

Testimony of

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SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND

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I am law professor at Chapman University School of Law in Orange, California. I am also a soldier -- a Major in the Army JAG Corps, Individual Ready Reserves. I have served three tours in the Global War on Terror, including one in Guantanamo Bay as the legal advisor to the detention camp commander; one as a legal advisor for investigators pursuing world-wide leads in the War on Terror; and one as a prosecutor at the Office of Military Commissions. I have recently published a book entitled *Honor Bound, Inside the Guantanamo Trials* (Carolina Academic Press, June 2008), which is based on my first-hand experiences serving in this Global War on Terror.

STOP RISKING SOLDIER SAFETY IN GUANTANAMO BAY:

As we discuss the Rule of Law this morning, it is important to remember our military troops and our obligation to preserve and protect their rights, too. The United States should interpret the law to help, not hurt, our men and women in uniform who serve and sacrifice every day for this great nation. Unfortunately, that is not happening.

For instance, in Guantanamo Bay, the U.S. Military requires religious accommodation in a way that risks the safety of soldiers. It issues various religious items to each detainee, including a copy of the Qu'ran. But, incredibly, it forbids military prison guards in charge of the facility from even touching the Qu'rans under any circumstances. ³ Not surprisingly, detainees have figured this out and use the Qu'ran to hide weapons, which they use to viciously attack military prison guards. Attacks against prison guards have risen to eight a day. In one year, detainees stabbed military troops with homemade knives 90 times, including cutting a doctor administering aid. (Incidentally, now doctors wear body armor when they treat detainees.)⁴

According to one military police officer who served in Guantanamo Bay, detainees brandish their home-made shanks to threaten U.S. troops, and then quickly shove them back into the Qu'ran, where they

know are "off limits" to guards. Even in this situation, the guard may not touch the Qu'ran to confiscate the weapon.

When the military places certain items off-limits to soldiers running the detention camp, it puts soldiers at risk for serious harm, and it compromises security. An incident at Camp Bucca, Iraq (a U.S. operated detention camp in Southern Iraq, a few miles from the Kuwait border), is just one example. At Camp Bucca, the military erected a tent as a mosque for the detainees, and designated it off-limits to U.S. prison guards running Camp Bucca. The detainees used their makeshift mosque as a weapons cache, where they stashed concrete-shards that they had dug from the concrete around tent poles, and home-made bombs that they had made using human feces, hand-sanitizer and socks. The prisoners attacked Camp Bucca from the inside out. For four days they rioted and seriously injured several U.S. troops. One officer was hit in the eye with a chunk of cinderblock, which fractured his cheek in three places and broke his teeth. One soldier called the violence "absolutely incredible" due to the number of rocks and sheer accuracy.

The attack from inside Camp Bucca continued for several days. The U.S. was forced to call for backup to restore order at its own prison camp. The U.S. foolishly excludes guards from certain areas of the prison camps, and designates items off-limits to U.S. prison guards.

What does the law say about religious accommodation in prisons? The Geneva Conventions say that POWs must follow the military disciplinary routine of their captors in order to preserve their right to religious latitude.⁶ This is similar to the standard applied in U.S. prisons. In *O'Lone v. Estate of Shabazz*,⁷ the Supreme Court said that prison officials could impinge on prisoners' right to exercise their religion for reasons related to legitimate prison management. The court upheld a regulation regarding prisoner work duties that precluded Muslim prisoners from attending religious services on Friday afternoons, as their faith required.

The U.S. should restore the rule of law in Guantanamo Bay, and other U.S. operated detention camps by following the Geneva Conventions and allowing U.S. prison guards to search all items in detainee cells, including the Qu'ran. No place, or item, within our own prison camps should be off-limits to our guards. Doing so is extremely dangerous; neither International nor U.S. law require or authorize this unusual accommodation.

STOP DISCRIMINATING AGAINST FEMALE SOLDIERS IN GUANTANAMO BAY:

When I served in Guantanamo Bay, I was shocked and appalled to learn that the U.S. Military engages in unlawful discrimination against female military prison guards. Because it offends detainees, the U.S. forbids female soldiers from performing all aspects of their job within the detention camp. It forbids

female soldiers from escorting detainees in some instances, or even walking beyond a designated point in a cellblock when detainees are in the recreation yard, lest she catch a glimpse of him - or he of she. Some detainees refuse any interaction with female guards and interrogators. The military accommodates their prejudices and adheres to the cultural mores of detainees, instead of protecting the rights of female soldiers.

The U.S. should not engage in gender discrimination to appease the detainees. What will happen when a detainee refuses to accept a food tray, or receive a vaccine, from a Jewish soldier? Will we discriminate then, too? During WW II we did not discriminate against our Jewish soldiers to appease Nazis; we should not discriminate against our female soldiers to appease detainees who embrace similar discriminatory views.

