to avoid detection and apprehension. Conversely, if the Administration knows everything about would-be terrorists, and they do not know that it has this knowledge, it is better able to disrupt, degrade, and ultimately defeat their efforts.

The broader implications of this orientation are beyond the scope of this Essay, but it is at least worth recognizing that virtually everything we have seen since 9/11 has been done in an attempt to create these information imbalances. Consider, for instance, the controversial program of secret wire-tapping and electronic eavesdropping by the National Security Agency. It is a massive effort to vacuum up pieces of information in order to learn otherwise secret intentions. It is, in a word, about intelligence. And the reason the Administration was so upset when this program came to light is that it did not want the people whose communications they were monitoring to know what was afoot; such knowledge obviously

1. Obviously the Administration also recognizes that the attacks of 9/11 were a crime. But this does not alter its principle policy objective, which is to gather intelligence about future events rather than prosecute offenders for past events. Under no circumstances will the latter be allowed to jeopardize the former. This orientation explains the star-crossed attempt to cobble together makeshift military commissions, predictably struck down by the Supreme Court. *See Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006).

disrupts the information imbalance. The Administration wants to gather as much as it can, and disclose as little as it must. Again, I find this a perfectly rational judgment, subject to the above caveats about ends and means, though I would certainly not want anyone to get the mistaken impression that I am a supporter of the NSA program.

Of course, one source of information in any intelligence gathering effort is what the military calls, "Human Intelligence," or HUMINT. It is that which is gathered from human sources of all kinds, including captured prisoners, and is distinguished from "Signals Intelligence," or SIGINT, which is gathered from electronic sources. Very soon after 9/11, the Administration recognized that a ground war would be part of the retaliatory response to the attacks, and that as a consequence, the Administration would soon have in its custody people who could, conceivably, possess information about the enemy's present organization and future plans. Almost since time immemorial, the interrogation of captured prisoners has been an integral part of armed conflict. Very early on, therefore, it was a goal of the Administration's detention policy to extract from prisoners every possible jot of information that they might have. And that, in turn, leads to the second critical point that must be understood about the Administration's detention policy.

Shortly after 9/11, the Administration decided to jettison the approach to transnational terror taken by prior administrations, which conceptualized terror primarily as a crime which should be prosecuted using the weaponry of the Nation's criminal justice system. These trials usually took place in the Southern District of New York, where a team of prosecutors and FBI Special Agents had developed a sophisticated expertise in al Qaeda and had successfully brought to justice the perpetrators of both the first World Trade Center Bombing in 1993 and the simultaneous bombings of the American Embassies in Kenya and Tanzania in 1998.

But to the Administration, the very fact of 9/11 vividly demonstrated the limits of the criminal justice orientation. After 9/11, the Administration shifted away from this approach, and while they did not abandon the criminal justice system entirely, as the prosecutions of Richard Reid and Zacarias Moussaoui make clear, they nonetheless concluded that the tools available to the criminal justice system were ill-suited to the task at hand, and that the threat

now facing the United States was better addressed by the combined military efforts of the Pentagon and the covert efforts of the CIA. The detention policy that developed from this new thinking thus became a military and covert response to an intelligence challenge, rather than a law enforcement response to a criminal challenge. The two are very different.

Once again, let us reflect on what this shift in orientation has meant. Prosecutors understand that, when they prepare a case for criminal prosecution, they must develop evidence with an eye to its eventual presentation in open court. To that end, a system of rules has developed that surrounds the evidence, girding it with a set of protections so that when introduced, it will satisfy the rigorous demands of a transparent and equitable criminal justice system. That is one reason why, for instance, we do not allow certain kinds of interrogation methods—because they are an affront to our notions of due process.

But what if you are not seeking criminal prosecutions? If that is not your goal, you arguably do not need to restrain interrogations in the same way. If your objective is simply to get reliable information, then you do not care whether the information you garner would be admissible in a court of law. Why? Because you do not intend to use that information in court. Obviously a prosecution might take place, but the prospect of such a prosecution is merely incidental to, and emphatically not the purpose of, the intelligence gathering process.

Which brings us to this important question: “How, at least according to the Administration, should the military and CIA go about gathering intelligence from suspected terrorists?” The answer, in a word, is Guantánamo. As I have argued elsewhere, Guantánamo was designed to be the ideal interrogation chamber.² And what does the ideal interrogation chamber look like in the post-9/11 world? It was in its answer to this question that the Administration went horribly awry.

