**Remarks of Stephen Abraham,**
**Lieutenant Colonel, U.S. Army Reserve (Ret.),**

**before the**

**House Committee on Foreign Affairs**
**Subcommittee on International Organizations, Human Rights and Oversight**

**"The Mistakes of Guantánamo and the Decline of America's Image"**

**Tuesday, May 20, 2008**

# The Ghosts of Nuremburg

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Thank you, Chairman Delahunt, Ranking Member Rohrabacher and the House Oversight Subcommittee, for permitting me to speak today.

I begin my remarks with a request, that you remember the following dates – September 16 and September 25 – and the numbers 33 and 35.

On April 13, 1945, following the sudden death of President Roosevelt, Supreme Court Justice Robert Jackson, speaking on the matter of war crimes trials, observed that "Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people." He continued, "The ultimate principle is that you must put no man on trial under the forms judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict." He would later serve as chief prosecutor at the Nuremburg War Crimes Trials.

Nearly sixty years later, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), delivering the plurality opinion, Supreme Court Justice O'Connor wrote that while the government can exercise

the power to detain unlawful combatants, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. Of significance were two specific observations. Firstly, "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's *core rights* to challenge meaningfully the Government's case and to be heard by an *impartial adjudicator*." Secondly, the Court remarked upon the "possibility that the standards articulated could be met by an appropriately authorized and properly constituted military tribunal. [… I]n the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the *minimum* requirements of due process are achieved." That same day, the Court, in *Rasul v. Bush*, 542 U.S. 466 (2004), would extend the protections of the writ of habeas corpus beyond the boundaries of citizenship. With reference to a transcendent principle, Justice Stevens, delivering the Court's opinion, repeated that "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land." Justice Stevens correctly understood that certain rights are fundamental and not merely an incident of citizenship.

Others have spoken before this committee on the abuses suffered by detainees at Guantánamo. I will not speak to those matters, not only because their voices do not need my inadequate words to express the indignities wrought by our hands but because, having no first-hand knowledge of their treatment, my contributions, such as they might be, would lack credibility, leaving their message to suffer in the end.

Rather, I will address, as best I can, those matters that I have observed – closely, personally – understood through the prism of experiences spanning nearly three decades, as an officer in the United States Army Intelligence Corps for more than 26½ years and as a lawyer for fourteen.

I will address the Combatant Status Review Tribunals based on my personal involvement in nearly every aspect of their conduct, having served as a member of the organization charged with their conduct and as a member of a Tribunal.

But more importantly, I will discuss what I have personally observed to be the perceptions, if not the response, by members of the international community to Guantánamo, though I will leave to our leaders, political and diplomatic – you, the honorable members of this subcommittee and of our Congress – to assess the resulting consequences for American national security and foreign policy objectives.

I was assigned to the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") from September 11, 2004 to March 9, 2005. OARDEC is the organization within the Defense Department responsible for conducting CSRTs and other administrative reviews of detainees in Guantánamo. It was during my tenure that nearly all of the CSRTs for detainees in Guantánamo were performed. While at OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT panel, and had the opportunity to observe and participate in all aspects of the CSRT process.

I came to OARDEC as an Army Reserve lieutenant colonel with then twenty-two years of experience as a military intelligence officer in the U.S. Army Reserve, both on and off active

duty. I was mobilized for service in support of Operation Desert Storm, and twice in support of Operation Enduring Freedom. My latest mobilization before my assignment to OARDEC was as Lead Counterterrorism Analyst for the Joint Intelligence Center, Pacific Command, from November 13, 2001 through November 12, 2002, for which I received the Defense Meritorious Service Medal. In that capacity, I became highly familiar with the wide variety of intelligence techniques and resources used in the fight against terrorism. My military resume is attached to my written testimony. I also came to OARDEC with more than ten years of experience as an attorney in private practice. I am a founding member of the law firm Fink & Abraham LLP in Newport Beach, California.

