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HISTORICAL PERSPECTIVE ON GUANTÁNAMO BAY: THE ARRIVAL OF THE HIGH VALUE DETAINEES

*Morris D. Davis**

Detainees were sent to Guantánamo Bay to be exploited for intelligence purposes, not to perfect criminal cases against them. The effort to construct credible criminal cases based upon intelligence was going to be problematic, and it became even more so when President George W. Bush decided in the summer of 2006 to transfer high value detainees from secret Central Intelligence Agency sites, where some were subjected to torture, to military detention at Guantánamo Bay. The former chief prosecutor for the military commissions describes the decision to create “clean teams” of Federal Bureau of Investigation agents and military law enforcement personnel to interview the high value detainees anew at Guantánamo Bay in hopes of separating the criminal prosecution effort from the earlier intelligence gathering phase. The merits of that decision will be tested as President Barack Obama’s administration moves forward with the prosecution of Khalid Sheikh Mohammed and the other high value detainees.

“A nation that forgets its past is doomed to repeat it”

—Winston Churchill

I. INTRODUCTION

Two things happened on Monday, August 29, 2005, that were unrelated, except perhaps in a symbolic sense: Hurricane Katrina devastated New Orleans and the moving company packed my household goods to take me and my family to Washington so I could become the Chief Prosecutor for the Military Commissions at Guantánamo Bay, Cuba.

I had agreed to accept the job as Chief Prosecutor a few weeks earlier following an interview with former Defense Department General Counsel Jim Haynes at his Pentagon office. At the time, I was excited about this historic opportunity and optimistic that I could play an important role in holding terrorists accountable in a system of justice that reflected American values and our commitment to the rule of law. For an attorney, the chance to lead a talented multi-agency prosecution team assembled to conduct the first

* Morris D. Davis retired from the Air Force in October 2008. These are his personal views and they do not reflect the opinions of any government agency or any other organization.

military commissions since World War II was more than a once-in-a-lifetime opportunity; most lawyers never got a chance like this.

Thanks to Hurricane Katrina, the cross-country drive from Cheyenne, Wyoming, to the Virginia suburbs of Washington took on a sense of foreboding that presaged the twenty-five months I served as Chief Prosecutor. The long drive was my first experience buying gasoline that cost more than three dollars a gallon, well over the military's travel reimbursement rate, which meant the new job came at a personal cost right from the start. The radio news coverage as my family and I passed from town to town was ominous as the impact of Katrina became more apparent, and the mood at every stop was subdued, similar to the mood that enveloped the country after 9/11. Just as the nation had done four years earlier when terrorists struck, it looked to the Bush Administration for leadership in the wake of a disaster.

My involvement in the military commissions began in early September 2005, nearly four years after President Bush authorized them in a military order issued on November 13, 2001.¹ I became the third Chief Prosecutor following Colonel Fred Borch, who left amid controversy within the prosecution team in early 2004 and retired from the Army shortly thereafter, and Colonel Bob Swann, who retired from the Army in September 2005 and remained on the prosecution team as a civilian attorney to work full-time on the high value detainee cases.

A little more than two years later, my initial excitement and optimism was gone. I agreed to serve as Chief Prosecutor for as long as I believed we were committed to providing full, fair, and open trials. At a presentation at Case Western Reserve University School of Law in March 2006, someone asked what I would do if I ever concluded we would not have full, fair, and open trials, and I responded that I would call it a day and walk away. Well, that day came on October 4, 2007, when I learned that Deputy Secretary of Defense Gordon England had signed orders placing me under the command of Brigadier General Tom Hartmann and Department of Defense General Counsel Jim Haynes, men who believed waterboarding was an acceptable way to extract confessions for use in criminal proceedings conducted by the U.S., including cases that could potentially result in the death penalty. I had instructed the prosecutors as early as October 2005 that we would not use any evidence obtained by waterboarding or other unduly coercive interrogation techniques, so a few hours after being placed under the command of Hartmann and Haynes I submitted a request to resign as Chief Prosecutor. My request was granted.²

¹ Mil. Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 16, 2001).

² See House Armed Services Comm., *Hearing on the Implications of the Supreme Court's Boumediene Decision for Detainees at Guantanamo Bay, Cuba Before the House Armed*

Some of what occurred in the period between 2005 and 2007 remains classified, but many of the details are now in the public domain and available for examination and discussion. I had a role in shaping some of the decisions that remain the subject of debate today, so, lest we forget, I offer a personal perspective on a significant chapter in the Guantánamo Bay legacy.