The U.S. should uphold the rule of law by ensuring that all troops, regardless of their race, religion, or gender, will be allowed to perform all aspects of their job, without regard for the prejudices of our enemies.

HONOR U.S. POWS AND STOP WAIVING THEIR RIGHTS UNDER GENEVA

According to the Geneva Conventions, an enemy combatant is entitled to Prisoner of War Protections when she meets four basic requirements. She must wear a uniform, carry her weapon openly, follow the laws of war, and operate under a legitimate military structure with a chain of command.⁹ In short - she cannot hide that she is a soldier. She cannot pose as a civilian, and operate in the shadows to gain a strategic military advantage. She is a soldier and must hold herself out as a soldier. If she does these four basic things, she is entitled to POW protections if the enemy captures her. The U.S. follows the laws of war, and our soldiers are, without a doubt, entitled to POW protections when they are captured.

On April 9, 2004, terrorists in Iraq attacked a convoy and captured U.S. Private Matt Maupin, an army reservist. It led him away from the convoy, and away from his fellow soldiers. Later, his terrorist captors released footage of Matt sitting on the floor, wearing his uniform, surrounded by masked gunman who forced him to make a statement. Later, the terrorist claimed they murdered Private Maupin. But, it was not until four years later, in March, 2008, that the U.S. military discovered Private Maupin's body.

During the four long years that Private Maupin's family waited for word of their son, the military promoted Matt twice, to Staff Sergeant. But, it refused to acknowledge that Staff Sergeant Maupin was, in fact, a POW. Instead, it gave Staff Sergeant Maupin a title unknown under the Geneva Conventions. It considered Matt "missing" and called him "missing/captured" instead of referring to him correctly as a POW.¹⁰

Staff Sergeant Maupin should be a household name. All Americans should know his tragic story. When he was missing, the U.S. should have reminded our enemies, and our critics, that we still waited for word from Iraqi terrorists about the fate of our beloved missing soldier.

Where was the International Committee of the Red Cross for Staff Sergeant Maupin? What happened to his rights under the Geneva Convention? We welcome the ICRC into GTMO. I was the liaison to the ICRC during one of my tours. We listened to their complaints and answered all of them while I was there. Should not the ICRC lobby to visit the prison camps where our soldiers are being held? Whether one is a privileged combatant (a POW) or non privileged combatant (a non-POW), the Geneva Conventions require that the holding authority treat the detainee humanely. The ICRC is supposed to issue complaints when it does not have the access necessary to determine if detainees are held humanely. But, the ICRC has been silent.

The U.S. should restore the Rule of Law and stop waiving POW protections for our own soldiers. U.S. Soldiers adhere to the Geneva Conventions and, if captured, are entitled to POW protections.

DO NOT TAR ALL SOLDIERS WITH THE BAD ACTS OF A FEW

The U.S. treats detainees in Guantanamo Bay humanely and affords them extensive privileges. Most detainees live in open bays with ten detainees to each bay. They receive twelve hours of recreation time a day, where they can do any number of activities including reading books from their library (which has over 5,000 titles), gardening, checking out movies or board-games, playing ping-pong, basketball, or volleyball, visiting the exercise facility, or even taking classes in English or in their native language. Conditions are so exemplary that when the U.S. offered release to one detainee, he declined and asked to stay. Another detainee asked if the military would consider moving his entire family to Guantanamo Bay.

The U.S. released several detainees to Albania. After a few weeks in Albania, the detainees said they preferred captivity in Guantanamo Bay to freedom in Albania. One Guantanamo Bay detainee said, ". . . If people say that there is mistreatment in Cuba with the detainees, those type speaking are wrong; they treat us like a Muslim not a detainee."¹¹

These are all good stories. The United States seeks to win the hearts and minds of our enemies and demonstrate that we are a freedom-loving nation. That is what we are about. That is how we are trained. What happened at Abu Ghraib was a disgrace. But, the U.S. Military investigated, uncovered the crimes, and brought those soldiers to justice. The military has tried and sentenced over ten soldiers for mistreating detainees. One is serving a ten year prison sentence; another is serving a three year prison sentence. We cannot tar the entire military and every soldier with the bad acts of a few. They do not

represent every soldier.¹² When the barrel is big enough, you are bound to find a few bad apples. And, the military is doing all that is possible to bring those bad apples to justice.¹³

Sometimes politicians have had ethics problems. But, we do not tar the entire Senate with the misdeeds of a few of their colleagues. Instead, we catch them and respond to each violation individually. The same principle applies to our troops and their work in the field. The fact that we catch people doing wrong is proof that the system works.