Regrettably, the Administration concluded that, in order to extract intelligence from captured prisoners, it needed to create an environment unlike anything the U.S. military had been authorized to

2. JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 4 (2006).

create before. The Administration believed it would have in its custody a collection of terrorist masterminds, skilled in the art of resisting conventional interrogation techniques, and that to overcome this resistance, interrogators needed to create an environment of complete isolation, absolute terror, and utter despair. They needed to imbue a prisoner with a sense of abject hopelessness. They needed to make him feel there was no possibility of rescue from the outside world, and that as a result he was entirely dependent on his interrogators to guarantee his welfare.

They wanted to trade on his fear and confusion. And they wanted to exacerbate that sense of fear by degrading him physically, exhausting him, disrupting his sleep cycles, disorienting him with hoods and blindfolds, using stress and duress positions or screamingly loud cacophonous noise to keep him bewildered, and making him stand and sit in awkward and painful positions for extended periods of time. This “touchless torture,” which traces its origin to the interrogation methods used against roughly three dozen U.S. servicemen during the Korean War, had one objective: to create an environment that prisoners simply could not tolerate—an overpowering and irresistible sensation of total misery.

Almost everything we have seen at Guantánamo and other DoD interrogation facilities, and everything we have learned about what took place at the CIA black sites, has been in service of this macabre vision of the ideal interrogation. Examples of this are legion, and I collect many of the known illustrations in my book. Let me give you just one example. In many countries, condemned prisoners wear orange uniforms. When they are sentenced to die, they lose the uniform they had and are given orange uniforms to signal to all that they have been slated for death. I am sure all of you saw the photos of the first prisoners arriving at Guantánamo, shackled at the hands, waists, and feet, with blackout goggles covering their eyes and ears, kneeling on the ground and wearing orange uniforms. Many of the prisoners believed they had been brought to this strange place to be executed. They were, of course, terrified.

This quickly became apparent to their interrogators, who recognized the horror the prisoners were enduring. A memo later surfaced in which an interrogator asked up the chain of command, in essence, “The prisoners believe that they are going to be put to death.

Should we tell them the truth?" In prior military conflicts—at least in this Nation's history—such a question would have been unthinkable. Yet in a post-9/11 world, the question not only arose, but received a telling response: "No. Do not tell them until we conduct the first round of interrogations." The goal, in other words, both at Guantánamo and at DoD and CIA cites all over the world, was a deliberate attempt to create an environment of hopelessness, terror and despair.³

III.

In sum, the Administration's detention policy emerged from two fundamental beliefs: first, that the threat of transnational terror is principally an intelligence challenge best met by the military and covert machinery of the Pentagon and CIA, rather than the legal machinery of the Department of Justice; and second, that effective interrogations demanded the creation of an oppressive environment. Let us turn now to a discussion of three critical assumptions embedded in these beliefs.

The first, of course, is that an applied program of coercive interrogations, coupled with the deliberate creation of oppressive conditions, is necessary to extract reliable intelligence. If we accept, as I am prepared to do, that 9/11 posed an intelligence challenge, and if we accept, as I am prepared to do, that one legitimate objective of the ground war was to gather information from captured prisoners, then the first assumption we must examine is whether the means justified the end—that is, whether it was necessary to create this particular environment in order to gather that information.

3. It should be at once apparent that such a world is wholly incompatible with the requirements of the Geneva Conventions. A complete account of the Conventions' requirements in the war on terror is not my purpose in this Essay. As I have argued elsewhere, however, the *legal* decision to jettison the Conventions followed from and was driven by the *policy* decision to create an oppressive interrogation environment. Margulies, *supra* note 1, at 11, 44–59. See also DEREK JINKS, *THE RULES OF WAR: THE GENEVA CONVENTIONS IN THE AGE OF TERROR* (forthcoming Oxford University Press 2008). Much the same is true for the decision to place Camp Delta at Guantánamo Bay, where the Administration believed, incorrectly, that it was beyond the reach of the federal courts. Margulies, *supra* note 1. The Administration believed that effective interrogations could only take place if they were beyond federal court supervision and intervention. *Id.*

Let me be as clear as I can: there is absolutely no evidence that subjecting a prisoner to intolerable conditions will make him more apt to disclose truthful information that he would otherwise opt to conceal. In fact, there is abundant evidence to the contrary—while coercive conditions will undoubtedly increase the *amount* of information given to an interrogator, it is not likely to increase the *reliability* of that information. And that is why so many people within the Executive Branch warned the architects of the Administration's detention policy that its policy was bottomed on a fundamental misapprehension of the science of interrogation, and that it was making a grave mistake by jettisoning the Geneva Conventions and embarking on a sustained course of coercive interrogations.

