Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications

Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

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Statement for the Record Submitted by

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Chairman Durbin, Ranking Member Cruz, members of the subcommittee, thank you for inviting me to testify today. I appreciate your commitment to moving forward on this difficult issue.

The following statement is based on my own personal experience and knowledge, and does not reflect the views of the Military Commissions Office of the Chief Defense Counsel, United States Navy or Department of Defense.

My name is LT Josh Fryday. I am a graduate of UC Berkeley School of Law, and member of the California State Bar. I am qualified and certified to practice before courts-martial pursuant to Article 27(B) of the Uniform Code of Military Justice, and an attorney at the Military Commissions Office of the Chief Defense Counsel. I am also a Term Member on the Council on Foreign Relations.

I am grateful for the invitation to share my experiences.

Over the past year I have been assigned under military orders to serve as military defense counsel for individuals detained in Guantanamo Bay, Cuba. There are 166 men remaining. I represent one of them.

I'm not here to ask for sympathy for the man I have been ordered to represent, justify his actions or argue his guilt or innocence. But I would like to tell you a little about him. He is an Afghan citizen with a 3rd grade education he received in a Pakistani refugee camp, after his family fled the Russian invasion. He has never been alleged to harm anyone—Afghan or American. He was roughly twenty-two years old when detained—although he isn't sure of his exact age. He has a son, Imran, who was 6 months old when he last saw him.

In 2008 he was charged with Material Support for Terrorism. In 2009, the Military Commission process halted, and his charges were dismissed. For several years he lingered, waiting for charges. But, in 2012, the D.C. Circuit Court of Appeals essentially eliminated his chances of being brought before a Military Commission. In *Hamdan v. U.S.*, the court vacated

the conviction of Hamdan, Osama Bin Laden's driver, and ruled that because Material Support for Terrorism is not an established violation of the international laws of war, it could not be applied to those whose alleged acts took place before Congress passed the Military Commissions Act in 2006. My client's alleged material support for terrorism happened in 2003.

As long as the D.C. Circuit's decision stands, there is no charge the government can bring against my client in a Military Commission.

Had my client been brought to federal court, instead of GTMO, he could have, and would have, been tried years ago. Ten years later, with no actual crime with which he can be charged, he sits in Guantanamo.

His only other option of challenging detention through habeas has effectively been cut off by the D.C. Circuit Court. The court has set the standard for evidence needed to justify continued detention so low, to include hearsay, that no detainee has been granted habeas in recent years. Thus, he remains imprisoned indefinitely.

I do not intend to argue here that my client has never made any mistakes in his life. But if he is guilty of any crime, he should be charged and given his day in court.

People often ask me if it is difficult representing a detainee in Guantanamo. I'm proud to live in a country where I can be ordered by my Commander-in-Chief to perform such a challenging mission. My colleagues, prosecutors and defense lawyers alike, are patriots who love their country. In the military, we are taught to perform our duties with honor, courage and commitment.

The tougher questions come from my client. He asked me how it is possible for my government to detain him for over ten years without proving he committed a crime, or even hurt anyone? I try my best to explain that some in our government believe under the laws of war, we are allowed to detain people indefinitely until the war is over. He then asks me, "You will no longer be at war with Afghanistan after 2014. Can I go home then? Or does this war never end?"

My client was heartened when he heard that President Karzai demanded the return of all remaining Afghan citizens still left in Guantanamo. The Afghan government now controls the Parwan, formerly Bagram, detention facility. They are now responsible for detaining Afghan citizens.

As a service member and an attorney sworn to uphold the constitution and our strong legal traditions, I don't have good answers to my client's questions.

Many of the legal rules and elements of due process we have set and worked to improve over the last two hundred plus years are largely absent from Guantanamo.

Basic elements that define our notions of justice—access to counsel, meaningful habeas review, continued independent review of evidence, and a reliable court system designed to ensure swift and fair proceedings--are not available to my client.

Access to counsel

We have a long tradition of respecting a defendant's right to counsel. Basic to that right is the ability of a defendant to have access to his attorney. In GTMO, access to counsel, even for those with attorneys, is a constant struggle.

The logistics of traveling to Guantanamo to meet my client are costly, and burdensome. Flights to Guantanamo are irregular and so uncommon that each visit requires a four to five day stay on the island. Due to budget constraints, the Office of Military Commissions has recently cut half of the flights scheduled to go to Guantanamo that are used for defense attorneys to visit our clients. Once there, procedures instituted by the detention facility create extra hindrances on our defense attorney meetings with clients.

Recently, one defense attorney representing a detainee with active charges at a Military Commission was prohibited from bringing his spiral notebook into a meeting with his client. The notebook contained attorney-work product for the Commissions case and had been brought previously and regularly into attorney-client meetings since 2008 by this same attorney at this same location. However, without notice or warning, one day in April 2013, the notebook was now labeled a prohibited item.