The process put in place by the Executive Branch to review its detention of the prisoners at Guantánamo was designed not to ascertain the truth, but to legitimize the detentions while appearing to satisfy the Supreme Court's mandate in *Rasul* that the government be required to justify the detentions. The CSRT process was initially created in haste immediately following the Supreme Court's decision in *Rasul* that federal courts had jurisdiction to hear habeas corpus actions brought by Guantánamo detainees requiring the government to justify the detentions. The Supreme Court decided *Rasul* on June 30, 2004, and the order establishing the CSRT process was issued eight days later on July 8, 2004.

Just as the creation of the CSRT process was a product of haste, so too were the Tribunals themselves, proceedings in more than 550 instances, conducted in but a few months time without the benefit of information necessary to the proper and just determination of the circumstances attending the detention of the detainees then at Guantánamo.

That CSRT process was nothing more than an effort by the Executive to ratify its prior exercise of power, and proof more broadly of its power to detain anyone in the war against

terror. The CSRT process was designed to rubber-stamp detentions that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.

In my observation, the system was designed not to fail as much as to succeed but on terms and as to objectives alien to the purposes declared in *Rasul* and *Hamdi*. This Sub-Committee should place no reliance on the procedures or the outcomes of those tribunals. The CSRT panels were an effort to lend a veneer of legitimacy to the detentions, to "launder" decisions already made. The CSRTs were not provided with the information necessary to make any sound, fact-based determinations as to whether detainees were enemy combatants. Instead, the OARDEC leadership exerted considerable pressure, and was under considerable pressure itself, to confirm prior determinations that the detainees in Guantánamo were enemy combatants and should not be released.

But the rendering of these conclusions alone are not the purpose of my remarks today. Rather, the question posed is not as to the nature of Guantánamo but, rather, the world's response to our use of Guantánamo as an instrument of our policies, both foreign and domestic.

As we sit here today, the debate is not about Guantánamo; it is about here. It is not about the application of military law, but the application of all of our laws, whether they stem from acts of Congress, understandings of our Courts, or deeper, immutable principles of man and the rights attending our existence. It is not about our security but about our willingness to live under such conditions as we would impose on others. It is not about torture as much as it is about the invoking and exercising and recognition of every fundamental right. Ultimately, it is not about detainees by whatever names we may give them, but about every one of us.

So if we are left wanting to ask, "what is the world's perception of us as a consequence of Guantánamo," we must first understand how the world views Guantánamo. I draw my conclusions from a recent personal experience.

On February 28th, I had the distinct honor of appearing before a joint hearing of the Committee on Civil Liberties and the Sub-committee on Human Rights of the European Parliament. My written remarks before that body accompany other materials presented to this Sub-committee.

A principal subject of the hearing was the manner of repatriation of former detainees. However, the discourse between members of Parliament, including representatives of countries that we have historically numbered amongst our great allies, grew increasingly rancorous, revolving around the question of which countries had participated in the United States' campaign of extraordinary rendition and which countries ultimately bore responsibility for the essentially stateless condition of scores of former Guantánamo detainees.

I explained that our system of justice was founded on principles shared by many of the countries represented by that body, principles invoked not only by our Charters of Freedom but that resonated two centuries later in the declaration of the United Nations that "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Regrettably, the unmistakable message conveyed by a number of the members of Parliament were that those were merely words, as dry as the parchment on which they were penned, though once embraced, now abandoned for the sake of political or military expedience.

Ultimately, two conclusions were to be drawn from the experience. As to Guantánamo, the opinions emerged that Guantánamo was a place in which fundamental human rights did not

apply; that judicial safeguards did not reach; and that lack of transparency permitted the creation of an environment in which intelligence gathering activities were allowed to displace balanced national and international policies based on a transient determination of parochial national imperatives that it is more convenient to hold somebody without legal or factual justification because of fear – no matter how well reasoned – that we may suffer in some way by their liberty.

The second opinion, far more reaching, as much a product of my perception of their remarks, may be explained by reference to remarks easily recognized.

- We as a people have refused Assent to Laws, the most wholesome and necessary for the public good.

- We as a people have affected to render the Military independent of and superior to the Civil Power.

- We as a people have deprived men in many cases, of the benefit of Trial by Jury.

- We as a people have transported men beyond Seas to be tried for pretended offences.

