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Opening Remarks

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OPENING REMARKS

*Barry Kamins**

Good morning, and welcome to what will be a stimulating program about a disturbing subject. You will hear an extensive analysis and discussion of the many issues evoked by the Guantánamo detention facility. I have the responsibility to set the table for this discussion, and I want to do that by giving a brief history of the Guantánamo detention experience. I then want to address the recent efforts by the Bush administration to demonize the lawyers who have so valiantly worked to preserve our Constitution and system of justice in the face of an unprecedented onslaught by the executive branch. Finally, I'll mention some of what the New York City Bar Association has done to respond.

The detention facility at Guantánamo was built in just ninety hours in January of 2002 on the long-term naval base the United States maintains on the tip of Cuba.¹ Why place this facility at Guantánamo? It combined proximity to the United States with what the administration believed was sufficient distance from U.S. territory to be beyond the reach of our nation's courts.² Thus, it was designed to be both geographically and legally beyond the reach of the law.

As many as 800 detainees have served time at the facility.³ They arrived under many different circumstances. Some were picked up on the field of battle in Afghanistan.⁴ Many were given, or often sold for a bounty, to U.S. troops by the Northern Alliance⁵

* President, Association of the Bar of the City of New York, 2006–2008.

¹ Joan Ullman, Book Review, N.Y. L.J., Mar. 7, 2007, at 2 (reviewing JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006)).

² Human Rights Watch, *United States: Guantánamo Two Years On: U.S. Detentions Undermine the Rule of Law* (Jan. 9, 2004), <http://www.hrw.org/english/docs/2004/01/09/usdom6917.htm> (“The Bush Administration has attempted to turn the forty-eight square miles of its naval base at Guantánamo Bay into territory beyond the reach of any law and outside the jurisdiction of any court.”).

³ Neil A. Lewis, *U.S. Terrorism Tribunals Set to Begin Work*, N.Y. TIMES, Aug. 22, 2004, at A22.

⁴ *See Profile: Guantánamo Bay*, BBC NEWS, Oct. 17, 2006, <http://news.bbc.co.uk/2/hi/americas/4720962.stm>.

⁵ The Northern Alliance is an Afghan opposition organization whose goal is to defeat the Taliban. *Who Are the Northern Alliance?*, BBC NEWS, Nov. 13, 2001, http://news.bbc.co.uk/2/hi/south_asia/1652187.stm.

or other factions allied with the United States in the Afghan war.⁶ Others were picked up by U.S. agents, under circumstances that are far from clear, in Europe and in Africa.⁷ Collectively, the detainees were labeled “the worst of the worst” by administration officials.⁸ They were considered from the outset to have no established human rights of any kind. The President made an early finding that the Geneva Conventions did not apply to the detainees.⁹ It is not clear that, prior to this, any government in the post-Geneva Conventions world has declared an entire group of foreign detainees to be beyond the reach of any international human rights protections.

The conditions under which the detainees have been held are clearly consistent with the assumption that they are all guilty of crimes against the United States; most have been kept in periods of isolation, frequently shackled,¹⁰ limited in their social contact and exposure to fresh air, with nothing to read but the Koran and virtually nothing to do.¹¹ Furthermore, many—perhaps all—of the detainees were seen as sources of intelligence. Orders were given, and techniques approved by Secretary of Defense Rumsfeld, to extract intelligence using means that at least constituted cruel, inhuman, and degrading treatment and quite possibly constituted torture.¹² We know this from the freed detainees who have told their stories,¹³ but we also know this from reports of what our own FBI agents observed.¹⁴ Some of the techniques were scaled back, but water boarding, shackling in severely uncomfortable positions, sensory overload, nudity, chilling temperatures, and many other

⁶ Christopher E. Smith & Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks*, 39 VAL. U. L. REV. 783, 796 (2005).

⁷ *Profile: Guantánamo Bay*, *supra* note 5.

⁸ Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 129 (2006).

⁹ Memorandum from President George W. Bush to the Vice President, et al., Re: Humane Treatment of al Qaeda & Taliban Detainees (Feb. 7, 2002), available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf [hereinafter Memorandum from President George W. Bush].

¹⁰ Patrick E. Tyler, *Ex-Guantánamo Detainee Charges Beating*, N.Y. TIMES, Mar. 12, 2004, at A10.