II. THE TRANSFER OF THE HIGH VALUE DETAINEES TO DEPARTMENT OF DEFENSE CUSTODY AT THE U.S. NAVAL STATION GUANTÁNAMO BAY, CUBA

More than three years had elapsed between the time the U.S. captured and detained some of its high value detainees and the time I became the Chief Prosecutor in September 2005.³ The circumstances surrounding how the detainees were captured, detained, and interrogated at secret CIA facilities have been and continue to be vigorously debated and are not discussed in detail here.⁴ Suffice it to say, the methods employed to elicit in-

Services Comm., 110th Cong. (Jul. 30, 2008) (prepared statement of Morris D. Davis, former Chief Prosecutor, Office of Military Commissions), available at http://armedservices.house.gov/pdfs/FC073008/Davis_Testimony073008.pdf (last visited Oct. 16, 2009). Lieutenant Colonel Will Britt (U.S. Army Reserve) served as Interim Chief Prosecutor from the time I resigned in October 2007 until a replacement, Colonel Larry Morris, arrived in December 2007 to become the fourth Chief Prosecutor. Colonel Morris retired from the Army in 2009 and was replaced by Captain John Murphy (U.S. Navy Reserve). John Murphy is a Department of Justice attorney assigned to the military commissions since 2006 as a civilian member of the high value detainee prosecution team. He switched to military status in May 2009 and became the fifth military judge advocate appointed Chief Prosecutor in less than eight years. The four Chief Prosecutors that preceded him all retired from the military before reaching their mandatory retirement dates.

³ Abu Zubaydah was the first of the group known as the high value detainees captured by the U.S. He was captured in Pakistan in March 2002. The most well-known of the high value detainees, Khalid Sheikh Mohammed, was captured in Pakistan in March 2003. See Office of the Dir. of Nat'l Intelligence, *Summary of the High Value Detainee Program*, available at <http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf> (last visited Oct. 16, 2009). See also *Profile: Key US terror suspects*, BBC, Feb. 11, 2008, <http://news.bbc.co.uk/2/hi/americas/5322694.stm> (last visited Oct. 16, 2009).

⁴ In conjunction with the release of Department of Justice Office of Legal Counsel interrogation memos, President Obama referred to the secret prisons and enhanced interrogation era as “a dark and painful chapter in our history.” Press Release, President Barack Obama, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/ (last visited Oct. 16, 2009). A May 7, 2004, report by the CIA Inspector General, released in redacted form in August 2009 in response to a Freedom of Information Act (FOIA) lawsuit by the American Civil Liberties Union, describes waterboarding, mock executions, threats to kill or sexually assault family members of detainees, and other interrogation methods the CIA Inspector General labeled “inhumane.” See CENTRAL INTELLIGENCE AGENCY, OFFICE OF INSPECTOR GEN., COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003)

formation from the high value detainees prior to their transfer to Department of Defense (DOD) custody caused the prosecution team to doubt that any of their post-capture statements would be admissible at trial, even though the evidentiary rules in military commissions are more lenient than the rules in federal courts and courts-martial.⁵ Given those doubts, when President Bush made the decision in 2006 to transfer the high value detainees to Guantánamo Bay, the prosecution team faced a pivotal question: Do we question the detainees again using a “clean team” of law enforcement personnel in an effort to obtain admissions independent of what they said in CIA custody, or do we preserve the status quo in hopes the military judges might admit some of their earlier admissions? At the same time, and unbeknownst to the prosecution team, the DOD intelligence community at Guantánamo Bay had other ideas, and a tug-of-war began.

In a speech on the afternoon of September 6, 2006, in the East Room of the White House to an audience that included family members of some of the 9/11 victims, President Bush said:

We're now approaching the five-year anniversary of the 9/11 attacks—and the families of those murdered that day have waited patiently for justice. Some of the families are with us today—they should have to wait no longer. So I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been

(May 7, 2004), *available at* http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf (last visited Oct. 16, 2009).

⁵ In a written statement that accompanied his testimony at a House Armed Services Committee hearing on Sep. 7, 2006, on proposed rules for military commissions in the wake of the Supreme Court's decision in *Hamdan v. Rumsfeld*, Acting Assistant Attorney General Stephen G. Bradbury said:

Because military commissions must try crimes based on evidence collected everywhere from the battlefields in Afghanistan to foreign terrorist safe houses, we believe that the Code of Military Commissions should provide for the introduction of all probative evidence, including hearsay evidence, where such evidence is reliable. . . . Court-martial rules of evidence track those in civilian courts, reflecting the fact that the overwhelming majority of court-martial prosecutions arise from everyday violations of the military code of conduct, far from the battlefield. By contrast, military commissions must permit the introduction of a broader range of evidence, including hearsay statements, because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. In this respect, the Code of Military Commissions follows the practice of international war crimes tribunals, which similarly recognize the need for broad evidentiary rules when dealing with evidence obtained under conditions of war.