Ultimately, we as a people have denied the self-evident truths that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The detention facilities at Guantánamo Bay, Cuba, are neither a necessary nor inevitable part of the grant of authorization by Congress on September 18, 2001. They are a consequence of our disposition "to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed."

They are evidence of how speedily we have tired of our constitutional rights, and how greatly we have clamored for the illusion of security that we should so quickly, so easily, and so completely surrender one for the other.

Moreover, they are evidence of how willingly we would cause to surrender fundamental human rights and forcibly relinquish essential human dignities those over whom we presume to exercise dominion.

In the beginning, I invoked the words of a great champion of justice and the words that preceded his appointment as chief prosecutor at the Nuremberg trials. But it is not to those ghosts of Nuremberg that I allude.

Rather, our participation in the experiment called Guantánamo may be compared to a body of laws adopted ten years before the first war crimes trial would commence. Those laws spoke to the protection of a people and of a state and of the divestment of rights of those not entitled by right of birth to the same. Ultimately, those laws, the Nuremberg Laws, would serve as the foundation for and would purport to legitimize acts of inhumanity that find no parallel in the history of mankind.

How can I speak of such matters when I was not a witness to them?

I asked you in the beginning to remember two dates – September 16 and September 25 – and two numbers 33 and 35. The latter were the numbers of the transport trains that on September 16th and 25th, 1942 sent members of my family to their deaths at Auschwitz.

Just as the world bore witness to events, guided as to their course in 1935, all of the word bears witness not only to the facts of what is Guantánamo but, as importantly, the manner in which we have responded.

At the opening session to the Nuremberg Trials, Robert Jackson, exclaimed, “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”

Mr. Chairman. What is the record on which you would wish history to judge us?

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**The Ghosts of Nuremburg**

**ENCLOSURES**

**Military Resume**

**Citation Accompanying the Award of the**
**Defense Meritorious Service Medal**

**Written Remarks to the Joint Hearing of the**
**Committee on Civil Liberties and the Sub-**
**Committee on Human Rights of the European**
**Parliament, February 25, 2008**

**ENCLOSURE**

**Military Resume**

**RESUME OF SERVICE CAREER**

**for**

**STEPHEN EDWARD ABRAHAM, Lieutenant Colonel**
**Military Intelligence (USAR) (Retired)**

**DATE AND PLACE OF BIRTH:** 01 December 1960, Urbana, Illinois

**YEARS OF COMMISSIONED SERVICE:** 26 years

**TOTAL YEARS OF SERVICE:** 26 years

**CURRENT OCCUPATION:** Attorney, Fink & Abraham LLP, Newport Beach, California

**MILITARY SCHOOLS ATTENDED:**
Airborne School
Air Assault School
NBC Defense Course (USAREUR)
Military Intelligence School - Basic and Advanced Courses
Military Intelligence School – Counterintelligence/HUMINT Course
United States Army Command and General Staff College
DAME-1

**EDUCATIONAL DEGREES:**
University of California at Davis – BA Degree – Anthropology
University of the Pacific, McGeorge School of Law – JD Degree with honors – Law

**FOREIGN LANGUAGE:**
None recorded

**MAJOR DUTY ASSIGNMENTS**

| FROM | TO | ASSIGNMENT |
|---|---|---|
| **Active Duty** | | |
| Jan 82 | Nov 82 | Student, Intelligence Center and School, Fort Huachuca, Arizona (Basic, SOTIOC, CI/HUMINT Courses) |
| Dec 82 | Dec 83 | Assistant S-3, Plans and Training, 527th Military Intelligence Battalion, Kaiserslautern, Germany |
| Jan 84 | May 85 | Chief, Intelligence Coordination Center, 66th Military Intelligence Group, Munich Germany |
| May 85 | Dec 85 | Case Control Officer, Defense Counterespionage Branch, 66th Military Intelligence Group, Munich Germany |
| Jan 86 | Jul 86 | Student, Intelligence Center and School, Fort Huachuca, Arizona (Advanced Course) |
| Aug 86 | | Student, Infantry School, Fort Benning, Georgia (Airborne Course) |
| Aug 86 | Feb 87 | S-4, 107th Military Intelligence Battalion (CEWI), Fort Ord, California |
| **USAR – Not on Active Duty (Individual Ready Reserve)** | | |
| Feb 89 | | Counterintelligence Officer, G-2, 10th Infantry Division (Mountain), Fort Drum, New York |
| **USAR – Not on Active Duty (Individual Mobilization Augmentee Tours)** | | |
| Jul 90 | | Intelligence Officer, APG Detachment, 902d Military Intelligence Group, Aberdeen Proving Grounds, Maryland |
| Jan 91 | | Defense Counterespionage Office, 902d Military Intelligence Group, Fort Meade, Maryland |
| **USAR – Mobilization (Desert Storm)** | | |
| Apr 91 | Aug 91 | Executive Officer, OPSEC Support Detachment, 902d Military Intelligence Group, Fort Meade, Maryland |
| **USAR – Not on Active Duty (Individual Mobilization Augmentee Tours)** | | |
| Jul 92 | | Counterintelligence Officer, OPSEC Support Detachment, 902d Military Intelligence Group, Fort Meade, Maryland |