¹¹ Amnesty International, *Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay* (Apr. 5, 2007), <http://web.amnesty.org/library/Index/ENGAMR510512007>.

¹² See Human Rights Watch, *Interrogation Techniques for Guantánamo Detainees* (Aug. 19, 2004), <http://hrw.org/english/docs/2004/08/19/usdom9248.htm> [hereinafter *Interrogation Techniques*].

¹³ *Id.*

¹⁴ FBI, *DETAINEES POSITIVE RESPONSES: GUANTÁNAMO BAY INQUIRY* (2004), available at <http://foia.fbi.gov/guantanamo/detainees.pdf>.

forms of abuse continued to be available to, and employed by, Guantánamo interrogators.¹⁵ These are practices that the United States has traditionally protested as human rights violations in other countries.¹⁶

So, are these detainees “the worst of a very bad lot”? Are they guilty and deserving of treatment devoid of human rights protections?

We know that U.S. officials at Guantánamo over the years have said that many of the detainees pose no risk to the United States.¹⁷ As of March 6, 2007, the United States has released more than half of the persons who served time in Guantánamo due to a lack of any evidence of wrongdoing.¹⁸ While many were released under the pretext that the country to whom they are being released will detain them, at the very least, a substantial number of the detainees now live freely in those countries.¹⁹ Some of the remaining detainees are Uighurs (pronounced wee-gurs)—Chinese Muslims who pose absolutely no risk to the United States, but who would be at risk of punishment for their beliefs if sent back to China.²⁰ So rather than let this handful of detainees live freely in the United States, they continue to be detained in the isolation of Camp 6 at Guantánamo.²¹

We also know that an analysis by Professor Mark Denbeaux and colleagues at Seton Hall University School of Law found that more than half of the detainees who had gone through the Combatant Status Review Tribunals (to which I will return) set up by the Defense Department have not been accused of engaging in hostile acts against the United States.²²

¹⁵ E.g., Colum Lynch, *Military Prison's Closure Is Urged*, WASH. POST, May 20, 2006, at A1 (noting that a United Nations anti-torture panel criticized military use of water boarding as an interrogation technique in Guantánamo.).

¹⁶ See Eric Green, *New Reports Condemn Human Rights Violations in Cuba, Venezuela* (Apr. 5, 2007), <http://usinfo.state.gov/xarchives/display.html?p=washfileenglish&y=2007&m=April&x=200704051355461xeneerg4.133242e-02>.

¹⁷ See, e.g., Carol J. Williams, *U.S. to Free 141 Terror Suspects*, L.A. TIMES, Apr. 25, 2006, at A1 (citing confidential U.S. officials as sources).

¹⁸ *Morning Edition: Freed from Gitmo, Where Do Detainees Go?* (NPR radio broadcast July 30, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=12344597>.

¹⁹ See *id.* (reporting that upon release, detainees have “essentially returned to their lives.”).

²⁰ Josh White, *Lawyers Demand Release of Chinese Muslims*, WASH. POST, Dec. 5, 2006, at A13.

²¹ Detainees were moved into Camp 6, the modern detention facility at Guantánamo Bay, in December 2006. Tim Golden, *Military Taking a Tougher Line with Detainees*, N.Y. TIMES, Dec. 16, 2006, at A1.

²² MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTÁNAMO DETAINEES: A

Surely, you would assume that the United States, the beacon of justice and the rule of law in the modern world, would have undertaken some procedures to determine if the detainees were rightfully detained. Unfortunately, this is not the case. Apparently, despite the above evidence to the contrary, the detainees were assumed to be guilty and, aside from being subjected to abusive interrogations,²³ were simply being left to rot in Guantánamo for the length of the “war on terror,” which we all know will be unending.