The FBI, for instance, strongly recommended against the use of coercive tactics. The agents assigned to the counterterrorism unit in New York had developed an unrivaled body of expertise in the interrogation of Islamic fundamentalist terrorists, whom they had successfully interrogated for years. In fact, they had even succeeded in turning former members of al Qaeda in government witnesses; the first two witnesses in the Embassy Bombing prosecutions were former members of al Qaeda. And they strongly recommended against the use of coercive interrogations. It is not necessary, they warned, nor is it effective as an interrogation tool, nor does it produce reliable information. Their advice was rejected as the outmoded product of a "law enforcement" conception of transnational terrorism..

But the FBI was not the only group that warned against the creation of Camp Delta. So did the military. When General Tommy Franks started the ground war in October of 2002, among his command decisions was an order that all troops under his command must comply with the Geneva Conventions, including the Conventions' prohibitions against coercive interrogation methods. Obviously, General Franks knew the asymmetrical nature of the conflict. He knew that U.S. troops were going to be capturing people who do not wear uniforms, who do not always adhere to the laws of war, and who may not, at least by allegation, follow an organized command structure. And yet he did not believe it was necessary to suspend the protections of the Geneva Conventions and to employ coercive interrogation techniques.

The most senior military planners in the Pentagon, including the Judge Advocate Generals in every branch of the service, recommended against the use of coercive interrogation techniques. Secretary of State Colin Powell, a career military man and former Chairman of the Joint Chiefs of Staff, recommended against it as did the most senior lawyers in the State Department. All their advice was rejected.

The architects of the Administration's detention policy, in fact, come from a small group of young lawyers, principally in the Office of the Vice President, the Office of the White House Counsel, then headed by Judge Alberto Gonzales, the Office of Legal Counsel in the Justice Department, and a small number of political appointees in the Department of Defense. So far as I can ascertain, these people had neither law enforcement, nor military, nor intelligence experience. Yet they discarded the view of those with the relevant forensic and legal experience, trusting instead to their own, unwarranted assumptions. History will not be kind to their arrogance.

The second assumption to the Administration's detention policy is that the people subjected to these aggressive techniques were actually a source of intelligence. That is, even if we assume oppressive conditions are necessary, it should be immediately obvious that these conditions should be confined to those who have intelligence value. The immediate question arises, therefore, whether the Administration had a sufficiently robust screening system that allowed it to identify those who should be subjected to harsh interrogations.

In fact, as military planners and Administration officials quickly learned, no reliable screening existed. According to the Pentagon's data, only five percent of the prisoners at Guantánamo were actually captured by the U.S. Military. The remaining ninety-five percent were captured by the Northern Alliance, Pakistani Intelligence officers or war lords operating in Afghanistan or Pakistan who turned them over to the United States, representing them to be members of the Taliban or al Qaeda. During 2002 and early 2003, when the overwhelming majority of the prisoners at Guantánamo arrived, the United States was offering substantial bounties for the capture of al Qaeda or Taliban members (\$5000 U.S. for every person who was reputed to be a member of the Taliban and up to \$20,000 for every member of al Qaeda). In fact, the military conducted a leafleting

campaign, described by Secretary Rumsfeld in a press conference in December 2002. He said that the leaflets were falling on Afghanistan like snowflakes in Chicago in December. These leaflets promised enormous wealth in exchange for members of al Qaeda and the Taliban. Of course, the bounty program produced predictable results. The Administration now acknowledges that a substantial number of people were turned in and shipped to Guantánamo based on false representations about their complicity, merely to secure these bounties.

But the bounty system merely exacerbated other difficulties in separating wheat from chaff. According to military analysts in Afghanistan, literally dozens of prisoners were sent to Cuba against the recommendations of interrogators at Afghanistan. Report after report identified prisoners as laborers, farmers, shop owners, or taxi drivers who had been seized in error and who should be released. But there was a lingering uncertainty: perhaps this prisoner, despite all available evidence to the contrary, was only *masquerading* as a taxi driver. Perhaps he was really a terrorist mastermind. Only if we turn the screws will we learn the truth. And so it was that literally scores of innocent prisoners were sent to Guantánamo.

Among them were a substantial number of juveniles. According to the Pentagon, the youngest prisoner to have been at Guantánamo was ten years old when he arrived. Another was twelve, a third was thirteen. Mercifully, these three children have been released, but a number of other prisoners who were children when they were taken into custody still remain at the base. All of them came of age in Camp Delta.

At the other extreme, some prisoners were quite old. One was eventually tracked down by an energetic reporter for the *New York Times*. He was babbling incoherently, unable to respond to the most simple questions. He said he was 105 years old. Another was so old that interrogators dubbed him, “Al Qaeda Claus.”

The former head of interrogations at the base, Major General Michael Dunleavy, said some of the prisoners at the base were, in his words, “older than dirt,” and that his greatest fear was that a prisoner would die of old age. Within weeks of taking over the interrogations, he flew to Afghanistan to complain that they are sending too many, in his words, “Mickey Mouse” prisoners.

One prisoner sent to Guantánamo from Afghanistan had suffered a severe head injury, which made him all but unable to respond to questions. The interrogators nicknamed him, “Half-head Bob.” He was there for nearly a year.

Let us turn now to the third, and final, assumption. Even if we grant that the military needed to create oppressive conditions in order to gather intelligence—though they did not—and even if we grant that everyone at the base was a proper candidate for these conditions—though they were not—then it seems obvious that once the interrogations were over, the oppressive conditions would end. This would seem to me simply a self-evident moral truth: If a prisoner is no longer being interrogated, there is no longer a moral justification for keeping him in uniquely severe conditions of confinement.

And that is why I welcomed the announcement of June 2005 that seventy percent of the prisoners at the base were going to be released. According to the Pentagon, these prisoners were no longer a threat to the United States or a source of intelligence. At roughly the same time, the Administration announced that they were no longer interrogating the great majority of prisoners at the base. The Administration also said that most of the remaining thirty percent would be transferred to a new, medium security facility—Camp Six, so-called because it would be the sixth unit built at the base. Six was specifically intended to improve the prisoners’ quality of life by allowing them to eat and sleep in a communal, less restrictive setting.

But none of this would ever come to pass. The mass release promised in June 2005 never took place, and a year later, in June 2006, three prisoners committed suicide. They hanged themselves with strips of knotted cloth ripped from clothing and bed sheets. Each had a ball of cloth stuffed in their mouth, apparently to muffle any reflexive choking sounds they may have made as they died. They left suicide notes that have never been made public. One of the three prisoners, Yasser Talal al-Zahrani from Saudi Arabia, was 21 at the time of his death but 17 when he arrived at the base. Another, Mani Shaman Al-Utaybi, also from Saudi Arabia, had been designated for release. The Pentagon has refused to say whether he knew of his pending release when he killed himself.

The Administration quickly announced that the suicides had nothing to do with the conditions of confinement. On the contrary, Rear Admiral Harry Harris, the base commander at the time, denounced the deaths as “an act of asymmetric warfare.” Colonel Mike Bumgarner, then commander of the guard force at Camp Delta, said the prisoners were “nothing short of a damn animal that can’t be trusted” and imposed an immediate crackdown, ordering restrictions on prisoner clothing, meals, recreation time, and lighting.

Worse, the suicides, along with another disturbance earlier in the year, convinced the Pentagon to scrap its plans for the nearly completed Camp Six. Instead, Camp Six was retooled into a super-maximum security compound, more oppressive even than the maximum security conditions in use before. Every prisoner at Camp Six is in solitary confinement, isolated from all human contact and restricted to his small cell 22 hours per day. Space originally reserved for exercise yards has been divided into a series of one-man pens. Peering out the narrow windows of their computer-controlled cell doors, some prisoners in Six can see the stainless steel picnic tables that were built to allow inmates to share a meal and conversation, but the tables now go unused.

In January 2007, in an article marking the fifth anniversary of the prison, the *Washington Post*, citing an Administration official “who spoke anonymously to avoid angering superiors,” admitted that only half the remaining inmates are believed to represent a threat to the United States and that 85 “pose so little threat, they should be transferred to their home countries.” Yet they remain, only now they are in Camp Six. And, just as it has since the first prisoners arrived in Cuba in January 2002, the Administration continues to maintain it may hold them in these conditions for the rest of their natural lives.