**MAJOR DUTY ASSIGNMENTS**

| FROM | TO | ASSIGNMENT |
|---|---|---|
| Jul 93 | | Intelligence Officer, J-2, Alaska Command, Elmendorf Airbase, Alaska |
| **USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)** | | |
| Aug 93 | Mar 96 | S-2, 7th Psychological Operations Group, Moffett Federal Air Field, California |
| Apr 96 | Feb 98 | Intelligence Officer, 478th Military Intelligence Detachment (Strategic), Camp Parks, California |
| Mar 98 | Apr 99 | Division Head, Detachment 2, Reserve Production Center Camp Parks, Joint Intelligence Center, Pacific Command, Camp Parks, California |
| May 99 | Sep 00 | Army Element Director and Production Team Chief, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California |
| Sep 00 | Oct 01 | Army Element Director and Production Manager, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California |
| **USAR – Mobilization (Operation Enduring Freedom)** | | |
| Nov 01 | Oct 02 | Lead Counterterrorism Analyst, Counterterrorism Branch, Joint Intelligence Center, Pacific Command, Pearl Harbor, Hawaii |
| **USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)** | | |
| Nov 02 | Aug 03 | Army Element Director, Reserve Production Center San Diego, Joint Intelligence Center, Pacific Command, San Diego, California |
| Sep 03 | Sep 04 | Joint Service Director, Joint Detachment San Diego, Joint Intelligence Center, Pacific Command, San Diego, California |
| **USAR – Mobilization (Operation Enduring Freedom)** | | |
| Sep 04 | Mar 05 | OARDEC, Washington D.C. |
| **USAR – Not on Active Duty (Troop Program Unit / Drilling IMA)** | | |
| Jun 05 | Feb 08 | Operations Officer, redesignated Sep 2006 as 3300 Det 1, Strategic Intelligence Group |

STEPHEN EDWARD ABRAHAM, Lieutenant Colonel,
Military Intelligence (USAR) (Ret.)

**PROMOTIONS**

| Rank | Component | Date |
|---|---|---|
| 2LT | USAR | 18 Dec 81 |
| 1LT | USAR | 27 Jul 93 |
| CPT | USAR | 1 Sep 85 |
| MAJ | USAR | 17 Dec 93 |
| LTC | USAR | 2 Sep 00 |

**US DECORATIONS AND BADGES:**

**Individual Decorations and Citations**

Defense Meritorious Service Medal
Joint Services Commendation Medal
Army Commendation Medal (with 2 Oak Leaf Clusters)
Joint Services Achievement Medal
Army Achievement Medal
Army Reserve Components Achievement Medal (with 3 Bronze Oak Leaf Clusters)
Armed Forces Reserve Medal (with Silver Hourglass, "M" and "2" Devices)
Global War on Terrorism Service Medal
National Defense Service Medal (with 1 Bronze Service Star)
Overseas Ribbon
Army Service Ribbon

**Unit Citations**

Joint Meritorious Unit Award

**Badges**

Basic Parachutist Badge
Air Assault Badge
German Military Proficiency Badge

**SOURCE OF COMMISSION:** ROTC (December 1981)

_____
Stephen E. Abraham

## ENCLOSURE

## Citation Accompanying the Award of the Defense Meritorious Service Medal

# THE UNITED STATES OF AMERICA

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING:

THIS IS TO CERTIFY THAT
THE SECRETARY OF DEFENSE
HAS AUTHORIZED THE AWARD OF THE

## DEFENSE MERITORIOUS SERVICE MEDAL

TO

**LIEUTENTANT COLONEL STEPHEN E. ABRAHAM**
**UNITED STATES ARMY RESERVE**

FOR

EXCEPTIONALLY MERITORIOUS SERVICE
FOR THE ARMED FORCES OF THE UNITED STATES
**13 NOVEMBER 2001 TO 12 NOVEMBER 2002**

GIVEN UNDER MY HAND THIS **23RD** DAY OF **OCTOBER** , 20 **02**

**DIRECTOR FOR INTELLIGENCE**
COMMAND OR OFFICE

**Permanent Order 189-02**

SECRETARY OF DEFENSE
**R. M. LEVITRE**
**Rear Admiral, U.S. Navy**

DD FORM 2412, MAY 1999

CITATION TO ACCOMPANY THE AWARD OF

THE DEFENSE MERITORIOUS SERVICE MEDAL

TO

STEPHEN E. ABRAHAM

Lieutenant Colonel Stephen E. Abraham, United States Army Reserve, distinguished himself by exceptionally meritorious service while serving as Lead Counterterrorism Analyst, Directorate of Operations, Joint Intelligence Center Pacific, Pearl Harbor, Hawaii, from 13 November 2001 to 12 November 2002. As Lead Counterterrorism Analyst, Colonel Abraham developed an Actionable Intelligence program focused on identifying significant terrorism activities in the Pacific theater and potential counterterrorism strategies and operations to defeat those activities. This program resulted in a weekly briefing to the Commander in Chief and Director for Operations, United States Pacific Command, which was pivotal in defining the intelligence support required to prosecute the war on terrorism. He also developed and implemented the Joint Intelligence Center Pacific Counterterrorism and Actionable Intelligence database, which was instrumental in shaping the Department of Defense terrorism database being implemented by the Defense Intelligence Agency. Colonel Abraham was personally selected to develop and lead the Joint Intelligence Center Pacific Special Studies Team for counterterrorism. His exceptional efforts and commitment to mission accomplishment significantly enhanced current intelligence operations and support to the United States Pacific Command. Through his distinctive accomplishments, Colonel Abraham reflected great credit upon himself, the United States Army Reserve, and the Department of Defense.

## ENCLOSURE

**Written Remarks to the Joint Hearing of the Committee on Civil Liberties and the Sub-Committee on Human Rights of the European Parliament, February 25, 2008**

**Stephen E. Abraham**

# Speech Before the Joint Hearing of the Committee on Civil Liberties and the Sub-committee on Human Rights on Guantánamo Bay

**European Parliament**

**Brussels, 28 February 2008**

Chairman Deprez, Vice Chairman Bradbourn, Vice Chairman Lambrinidis, Vice Chairwoman Gál, Vice Chairman Catania, and honorable members of the Committee on Civil Liberties,

Chairwoman Flautre, Vice Chairman Howitt, Vice Chairman Gaubert, Vice-Chairwoman Baroness Ludford, Vice Chairman Pinior, and honorable members of the Subcommittee on Human Rights,

I have been invited to speak regarding controversies that now rest with various courts, including the highest court of my nation. While I would not presume to speak for that or any other court, I humbly offer the following observations, shaped by my experiences as an intelligence officer and a lawyer, and by my participation in and service as a member of the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC"), the organization the activities of which lie at the heart of the matter now before this body.

I do not speak on behalf of the United States. I do not speak on behalf of the United States Army. I do not speak on behalf of any group or any other individual. But as a citizen of the United States, and as a commissioned officer in the United States Army for 27 of my 47 years, I can no more separate myself from them than can I from the entirety of humanity that serves as a backdrop for all that we are and all that we do.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), delivering the plurality opinion, Justice O'Connor wrote that while the government can exercise the power to detain unlawful combatants, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. Of significance were two specific observations, both of which would foreshadow years of uncertainty, the latest chapter of which is the decision yet to be reached by that Court.

Firstly, "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's *core rights* to challenge meaningfully the Government's case and to be heard by an *impartial adjudicator*."

Secondly, the Court remarked upon the "possibility that the standards articulated could be met by an appropriately authorized and properly constituted military tribunal. [… I]n the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."

That same day, the Court, in *Rasul v. Bush*, 542 U.S. 466 (2004), would extend the protections of the writ of habeas corpus beyond the boundaries of citizenship. With reference to a transcendent principle, Justice Stevens, delivering the Court's opinion, repeated that "Executive imprisonment has been considered oppressive

and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land."

Both of those opinions were delivered on June 24, 2004.

Two weeks later, the Secretary of the Navy would announce the implementation of a process, admittedly created in haste, on its face intended to effectuate the decisions of the Supreme Court in *Hamdi* and *Rasul*.

As described by the Secretary, the process would be "a thoughtful exercise to make sure it is fair," notwithstanding the fact that detainees would not be represented by counsel and witnesses would not be called; in fact, there was no budget for witnesses. The expectation was that the board would run concurrently, three a day, four detainees per board, six days a week, 72 detainees a week, concluding the entire process within 90-120 days.

It was at that time, from September of 2004 until March of 2005, the period during which nearly all of the Combatant Status Review Tribunals for detainees at Guantánamo were conducted, that I, a Lieutenant Colonel with twenty-two years of experience as a military intelligence officer, serving both on active duty and as a member of reserve components, was assigned to OARDEC. Prior to my assignment, I served for one year as a Lead Counterterrorism Analyst for the Joint Intelligence Center, Pacific Command, for which I was decorated. I also came to OARDEC with more than ten years of experience as an attorney.

While there, in addition to other duties, I worked as an agency liaison, coordinating with various government agencies to gather or validate information relating to detainees for use in Tribunals. In that capacity, I was asked to confirm that the organizations did not possess "exculpatory information" relating to the subject of the Tribunal. I also served as a member of a Tribunal, and had the opportunity to observe and participate in all aspects of the Tribunal process.

At the end of February 2005, my assignment at an end, I concluded my military duties, returning to my civilian life, comforted by the belief that I would have no need to reflect upon my past tour of duty or the consequences of the actions of the organization to which I had been assigned. That belief would remain untested for more than two years, though the legal tableau relating to the Guantánamo detainees continued to evolve.

In September 2006, Congress approved the Military Commissions Act of 2006. The following month, the President signed the Act into law. Under the Act, the

rights guaranteed by the third Geneva Convention to lawful combatants were expressly denied to unlawful military combatants. [1]

The Act also held the decision of the Tribunal that a detainee was an unlawful enemy combatant to be dispositive for purposes of jurisdiction for trial by military commission. Of relevance, the Act also contained provisions that stripped the Courts of the jurisdiction to hear applications for writs of habeas corpus filed by or on behalf of aliens who had been determined to have been properly detained as enemy combatants or were awaiting such determinations.

On February 20, 2007, the United States Court of Appeals for the District of Columbia decided the case of *Boumediene v. Bush*, consolidated with *al Odah v. United States*. The first question was whether the Military Commissions Act applies to the detainees' habeas petitions. To this question, the Court's opinion was delivered with a degree of force uncharacteristic in its tenor. "Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the Act was to overrule *Hamdan*. Everyone, that is, except the detainees."

Excerpting statements from the Congressional Record, the answer to the first question could not have been more clear. "The Hamdan decision did not apply . . . the [Detainee Treatment Act] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now." Continuing, "[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [Detainee Treatment Act] last year. It will finally get the lawyers out of Guantánamo Bay."

Deciding that the Military Commissions Act did apply, the Court turned to the second question of whether that Act was an unconstitutional suspension of the writ of habeas corpus. Seemingly avoiding the question, the Court held that the detainees' status, both geographic and legal, foreclosed their claims to constitutional rights, ultimately concluding that federal Courts had no jurisdiction in these cases.

Petitions for writ of certiorari were filed on behalf of Boumediene and al Odah in the United States Supreme Court. On April 2, 2007, having failed to obtain four votes in favor of review, the petition was denied. Three justices voted to grant review. However, two justices, in a fairly unusual move, filed separate statements, explaining that they were rejecting the appeals on procedural grounds but leaving open the possibility of hearing the case at a later date, remarking that "[t]his Court

[1] (Section 948b: (g) Geneva Conventions Not Establishing Source of Rights — No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.)

has frequently recognized that the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies."

During the first week of June, I was contacted by my sister, an attorney with a law firm that served as counsel to a detainee in *Bismullah v. Gates*, another case then pending before the United States Court of Appeals, the same court that had previously decided *Boumediene* and *al Odah*. We spoke of a presentation that would be given by the attorneys for Bismullah and of an invitation for me to listen to that presentation and, perhaps, provide comments regarding my experiences at OARDEC.

To that point, knowledge of my assignment to OARDEC was known by few people beyond my family, co-workers, and members of my temple; as to the particulars of my tour, even less was known. I was equally unaware of the activities of my sister's firm or of the particulars of any detainee case, whether before the Court of Appeals or the Supreme Court.

Following the presentation, I was called by two of the attorneys, the conversation culminating in my being forwarded a declaration to which I was asked to provide comments. That declaration had been submitted by Rear Admiral McGarrah in a case before the United States Court of Appeals. It purported to describe the degree to which the Tribunal process had satisfied the Supreme Court's requirement, as expressed in *Hamdi* and *Rasul* of a *meaningful factual inquiry before an impartial adjudicator*.

My comments, an unclassified narrative summarizing my experiences as a member of OARDEC, were at considerable odds with the statements of Admiral McGarrah, particularly as related to details of which I had personal knowledge.

Those comments, ultimately set forth in declarations not only to the United States Court of Appeals but to the United States Supreme Court, to which were joined a subsequent declaration, set forth my observations as follows:

The Tribunal process had two essential components: an information-gathering component, conducted almost entirely in Washington, and the Tribunal proceedings that took place either in Guantánamo or in Washington, depending on whether the detainee elected to participate.

The Recorders (military officers who presented the cases to the Tribunal panels), personal representatives (who met with detainees briefly prior to the panel proceedings), and panel members had no role in the gathering of information to support an "enemy combatant" determination.

The information presented to the Tribunals was typically aggregated by individuals identified as "case writers." These case writers, in most instances, had only a limited degree of knowledge and experience relating to the intelligence commu-

nity and evaluation of intelligence products. The case writers were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for a detainee's designation as an enemy combatant. These case writers, in turn, depended entirely on government agencies to supply the information they used. The case writers and Recorders did not have access to the vast majority of information sources generally available within the intelligence community.

In conducting intelligence liaison duties related to the information gathering component, I was allowed only the most limited access to information, typically prescreened and filtered. The limited information provided by intelligence agencies ordinarily consisted only of distilled summaries and conclusory statements, lacking even the most fundamental indicia of credibility or, alternatively, consisted of volumes of information, most of which could not be determined to relate to a particular detainee, let alone a specific subject of my inquiry. Despite these extraordinary limitations, regulations applied to the conduct of the Tribunals required that the Tribunal presume that information presented was "genuine and accurate." Though my concerns regarding the efficacy of my reviews were communicated to my superiors, responses were dismissive and did nothing to address my concerns.

Ultimately, the information used to prepare the files to be used by the Recorders consisted, in large part, of finished intelligence products of a generalized nature - often outdated, often "generic," rarely specifically relating to the individual subjects of the Tribunals or to the circumstances related to those individuals' status. The content of those materials was often left entirely to the discretion of the organizations providing the information. The scope of information not included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the persons preparing materials for use by the Tribunal panel members did not know whether they had examined all available information or why they possessed some pieces of information but not others.

Tribunal members reported through a line of succession to Admiral McGarrah. Any time a Tribunal determined that a detainee was not properly classified as an enemy combatant, the panel members would have to justify their finding. There would be intensive scrutiny of the finding that Admiral McGarrah would, in turn, have to explain to his superiors. Similar scrutiny was not applied to a finding that a detainee was classified as an Enemy Combatant.