Contrary to Article 5 of the Geneva Conventions, which requires a status hearing where there is any doubt as to the status of someone captured during a conflict,²⁴ the United States made no effort to evaluate the basis for the detentions until prodded by the Supreme Court in June 2004, in its *Hamdi* decision.²⁵ Then, the Defense Department established Combatant Status Review Tribunals,²⁶ about which I am sure you will hear more. In these tribunals, detainees are not brought before a neutral decision maker but before military officials who are notified that the detainee’s status as an enemy combatant has already been established.²⁷ The detainees are not permitted the advice of attorneys.²⁸

Rather, a detainee is assisted by a personal representative who does not serve as an advocate; communications between the detainee and the personal representative are not confidential and may be revealed by the personal representative to the Tribunal.²⁹ Detainees are not permitted to see any of the classified evidence upon which their enemy combatant status determination was based.³⁰ The Tribunal is not bound by any rules of evidence and is free to rely on hearsay.³¹ All of the government’s evidence is then

PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (Feb. 2006), available at <http://law.shu.edu/aaafinal.pdf>.

²³ *Interrogation Techniques*, *supra* note 13 (listing techniques such as stress positions, isolation, sensory deprivation, and hooding).

²⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

²⁶ Amnesty International, *Military Commissions, Like CSRT’s, Threaten to Whitewash Detainee Abuse* (Mar. 23, 2007), <http://www.amnestyusa.org/document.php?lang=&id=ENGAMR510462007>.

²⁷ Human Rights Watch, *Making Sense of the Guantánamo Bay Tribunals* (Aug. 16, 2004), <http://hrw.org/english/docs/2004/08/16/usdom9235.htm> [hereinafter *Guantánamo Bay Tribunals*].

²⁸ *Id.*

²⁹ *Id.*

³⁰ Neil A. Lewis, *Guantánamo Prisoners Getting Their Day, But Hardly in Court*, N.Y. TIMES, Nov. 8, 2004, at A1.

³¹ *Guantánamo Bay Tribunals*, *supra* note 28.

entitled to a rebuttal presumption and is evaluated using the preponderance-of-the-evidence standard.³² These procedures turn tribunals into sham proceedings that do not remotely satisfy the ideals of fundamental fairness for which the United States has long been known. Not surprisingly, the overwhelming majority of inmates lose their hearings; some have refused to participate.³³ From July 2004 to January 2006, only thirty-eight of 558 detainees prevailed at their hearings.³⁴

Some detainees have been designated as appropriate for trial under the military commissions procedure the administration first announced in November 2001, to widespread criticism.

Although the procedures had been approved several times in the intervening years, the Supreme Court still found them wanting in its *Hamdan* ruling in 2006.³⁵ Since then, some further improvements were made in the Military Commissions Act and the recently released rules, but deficiencies still remain—deficiencies that will call into question any verdicts resulting from commission trials.

The American legal community became engaged in the Guantánamo facility early in its life. In addition to the Center for Constitutional Rights, which took a leading role in providing and coordinating representation, lawyers from firms of all sizes volunteered to represent detainees.³⁶ Their efforts have led to two favorable Supreme Court decisions,³⁷ major changes in administration policy with regard to military commissions, and quite possibly to an easing in the interrogation techniques to which the detainees were subjected. And, as a result, the Bush administration has undertaken a campaign to demonize these lawyers.³⁸ It has tried to embarrass the lawyers and encourage their clients to press them to drop the detainee representation.³⁹ A recent Wall Street Journal column suggested the lawyers were allied with al Qaeda in pursuing a tactic of “lawfare,” invoking domestic and international law

³² *Id.*

³³ Lewis, *supra* note 31.

³⁴ Kathleen T. Rhem, *38 Guantánamo Detainees to be Freed After Tribunals*, AM. FORCES PRESS SERVICE, Mar. 30, 2005, <http://www.defenselink.mil/news/newsarticle.aspx?id=31063>.

³⁵ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

³⁶ See Editorial, *Unveiled Threats: A Bush Appointee's Crude Gambit on Detainees' Legal Rights*, WASH. POST, Jan. 12, 2007, at A18 [hereinafter *Unveiled Threats*].

³⁷ *Hamdan*; *Rasul v. Bush*, 542 U.S. 466 (2004).

³⁸ See *The Federal Drive with Mike Causey and Jane Norris: Is It Just Us?* (Federal News Radio broadcast Jan. 11, 2007), available at <http://www.federalnewsradio.com/emedial/59677.wma> (Cully Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs, reading a list of law firms representing Guantánamo detainees).