Detainees are also discouraged from meeting with their attorneys. After the most recent hunger strikes were widely publicized, new procedures were put in place every time a detainee moved from his housing camp to the attorney meeting rooms. My client refused visits from me during my last trip because of newly required invasive genital searches, and new transportation vehicles forcing him to sit in very uncomfortable positions – similar to stress positions - for long periods of time. The chief judge of the D.C. District Court recently addressed this issue for civilian habeas attorneys who were having the same experience with their clients. The judge concluded, "…the search procedures discourage meetings with counsel and so stand in stark contrast to the President's insistence on judicial review for every detainee." (In Re Guantanamo Bay Detainee Litigation - Hatim, et al v. Obama, D.D.C. 11 July 2013)

When meetings do occur, there is no confidence that the attorney-client conversations are private or privileged. That trust was shattered when it was discovered a few months ago that attorney meeting rooms had secret audio and video recording devices in them, disguised as smoke-detectors, and the audio and video feed of commission trials were being controlled by government agencies, unbeknownst to even the judge. If I do make it into a meeting with my client at Guantanamo, I have reason to believe that someone within the U.S. Government could be listening in on my conversation with my client.

Periodic Review Boards

In Executive Order 13567, the Commander-in-Chief ordered the establishment of Periodic Review Boards. The purpose of the review was supposed to be to determine whether or not each detainee continued to constitute a "significant threat to the security of the United States." An initial review for each detainee was ordered to be completed no later than one year later, March 7, 2012. As of today, two years and four months after the Executive Order, not a single review board has been held.

When they do start, and we are told they will begin soon, no one knows what they will actually look like, and how they will be structured. Serious questions remain as to whether they will be conducted with any assurances to the American people that they will accomplish what they are supposed to do—determine who in fact truly still poses a threat to our country. If they are not conducted properly, and exist merely to rubber stamp the continued detention of those in Guantanamo, they will fail to achieve their goal, and continue to erode confidence in the processes at place in Guantanamo.

Military Commissions

Lastly, when it comes to the military trials actually being conducted at Guantanamo, for six out of the one hundred and sixty-six detainees, the experiment of Guantanamo continues. Rather than relying on our Federal criminal justice system, which has exhaustively litigated, and exhaustively re-litigated trial issues for over two-hundred years, we continue to re-invent the wheel in a remote location.

Our federal system has successfully prosecuted nearly 500 terrorists since 9/11. The nearly five hundred terrorist convictions were the result of trials in sixty different US district courts; forty-four cases were in the Southern District of New York alone. (http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf). The Federal Government successfully convicted Zacarias Moussaoui, the twentieth 9/11 hijacker, who is currently serving a life sentence at a Federal Supermax prison in Colorado.

In contrast, after being revamped three times, the Military Commissions in Guantanamo have only convicted six people since 9/11. Two of these convictions have already been vacated, casting further doubt as to Military Commissions' ability to withstand appellate review.

The Military Commissions continue to be wrought with debilitating challenges for both the prosecution and defense that often bring substantive hearings to a halt. The overbroad classification rules and the absence of a classification guide prevent both the prosecution and defense from fulfilling their respective obligations to discover evidence and investigate the allegations against detainees. Recently, both sides were forced to litigate the discovery of hidden microphones in attorney-client meeting rooms placed there by law enforcement and intelligence agencies that work independently of the prosecution. Defense attorneys are further restricted

from effectively communicating with their clients by unreasonable searches of attorney-client mail, an issue that resulted in almost two weeks of hearings.

Conclusion

We are a nation of laws and high moral standards. We are a people of principle who believe in due process and innocence until proven guilty. Denying my client a trial and detaining him indefinitely is at odds with our values.

It is also at odds with our history.

On the eve of the Revolutionary War, we held trials for British soldiers responsible for the Boston Massacre. Before we were even a nation, our founding father John Adams extolled the virtues of a people governed by the Rule-of-Law when he served as one of the British soldiers' defense lawyers. He set the example for the type of justice this new country would stand for.

Some in Guantanamo are responsible for unforgiveable acts of evil. Our history teaches and our values demand that, they too should be tried, and if found guilty, punished for their crimes.

Today, six detainees are being tried in Military Commissions for the atrocities of 9/11 and USS COLE bombing. These trials have been marked by arguments over what clothes can be worn in court, how attorney-client mail should be read, and how lawyers may be permitted to take notes in meetings. Almost twelve years after our nation was attacked, we are still years away from completing these trials and securing justice.

This delay in justice is not because we provide too many rights for our enemies. Quite the opposite—it is because for too long we tried to abandon our basic principles of justice and existing courts of law, on an island prison we created.

Everyone here knows our threats are real. They must be taken seriously and pursued with the utmost intensity and vigilance. Criminals and terrorists should be prosecuted and jailed. Our enemies must be clear about our steadfast and dogged commitment to bring them to justice, and they must know we will not stop until we do.

At the same time, the law and our values require that we put these men on trial and prove they are guilty. We believe in due process – a fair trial, the opportunity to confront your accusers, and a chance to be presented with the evidence against you.

For centuries, American service members have fought and paid the ultimate sacrifice to protect these fundamental values that define our country. We should endeavor to always be faithful to those values, especially when it is most challenging to do so.