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

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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 conse-

quences 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."

[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.)

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 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 community 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 Tribu-

nal 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 particular 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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