³⁹ *Unveiled Threats*, *supra* note 36.

and legal tactics to serve the purposes of the terrorists.⁴⁰

I find this not only deeply troubling but ironic. We have an administration which has proclaimed people guilty without charge or trial, claiming the right to detain them for life without any human rights protections, and which has lost twice at the Supreme Court when it argued that detainees do not have access to the United States justice system. And yet the administration argues that the lawyers are aiding the enemy by having the nerve to say there may be violations of law and human rights?

I would turn this argument further. We should be embarrassed by our government's callous disregard of the rule of law and human rights. One could even argue that the administration itself has been abusing legal processes for lawless purposes. Here are some examples:

- The Bush administration determined that the Geneva Conventions did not apply to anyone detained in Guantánamo,⁴¹ a finding overturned by the Supreme Court.⁴²
- The administration, in its now infamous series of memoranda, only some of which have been disavowed, provided incredulous interpretations of U.S. law so that what we commonly conceive to be torture would be justified.⁴³
- The administration established military commissions that the Supreme Court found to lack fundamental due process even after numerous revisions to the rules, and which have been so faulty that after five years, no proceeding has gotten beyond the most preliminary stages.
- For over two years, the administration failed to establish any procedure to review whether the government was right to hold a detainee. When pressed by the Supreme Court, the government established the woefully inadequate Combatant Status Review Tribunal (CSRT) system.⁴⁴ The last

⁴⁰ Debra Burlingame, *Gitmo's Guerrilla Lawyers: How an Unscrupulous Legal and PR Campaign Changed the Way the World Looks at Guantánamo*, WALL ST. J., Mar. 8, 2007, at A17, available at <http://www.opinionjournal.com/editorial/feature.html?id=110009758>.

⁴¹ Memorandum from President George W. Bush, *supra* note 10.

⁴² *Hamdan*, 126 S. Ct. at 2759; *Rasul*, 542 U.S. at 485.

⁴³ For a summary of the key points of the memos and links to PDF versions, see Dahlia Lithwick, *The Legal Memos: How the Rules Were Rewritten*, SLATE, May 26, 2005, <http://www.slate.com/features/whatistorture/LegalMemos.html>. For links to all Memos and Reports on Treatment of Detainees, see Pace Law School Library, http://www.library.law.pace.edu/government/detainee_memos.html (last visited Sept. 9, 2007).

⁴⁴ For an overview of the procedures used in Combatant Status Review Tribunals (CSRT), see Memorandum from Gordon England, Deputy Sec'y of Def., for Sec'y of

Congress was complicit in this failure by providing, in the Detainee Treatment Act, that detainees can challenge the CSRT only with regard to procedural deficiencies.⁴⁵ This is not a meaningful review, particularly when the detainees are at risk of losing their liberty for the rest of their lives.

- The Justice Department has made a series of troubling legal arguments that attempt to avoid any accountability for misconduct. Here are a couple of examples:
 - In several pending court cases covering a number of issues, the administration claims that the state secrets doctrine prevents a court from even considering a case. This has been invoked in all three cases involving the warrantless surveillance program.⁴⁶
 - In the *Padilla* case and in other proceedings, the administration argues that the interrogation techniques which may have caused serious abuse and may have rendered Padilla unfit to assist in his defense⁴⁷ cannot be disclosed for reasons of national security.⁴⁸
 - A key part of the Military Commissions Act passed last fall would immunize government officials for mistreatment of detainees prior to the passage of the Act.⁴⁹
- The administration has sought to avoid court cases challenging their allegedly unlawful activities by manipulating the judicial process. For example, the transfer of Padilla from “enemy combatant status” to criminal defendant brought the administration a stinging rebuke from a hitherto friendly Fourth Circuit Court of Appeals.⁵⁰

the Military Dep’ts (July 14, 2006), *available at* <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

⁴⁵ Detainee Treatment Act of 2006, Pub. L. No. 109–148, § 1005, 119 Stat. 2739, 2740 (2005).

⁴⁶ *ACLU v. NSA*, 493 F.3d 644, 650 (6th Cir. 2007); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006); *Ctr. for Constitutional Rights v. Bush*, No. 06-CV-00313 (S.D.N.Y. filed Jan. 17, 2006).

⁴⁷ Deborah Sontag, *A Videotape Offers a Window into a Terror Suspect’s Isolation*, N.Y. TIMES, Dec. 4, 2006, at A1.