Considerable emphasis was placed on completing the hearings as quickly as possible. The only thing that would slow down the process was a finding that a detainee was not an enemy combatant. These conditions encouraged Tribunal

members and other participants in the process to find the detainees to be enemy combatants.

On one occasion, I was assigned to a Tribunal panel with two other officers. We reviewed evidence presented to us regarding the status of Abdullah Al-Ghazawy, a detainee accused in the unclassified summary of being a member of the Libyan Islamic Fighting Group.

There was no credible evidence supporting the conclusion that Al-Ghazawy met the criteria for designation as an unlawful enemy combatant. The information presented to us had no substance. What were purported to be specific statements of fact lacked even the most fundamental hallmarks of objectively credible evidence. Statements allegedly made by percipient witnesses had no detail. Reports presented generalized, indirect statements in the passive voice without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source. Material presented to the panel begged the conclusion that the detainee was an unlawful enemy combatant. Questions posed by members of the Tribunal yielded no answers but, instead, frustration borne out of a complete absence of factual matter.

On the basis of the paucity and weakness of the information provided both during and after the hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. The validity of our findings was immediately questioned. We were directed to reopen the hearings, to allow for additional evidence to be presented. Ultimately, in the absence of any substantive response to our questions and no basis for concluding that additional information would be forthcoming, we left unchanged our determination that the detainee could not be classified as an enemy combatant.

The response to this determination was not acceptance but, rather, the expression that something had gone wrong. I was not assigned to another Tribunal panel.

Based on my observations and my experience, I concluded that the Tribunal process was little more than an effort to ratify the prior exercise of power to detain individuals in the war against terror while appearing to satisfy the Supreme Court's mandate in Rasul and Hamdi. The Tribunal process was designed to validate detentions that the Executive Branch either believed it should not have to justify, could not be bothered to justify, or could not justify.

I subsequently learned that the subject of the Tribunal, Al-Ghazawy, was subjected, two months later, without his knowledge or participation, to a second Tribunal that reversed my panel's unanimous determination that he was not an enemy combatant. I also learned that this particular panel also reconsidered and reversed the findings as to another detainee. So it appeared to me that this particu-

lar panel was convened precisely for the purpose of overturning prior findings favorable to the detainees.

On June 29, 2007, for reasons left unstated but that consensus attributes to my affidavit filed with the Supreme Court, that Court vacated its prior order denying the petitions for writs of certiorari and, instead, granted the petitions.

In the ensuing months, briefs would be submitted, literally from all corners of this Earth advocating a particular result to be reached by the Court. I would not presume to state the merit of those briefs or the weight to be accorded any of them.

On December 5th, I had the honor of attending oral argument before the Supreme Court. I observed much of the time to have been spent on the question of from what source the writ of habeas corpus emanated, whether derived from common law or statute and the basis for extending the rights attending that writ to the detainees. But, from that discussion emerged very clearly the points that respect of fundamental rights required, as to the fate of the detainees, a fair hearing before an impartial decision maker. In that regard, criticisms of the Tribunal process remained largely unrefuted.

As I sit here today, the Supreme Court has not yet announced a decision in the detainee cases. I would not presume to state how the Supreme Court will decide the two cases now submitted. But I am certain that near to the minds of those upon whose shoulders that task now rests are the words that first signaled the course by which our national destiny would be shaped. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

These words would resonate two centuries later in the declaration of the United Nations, that “Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

These two statements, one penned by witnesses to the birth of a nation, the other by members of a union of nations, were not the source from which any rights emanated. Rather, common to both was and is the recognition, explicitly stated in the Universal Declaration of Human Rights that “All human beings are born free and equal in dignity and rights.”

The words that I have spoken are not intended as a disparagement of any person or of any organization. They are neither an indictment nor a criticism of a people possessed of no will nor intent to act in any particular manner towards the detainees at Guantánamo.

Following the submission of my declaration, I received and otherwise became aware of an outpouring of favorable responses transcending divisions of race, of politics, of religion, or of any other distinctions that the mind might conceive. There was, in those responses, an affirmation that fundamental rights of human beings, any human being, need not be subordinated to transient interests, no matter how expressed. Beyond that was the distinct message on the part of so many of an unwillingness to quietly submit to an erosion of fundamental human rights.

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