With respect to detainees in Guantanamo Bay, the rule of law is in full force - and it is working. Congress should not blame every soldier for the misdeeds of a few. It should not blame the military when the system is working. Instead, like what happened at Abu Ghraib, it should investigate any allegations of mistreatment, and bring those individual soldiers to justice.

In closing, I wish to thank the Committee for the opportunity to address this matter. It is important that we uphold the rule of law, and protect our men and women in uniform who are serving and sacrificing for this great nation every day. They are fighting for us - and we should fight for them, too.

¹ KYNDRA ROTUNDA, is the author of *Honor Bound: Inside the Guantanamo Trials*, which is published by Carolina Academic Press (June 2008) and is available on Amazon. Professor

Rotunda formerly directed the Clinic for Legal Assistance to Service members at George Mason School of Law. She and her students successfully represented military families in various legal disputes, including Physical Evaluation Boards and Traumatic Service Group Life Insurance Appeals. Rotunda has recovered hundreds of thousands of dollars for disabled troops. Professor Rotunda is regarded as a leading expert in military law, and was recruited by the National Veteran's Legal Services Program (NVLSP) to produce a series of instructional DVDs about military law. She also authored a coordinating outline, and co-authored NVLSP's forthcoming book regarding military administrative/disability proceedings, to be published by Lexis Nexis. Rotunda began her career in the US Army JAG Corps. She remains in the Army Reserves and holds the rank of Major. Rotunda has served in several missions related to the Global War on Terror. She served in Guantanamo Bay; was the legal advisor to a team of investigators pursuing leads in the war on terror; served as a prosecutor at the Office of Military Commissions; and represented wounded troops at Walter Reed Army Medical Center. She was the lawyer assigned to Jessica Lynch after Lynch's rescue. Professor Rotunda is an avid writer and soldier advocate. She has written op-eds for the *Christian Science Monitor*, *The Wall Street Journal*, *The Chicago Tribune*, *The Washington Times*, and *The New York Sun*. Rotunda is a regular television and radio commentator regarding military law, and the ongoing trials in Guantanamo Bay. She has appeared on over 20 nationally syndicated radio shows, including the Michael Reagan Show, the Dennis Miller Show and the Jim Bohannon Show. Rotunda has also appeared on national and international television news programs, including *Hannity's America*, the *Brit Hume Report*, and *Al Jazeera*.

2 Professor Rotunda's opinions are based, in part, on her experiences serving three tours in the Global War on Terror, including a tour in Guantanamo Bay and one as a prosecutor at the Office of Military Commissions. She does not speak on behalf of the Department of Defense. Her views and opinions are her own.

3 Army Command Sergeant Major confirmed this fact in June 2005, when he testified before Congress. He stated that certain items remain "off-limits" to guards in Guantanamo Bay. He stated, "The rule of thumb for the guards is that you will not touch the Qu'ran. . . that's the bottom line." Kyndra Rotunda, HONOR BOUND INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, 2008), citing Donna Miles, Joint Task Force Respects Detainees Religious Practices, DEPARTMENT OF DEFENSE, AMERICAN FORCES PRESS SERVICE, June 29, 2005.

4 Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), discussing and citing Richard Miniter, Deadly Kindness, NEW YORK POST, September 15, 2006.

5 Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), discussing Steve Fairnau and Anthony Shadod, In Iraq Jail, Resistance Goes Underground, WASHINGTON POST FOREIGN SERVICE, WASHINGTON POST, August 24, 2005 at A 01.

6 Third Geneva Convention, Relative to the Treatment of Prisoners of War Chapter V, Article 34, August 12, 1949, stating, "Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate premises shall be provided where religious services may be held."

7 O'Lone v. Estate of Shabazz, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), on remand 829 F.2d 32 (3d Cir. 1987).

8 Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), citing ROTUNDA AND NOWAK, TREATISE ON CONSTITUTIONAL LAW, Vol. 5 sec. 21.6, fn. 25 (Thompson West, 3d ed. 1999).

9 Third Geneva Convention Relative to the Treatment of Prisoners of War, Article 4, August 12, 1949.

10 Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008). See also www.yellowribbonsupportcenter.com

11 Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), citing JTF GTMO Information on Detainees, 4 March 2005, available at <http://www.jtfgtmo.southcom.mil/>.

12 Kyndra Rotunda, Honor Bound: Inside the Guantanamo Trials (Carolina Academic Press, June 2008), discussing the sentence and trial of Charles Garner and Lynndie England.

13 It is important to note that the abuses at Abu Ghraib did not occur in the context of approved interrogation methods. See Kyndra Rotunda, HONOR BOUND: INSIDE THE GUANTANAMO TRIALS (Carolina Academic Press, June 2008), citing and discussing, The Church Report, Unclassified Executive Summary at 3, which concludes, "none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater."