

Speech by the Hon. Gustin L. Reichbach
to NY Criminal Bar Association
at its Annual Dinner on June 16, 2008

Thank you all very much. I was certainly very flattered when Tony Ricco invited me to address you, but, this ego boost notwithstanding, I accepted this invitation with some reservations. I have attended many, many of these events at Tavern on the Green, first as a defense lawyer and later as a judge, so I am well aware of the atmosphere of bonhomie that exists on these occasions, no doubt fueled by 2 hours of an open bar. It's usually impossible for anyone to hold the attention of this well lubricated crowd. And I know my task would be harder because, as our nation stands at the precipice of a moral, legal and ethical Rubicon, the subject I feel obliged to address is, to say the least, an unappetizing one after a few drinks and a pleasant dinner. But in times of fear and uncertainty, when the rule of law is threatened, who else but lawyers and judges are most obliged to step into the breach to reaffirm our most basic principles. Because unless those principles, our constitutional traditions and our law, can save us from ourselves, if a single act of terrorism like the World Trade Center attack is enough to transform us from victims to torturers, than those principles are nothing but empty cliches, mere matters of opportunity and occasion.

I was born in the first year of the baby boom and, growing up in the 50's, the most eidetic image of unredeemable cruelty and sadism was that of the Gestapo torturer. Who would've thought that in our lifetime respected academics would be arguing for the endorsement of torture, that this ultimate taboo would become part of polite academic discourse; be it Professor Dershowitz at Harvard, who endorses torture as long as it's authorized by court order, or Professor Yoo, now at Berkeley, who sanctions torture by claiming a president can order it unilaterally, and with

impunity. And most shockingly, we have recently learned that our highest government officials have huddled at White House meetings, discussing in specific detail, how to make men scream in name of national security.

Torture was part of Western *jurisprudence* from the 13th well into the 17th Century. However, with the development of enlightenment thinking about the modern state and the rights of man, the abolition of torture represented a shift in thinking, a recognition of a shared humanity, enabling law to trump torture. Today, torture is unequivocally and absolutely forbidden by the law of civilized nations. The U.N. Convention Against Torture to which we are signatories, provides that torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person and that no exceptional circumstances whatsoever may be invoked as a justification for torture. Government officials who advocate torture and justify disappearances into black-hole prisons reveal a fundamental lack of trust in the law, this despite the demonstrable successes of the courts in dealing with properly investigated terrorist cases, such as the Kenyan bombing prosecution.

Whatever torture's particular technique, in making the victim wail and beg, its goal is the same. The torturer attempts to place the victim outside and beyond any form of compassion or empathy. Torture aims to strip away all qualities of human dignity, to break the spirit of the victim, to isolate, to humiliate, to terrorize. While apologists attempt to parse the difference between torture and cruel and inhuman treatment such a distinction is without legal significance, both are barred under international treaty. Whether or not individual U.S. interrogation practices are torture, there can be little doubt that they qualify as cruel, degrading and inhuman treatment, under international law. In consenting to the Anti-torture Convention, the United States Senate declared that it considered itself bound by the obligation to prevent "cruel and degrading treatment or punishment" as that term is defined and prohibited by the Fourth, Fifth and Eighth Amendment to the Constitution.

Seeking to disassociate torture from its historic purposes of conquest, terror, punishment or sadistic pleasure, the advocates of torture today claim their only purpose is not cruelty but simply to extract intelligence from captors who will not talk. But if the rationale for today's torture has changed, medieval and modern methods often seem indistinguishable. Hooding, water torture, short shackling, sensory deprivation and sexual humiliation have been used through the ages.

At Bagram Air Force base near Kabul in 2002, prisoners were forced to stand with their hands chained to the ceiling and their feet shackled to the floor, creating an effect similar to the Old Italian Inquisition's Strappado. At Abul Gharib in 2003, prisoners were paraded naked with plastic sandbags over their heads, combining psychological humiliation with the pain of restricted breathing, just as medieval victims were once displayed in town squares with iron masks clamped on their head forced to suffer both public humiliation and obstructed breathing. By making victims stand in stress positions, CIA interrogators are replicating the inquisition's Crippling Stalk that hobbled the victim's body. Both the Paris Inquisition's "water question" and the CIA's "water-boarding" force liquids down the victim's throat to simulate the sensation of drowning.

Torture represents the certainty of anguish against the mere possibility of learning something vital. It has long been recognized that torture tests endurance, not veracity. As the Third Century Roman jurist Ulpian noted, "The strong can resist torture and the weak will say anything to end the pain." In short, the agony of torture creates an incentive to speak, but not necessarily to speak the truth. Against the coercive force of torture there are no safeguards to protect the innocent or to guarantee truth.

If hard cases make bad law, it's also true that artificial cases make bad ethics. The perfect illustration is the so-called ticking time bomb hypothetical, which is nothing more than an attempt to make an example so sufficiently extraordinary that

its conclusion is self-evident. The ticking time bomb scenario also serves a second goal, which is to make us see the torturer as a conscientious public servant thereby attempting to separate torture from cruelty. This attempt at disassociation tries to shift an appreciation of what torture really means by suggesting we focus on the torturer's viewpoint, rather than the victim's. Thus the torturer, to gather intelligence, and presumably save lives, comes to be seen not as cruel but as heroic, even noble. This is the mindset of all modern torturers, the SS interrogator at Prinz Albert Strasse, the KGB inquisitor at Lubyanka, Chilean torturer's at the Santiago Naval Academy and now our own CIA operatives in dark holes around the globe.

The ticking time bomb's dishonesty is premised on the stipulation that the bomb is known for certain to be there, is ticking away and that officials know with certainty that they have the man who knows where it is. Such conditions of course, will seldom be met. As Chicago law professor Cass Sunstein has noted, "Worse case scenarios have a distorting effect on human conduct, often producing excessive fear about unlikely events."

We can, however, with some certitude, address related questions that proponents of the ticking time bomb fail to address. It should be apparent that a normalization of torture will inevitably result in its employment not just in imminent emergencies, but in support of any and all goals in the war on terror. Measures created to deal with the worst case will inevitably be extended to less than worst-case circumstances. Escalation becomes the rule, as a wider range of unforeseen threats become occasions for torture. As conservative a commentator as Judge Richard Posner has recognized that once you allow torture in narrowly defined circumstances, officials will want to explore the outer bounds of permission, setting the stage for further expansion.

If torture may be employed to save human life from a very specific threat, its employment for general intelligence, to unwind a terrorist organization, is inevitable.

The limitation of torture to the ticking time bomb scenario begins to unravel. Why not torture in pursuit of any worthwhile goal? Why not torture loved ones in front of suspects? You won't know until you try whether torturing his child will break a suspect. Does the torture of the innocent seem too implausible? George Orwell noted that "the nationalist not only does not disapprove of atrocities committed by his own side, but he has a remarkable capacity for not even hearing about them."

How many of us, even in this room, are aware that the United States has already engaged in kidnapping children in order to get at their parents? The CIA has acknowledged spiriting Khalid Sheik Mohamed's two children, ages 6 and 8, out of Pakistan, and Amnesty International and Human Right Watch cite credible sources that they were psychologically tortured to get them to reveal where their father was hiding. Denying actually inflicting harm on them, the CIA has confirmed that at least threats to harm them were part of their interrogation of Mohamed's.

It is incumbent on everyone, especially lawyers and judges, to speak out and resist this normalization of criminality, where horrors and atrocities are either ignored or made to seem normal or even beneficial. Legal ethics demands scrutiny of the role that Department of Justice lawyers played in justifying these tactics. Hopefully the Congressional hearings about to start under Congressman Conyers will illuminate this dark corner and start the process of accountability.

The war crimes tribunal in Nuremberg convicted as Nazi war criminals high-ranking members of the Reich Justice Ministry. The tribunal emphasized that the head of the Ministry of Justice had sold his intellect and scholarship to Hitler and, "prostituted a judicial system for the accomplishment of criminal ends." They were convicted because, as lawyers, it was held that they must have recognized that their technical justifications for avoiding application of the Hague and Geneva Conventions were unavailing and that these conventions were recognized by all civilized nations.

I will close with the words of Justice Robert H. Jackson, a former attorney general, a rather conservative Supreme Court Justice, and the chief prosecutor at Nuremberg who stated, “we must never forget that the record on which we judge these defendants today, is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.”

All that can distinguish us from those who would seek to legitimize torture is our protest, our willingness and the necessity to resist and, to declare to the world, that we do not assent.

Thank you.