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Due Process: After All, We Are Americans

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The mistreatment of detainees at the hands of U.S. troops has taught us many things about ourselves, most of which we'd prefer not to know. One of the things that I have learned has come as quite a surprise to me: Laws are less important than I thought they were and lawyers are more important.

Good laws have been twisted by lawyers who started with an ultimate objective and then reverse engineered the legal analysis to achieve that objective. This is a recipe for disaster. There are plenty of perfectly good laws that should have prevented the abuses that have occurred and nearly as many that afford the detainees some level of due process.

By any fair reading, the Geneva Conventions -- the universally accepted rules for the conduct of warfare -- do not contemplate a category of people who fall outside of their purview. Under one section or another, everyone is covered, even terrorists. While the detainees may not qualify as prisoners of war, the argument that they aren't protected at all is as fallacious as the argument that Guantanamo is a piece of land in which no law applies.

There is a plethora of authority prohibiting torture and cruel, inhuman, and degrading treatment as well as viable legal avenues to deal with violations. But wily, misguided lawyers and policy makers would have us believe otherwise. They would have us believe that the so-called war on terror is a "new paradigm" so "different rules apply" without identifying exactly what those rules are. This is a very dangerous road to travel: It is a two way street and thus inimical to long term U.S. interests.

While there is legitimate debate over precisely what or how much due process detainees are entitled to, there is no question about whether they are due some protection. We know from the Supreme Court's decision in *Rasul v. Bush*, 124 S.Ct. 2686 (2004) that the federal courts have jurisdiction and the detainees have a right to habeas corpus.

In important respects, however, this debate is all legal mumbo-jumbo. Detainees should be treated humanely and given at least minimal due process because it is legally required AND because it is important for moral, diplomatic, military, and practical reasons. We should do it because they are human beings, and we are Americans. We should treat the detainees with the dignity and respect that Americans should always treat others because of their humanity alone.

The unfortunate nature of this business is that the issues are largely being argued by lawyers in courts. Courts are not always well suited to these issues, but Congress has taken a bye on the legal niceties of torture and the accountability of those responsible. The courts may be the last option, but an option nonetheless.

The issue involving "competent tribunals" required by Article 5 of the 3rd Geneva Convention is an example of what happens when the President refuses to follow the law and the courts get involved. In prior wars we have conducted untold numbers of those hearings without a complaint or problem. The due process was very minimal but adequate for the purpose.

In the present war, the Administration refused to conduct the tribunals until ordered to do so by the U.S. Supreme Court in *Rasul*. In their opinion, the Court added a number of new due process

requirements that had never been followed before. The Administration would have been much better off simply following the law in the first place.

For generations, the United States stood tall for international and domestic adherence to the Rule of Law and support of human rights. That was part of the justification for going into Iraq in the first place. If we continue down the path from the high road to the low road, the world will become a much more dangerous place because we will have lost our ability to hold other nations to our high standard.

We are the strongest nation on earth not because of our military might, although we are certainly powerful. Nor is it because of our strong economy or the essential island nature of our land mass. We are the strongest nation because of the virtue of our cause. That purpose is what gives us strength and respect. If we lose that, we will have lost our greatest weapon.

The courts have shown tremendous legal acumen, common sense, humanity, and even courage in their decisions upholding the Rule of Law and supporting human rights. They haven't had to make up law, or stretch it, or even interpret it. They have simply applied the laws on the books.