⁴⁸ *See* Government’s Motion in Limine Regarding Classified Information at Trial at 1, *United States v. Padilla*, No. 04-60001 (S.D. Fla. Nov. 22, 2006).

⁴⁹ Letter from Barry M. Kamins, President, Ass’n of the Bar of the City of N.Y., to Sen. Patrick J. Leahy, Chairman Senate Comm. on the Judiciary (Mar. 6, 2007), *available at* http://www.nycbar.org/pdf/report/Restoration_Habeas_Corpus.pdf [hereinafter Letter from Barry M. Kamins].

⁵⁰ *Padilla*, 432 F.3d at 585 (“It should go without saying that we cannot rest our decisions on media reports of statements from anonymous government sources regarding facts relevant to matters pending before the court, nor should we be required to do so or to speculate as to facts based upon such reports. The information that the

- The confiscation of attorney-client privileged material from the detainees after the three suicides last year, on the pretext that one of the notes was written on a piece of paper provided by a lawyer to a client—when virtually the only paper available to the detainees was the lawyer–client privileged documents.⁵¹

This is a sampling, and I am sure you have your own list, perhaps longer. We face an administration with disdain for law and the role of lawyers, yet it seeks to use legal machinations for the least dubious purposes. We cannot take a step back from our efforts to be sure that what our government does comports with its Constitution and laws. We cannot forfeit the playing field to an administration seeking an unprecedented expansion of executive power and a reduction of the countervailing judicial power to insignificance.

The New York City Bar Association has been involved in challenging the administration's policies throughout this post 9/11 period.⁵² To mention just a few of our actions:

- We provided an early, extensive analysis of the President's executive order establishing the military commissions, and facilitated the American Bar Association's (ABA) passage of a resolution critical of the commissions. We have worked closely with the ABA since in pressing our joint concerns about human rights and due process;
- We have pressed the Defense Department with regard to its failure to provide status reviews for the detainees and have critiqued the changes in commission rules;
- We provided an outlet for JAG officers⁵³ to complain about the treatment of detainees, which led to our extensive analysis of U.S. and international law relating to interrogation of detainees, and also was part of what led to this issue becoming exposed in Congress and the media;

government would provide to the media with respect to facts relevant to a pending litigation, it should be prepared to provide to the court.”)

⁵¹ Josh White, *Signs of Detainees' Planning Alleged: Messages Found on Legal Papers*, WASH. POST, July 8, 2006, at A1.

⁵² See, e.g., Press Release, The Ass'n of the Bar of the City of N.Y., City Bar Petitions U.S. Supreme Court to Grant Padilla Right to Due Process (Apr. 12, 2004), available at http://www.nycbar.org/PressRoom/PressRelease/2004_4_12.htm; Letter from Barry M. Kamins, *supra* note 51.

⁵³ JAG stands for Judge Advocate General's Corps, and is the judicial arm of the United States Armed Forces. Office of Judge Advocate General, Dep't of the Navy, Manual of the Judge Advocate General (JAGMAN) (2004), available at <http://www.jag.navy.mil/documents/JAGMAN2004.pdf>.

- We have participated in a number of amicus briefs on many aspects of the administration's post-9/11 policies;
- We lobbied Congress in support of efforts to rein in Executive power and against ill-conceived measures such as the Military Commissions Act;
- We have written extensively about the practice of "extraordinary rendition," the handing of a detainee over to a country likely to torture the detainee.

Much of our work has been compiled into a two-volume set that will be published shortly.⁵⁴

To conclude, I trust we will hear more today about what are truly difficult and complicated legal issues, and there will be much discussion of alternative ways to approach legal issues raised by the Guantánamo experience in the future. But underlying all of this is a simple commitment to the rule of law. Our detention policy at Guantánamo has affronted our allies, enraged our enemies, and diminished our moral standing around the globe. We cannot have the United States fighting for the defense of democratic principles while itself undermining these principles.

Terrorism must be fought, but fundamental principles of law and human rights must prevail.

Thank you for your time.

⁵⁴ See *THE IMPERIAL PRESIDENCY AND THE CONSEQUENCES OF 9/11: LAWYERS REACT TO THE GLOBAL WAR ON TERRORISM* (James R. Silkenat & Mark R. Shulman eds., Praeger Security International 2007).

