**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**

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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 25th, 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 world 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?