Dep't of Justice, *Statement of Stephen J. Bradbury, Acting Assistant Attorney General Office of Legal Counsel Department of Justice, Before the Committee on Armed Services Concerning the Supreme Court's Decision in Hamdan v. Rumsfeld*, 5–6 (Sept. 7, 2006), *available at* <http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf> (last visited Oct. 16, 2009).

transferred to the United States Naval Base at Guantanamo Bay. They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.⁶

As President Bush said in his speech, the transfer of the high value detainees from the CIA to the DOD marked a change in focus from a CIA-controlled phase focused on intelligence collection to a DOD-controlled phase focused on prosecution and criminal accountability. The transition was neither smooth nor easy. Years earlier, the decision was made to send some detainees captured in the Global War on Terrorism to Guantánamo Bay so they could be exploited for intelligence purposes in a controlled environment away from the battlefield and at a place some senior administration officials mistakenly believed was outside the reach of the federal courts.⁷ Accordingly, in 2002 the U.S. Naval Station Guantánamo Bay took on two new missions: (1) creating and operating a detention facility for enemy combatants selected for transfer from other detention locations; and (2) creating and operating an intelligence collection program to exploit those detainees. As proved to be the case at Abu Ghraib, mixing two separate and distinct missions at one detention facility can blur the lines of command and control and generate tensions and adverse consequences. Law enforcement's retrospective focus—what has the person already done in the past?—with its well-defined and rigid rules is often at cross purposes with the intelligence community's prospective focus—what is the person planning to do in the future?—and its vaguely defined, situation-driven practices. Trying to merge these two focuses presents the classic square peg and round hole challenge.

By the time the high value detainees arrived in September 2006, the intelligence group at Guantánamo Bay had been in operation for more than

⁶ Press Release, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (last visited Oct. 16, 2009). Prior to President Bush's announcement, we had divided the prosecution team into two parts operating out of separate facilities, with one part of individually selected members with high level security clearances dedicated solely to preparing cases against the high value detainees. This prosecution task force (PTF), as it was called, included prosecutors from the military services, the DOD, and the Department of Justice. The PTF was supported by law enforcement agents from the Federal Bureau of Investigation (FBI) and DOD's Criminal Investigation Task Force (CITF), as well as analysts, agents, administrative support personnel and others from various federal agencies. When I resigned in October 2007 there were more than one hundred people assigned to the PTF on a full-time or part-time basis.

⁷ Those believed to be major figures in the global terrorist network with significant intelligence value went into the CIA program. Some of them were eventually transferred to Guantánamo Bay.

four years, and, predictably, some in the DOD intelligence community were excited to have Khalid Sheikh Mohammed and thirteen other alleged major terrorist figures right in their backyard. A few in the DOD intelligence community seemed to believe that if they had a few minutes alone with Mohammed he would give up information that the CIA had been unable to extract through months of enhanced efforts. The senior leadership of the Prosecution Task Force (PTF) that I led was unanimous in its belief that whatever remote possibility there was of eliciting actionable intelligence at that point was outweighed by the realistic prospect of compounding the problems of already very difficult cases with significant evidentiary and legal challenges. Together we were able to persuade decision-makers at higher levels to order a brief hands-off period where neither the PTF nor the intelligence group had access to the detainees, ostensibly to allow the detainees to adapt to their new environment. During that period we convinced the decision-makers to prevent the intelligence group from interrogating the high value detainees while we prepared criminal charges so the detainees could face justice as President Bush had vowed.⁸ Some members of the DOD intelligence community at Guantánamo Bay were not happy with the hands-off decision.

In an interview with the New York Times in February 2008, former Assistant Attorney General for National Security, Kenneth Wainstein, said that “seasoned prosecutors who [were] very adept at building cases and anticipating the challenges down the road” were involved in developing the high value detainee cases.⁹ I was the Chief Prosecutor for the majority of that period and I agree that both the DOD and the Department of Justice provided their best legal talents to the PTF. I would note, too, that the FBI and CITF detailed exceptional law enforcement agents and analysts to the team as well. It was reported after Khalid Sheikh Mohammed and five other high value detainees associated with 9/11 were charged with capital murder that a “clean team” of FBI and military law enforcement agents had obtained admissions from some of the high value detainees when they were interviewed at Guantánamo Bay “without the use of coercive interrogation tactics.”¹⁰ The decision to create the “clean teams” and initiate fresh interviews was made after much discussion and debate, but it was our collective belief that we did not have much to lose by trying.

⁸ There were several layers of decision-making authority between the PTF and the White House, including a working group and a senior oversight group within the Pentagon, as well as the National Security Council. I never learned who approved our request to block the intelligence group from interrogating the high value detainees.

⁹ Scott Shane & David Johnston, *U.S. Acts to Avert Tactic Expected in Qaeda Trial*, N.Y. TIMES, Feb. 13, 2008, at A16.

¹⁰ Josh White et al., *U.S. to Try 6 on Capital Charges over 9/11 Attacks; New Evidence Gained Without Coercive Tactics*, WASH. POST, Feb. 12, 2008, at A1.

We anticipated three potential outcomes to the clean team effort. In the best case, the detainee would agree to talk and voluntarily provide the same or similar information as that provided while in CIA custody. We hoped “clean” admissions would allow us to introduce the statements made to law enforcement personnel, using them as witnesses at trial, and eliminate or at least minimize CIA involvement in courtroom proceedings. The status quo outcome was the detainee would refuse to talk and we would proceed with what we already had in hand. The worst-case scenario was the detainee would agree to meet with the clean team, but would only talk about alleged mistreatment while in the CIA program. Rather than bolstering the prosecution’s case, allegations of abuse required further investigation and might leave the prosecution in a weaker position.¹¹ We believed a well-prepared interview team with a well-structured script could mitigate the risks by focusing the discussion on the detainee’s own conduct and away from his treatment while in CIA custody.

The most significant task remaining before executing the clean team effort was to craft an introductory advisement—something similar to a traditional law enforcement cleansing statement—that would ensure that the detainee understood his choices sufficiently to demonstrate reliability of the statement at trial if he chose to talk.¹² Since the fate of the high value detainees is unresolved and some form of criminal proceeding is almost certain, I will not go into detail about the introductory advisement in any particular case, but I will make two general observations.

First, I did not watch the clean team sessions with all of the high value detainees, but in the sessions I did observe the law enforcement agents, particularly those from the FBI, went to extraordinary lengths to explain to each detainee that his decision to talk or not talk was a purely voluntary choice and there would be no punishment or reward tied to the decision. In one session I thought the law enforcement agents were going to such great lengths that they risked persuading the detainee to change his mind and switch his yes to a no. I had no doubt that the sessions I observed

¹¹ See Dep’t of Def., Directive 2310.E, The Department of Defense Detainee Program 3 (Sep. 5, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf> (last visited Oct. 16, 2009) (requiring that allegations of detainee abuse be reported and investigated).

¹² See Mil. Comm. R. Evid. 304(c)(2), available at [http://www.defenselink.mil/pubs/pdfs/Part%20III%20-%20MCREs%20\(FINAL\).pdf](http://www.defenselink.mil/pubs/pdfs/Part%20III%20-%20MCREs%20(FINAL).pdf) (requiring that the military judge may only admit an incriminating statement in which the degree of coercion is in question if he or she finds, based on the totality of the circumstances, that it is reliable and has sufficient probative value, its admission is in the interest of justice, and the methods used to obtain it did not amount to cruel, inhuman, or degrading treatment). See also DEP’T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS III-9 (2007), available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>; Military Commissions Act of 2006, 10 U.S.C. § 948r(d) (2006).

resulted from knowing, voluntary consent and it appeared to me that the detainees were relaxed and eager participants in the discussions.¹³

Second, there was debate over whether to include Miranda rights in the introductory advisement.¹⁴ In my view, Miranda rights did not apply and were unnecessary, and they were excluded.¹⁵ In addition to believing them unnecessary, I was concerned that acknowledging that Miranda rights existed in 2007 for the high value detainees would also acknowledge that the thousands of statements obtained earlier from hundreds of other detainees interrogated at Guantánamo Bay without Miranda rights advisements violated those rights, or at least it would provide the fodder for defense counsel's argument on a motion to suppress. The overwhelming majority of the evidence in the cases that were already in development when the high value detainees arrived at Guantánamo Bay—cases we referred to as the “non-high value detainee” cases—consisted of admissions made during custodial interrogations without Miranda rights advisements. If Miranda rights had indeed applied, and if the failure to provide Miranda rights warnings rendered the statements inadmissible, it would be impossible to successfully prosecute the vast majority of the non-high value detainee cases.¹⁶

¹³ Clearly an argument can and will be made that the long period of confinement and harsh treatment that preceded transfer to Guantánamo Bay negated the ability to later give voluntary consent, but my personal observations at the time were that the detainees who participated did so willingly.

¹⁴ See *Miranda v. Arizona*, 384 U.S. 436, 444–46 (1966) (holding that the Fifth and Sixth Amendments require law enforcement agents to advise a suspect in a custodial interrogation of the right to remain silent, that anything said can be used in court, and of the right to consult an attorney and to have the attorney present during questioning).

¹⁵ I believed that alien unlawful enemy combatants held outside the U.S. did not have constitutional rights. I believed then, as I do now, that the rights to which they are entitled are those in Common Article 3 of the Geneva Conventions as further defined in Article 75 of Additional Protocol I. See Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 75, June 8, 1977, 1125 U.N.T.S. 609.

¹⁶ As late as October 2007, I estimated that we would prosecute about seventy-five detainees. At a press conference in July 2009, current Chief Prosecutor Captain John Murphy said he is prepared to prosecute about sixty-six detainees. See Viola Gienger, *Al-Qaeda Suspects at Guantanamo Face Delays in Review*, BLOOMBERG, July 15, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601103&sid=a13CMSW33nlc> (last visited Oct. 16, 2009). That number likely includes the original fourteen high value detainees plus an additional high value detainee, Abd al-Hadi al-Iraqi, who was transferred to Guantánamo Bay in April 2007, leaving about fifty non-high value detainees facing prosecution. See Press Release, Dep't of Def., Defense Department Takes Custody of a High-Value Detainee (Apr. 27, 2007), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10792> (last visited Oct. 16, 2009) (providing information on the transfer of Abd Hadi al-Iraqi). The Obama administration is reportedly considering transferring as many as thirty cases to several U.S. Attorneys for prosecution in the federal courts. See Peter Finn, Jerry Markon & Del Quentin Wilber, *Va., N.Y. Districts Vie for 9/11 Case; U.S. Attorneys Seek Trial of Alleged*

III. CONCLUSION

The Washington Post reported in February 2008 that most of the high value detainees chose to cooperate with the clean teams and only one or two of them declined.¹⁷ The article said the teams of FBI and military law enforcement agents used a non-confrontational, rapport-building approach to facilitate dialogue with those that decided to talk and the discussions continued for days or, in some cases, months.¹⁸ The newspaper's description of the clean team initiative is consistent with my personal observations. In the sessions that I watched, it appeared that the detainees enjoyed talking with the members of their clean teams; in fact, it was not uncommon for there to be some occasional laughter. I never saw any indication of intimidation or fear; to the contrary, in some instances I observed a sense of pride that at times bordered on arrogance. In other cases the dynamic was one of mutual respect, like soldiers from opposite sides sitting down over coffee after the war is over to reflect on their past battles. The question of whether the high value detainees would be willing to talk was soon answered and I began to wonder if they would ever stop.

I believe the decision to create the clean teams and attempt to separate the law enforcement effort from the earlier intelligence collection phase was sound. Will it prove to be a positive factor in eventually bringing these alleged terrorists to justice? That remains to be seen. Admittedly, there is some logic to the argument that you cannot un-ring the torture and maltreatment bell after it chimes, but perhaps with enough time and distance, and a good faith effort to treat the detainees humanely, you can demonstrate that the ill effects were overcome and the subsequent admissions were voluntary and reliable.

The decision I would reconsider if given a chance to do it all over is the one regarding Miranda rights. The detainees with the greatest degree of culpability, the ones that definitely should be held accountable for their conduct, are the high value detainees. If the failure to include Miranda rights proves fatal, then my concern about the impact of rights advisements on the ability to prosecute the non-high value detainee cases was for naught. I believe that the overwhelming majority of the high value detainees would have agreed quite willingly to talk with their clean teams—just as many of them talked at length at their administrative hearings and at their military commissions—with or without Miranda rights warnings. A person who is proud of his accomplishments and believes he has earned glory and honor

Leader Mohammed, WASH. POST, Aug. 4, 2009, at A1. Since there are fifteen high value detainees, about half of the thirty cases under review for prosecution in the federal courts are non-high value detainee cases.

¹⁷ See White et al., *supra* note 10.

¹⁸ *Id.*

will generally not decline a chance to brag, even when he is warned of the potential consequences. To paraphrase one of comedian Ron White's more famous lines, "even if they had the right to remain silent, they didn't have the desire."¹⁹

¹⁹ RON WHITE, I HAD THE RIGHT TO REMAIN SILENT . . . BUT I DIDN'T HAVE THE ABILITY (2007).