The Abuse of (Our) Power - through the Looking Glass of Guantanamo Bay

Good evening everyone. Thank you so much for being here tonight, showing your support and your commitment to our civil liberties. And thank you for having me - it is truly an honor to be here.
This is a challenging time for civil libertarians.
It is a challenging time for those of us who believe in limits on government power.
For those of us who believe there are fundamental freedoms no government can take away from us.
For those of us who believe that checks and balances, and the separation of powers is more than a school house rock jingle.
We unfortunately live in a time in which "extraordinary rendition" appears not to be extraordinary at all. And it is not a far-off practice of third world dictatorships - this is our government spiriting people to black prisons in undisclosed countries. Committing "terror suspects" to the custody of governments who are known to employ torture. Because, as we all know - because our executive says so - the United States does not torture.
We live in a time of assertions of unfettered executive power in "wartime", and executive privilege to eavesdrop on us - because it is for our own good.
A month ago, a van with the markings of the RCN cable company was parked in front of my house. It was 7 a.m. on a Sunday, and a "technician" was working on the cable and phone lines in front of my house. I hadn't called him. When I tell you I think the government was tapping my phone and cable internet lines, you are more likely to nod your heads than to haul me off to get my head examined. Those are the times we live in.

Indeed, have you read these past few days about the Vermont lawyer with a similar problem? He is a colleague of mine working on the Guantanamo litigation - he and his firm had to write a letter to all of their clients notifying them that none of their phone or email communications are secure and confidential because someone had tapped the phone lines and was monitoring the computers. They believe they have evidence pointing to the government. With the help of the ACLU, he is fighting back. But these are the times we live in.

In the name of an apparently limitless War on Terror, we are witnessing relentless abuse of power by the executive and, frankly, simple cowardice by the judiciary and congress.
But that is a gigantic topic, and I am here to talk more narrowly about one small piece of it, a piece that I think captures much of the essence of the civil liberties crisis facing us at this moment in history.
For the past two and a half years I have been representing several prisoners of the United States held at the US Naval station at Guantanamo Bay, Cuba - Gitmo. My clients are all Uighur men - members of a moderate Muslim minority group from far western China. They are in their sixth year of imprisonment, wrongly branded enemy combatants by a military tribunal. Ironically, they have been cleared for release for years, but are in solitary confinement at Guantanamo even as I speak. I will return to them in a moment.
But first, I think the best way to study Guantanamo is to ask the question, broadly, just who is at Guantanamo, anyway? Who are these 330 men who are there today.
Well, the government has certainly tried to tell us who is there.
Secretary Rumsfeld told us over and over they are "the worst of the worst."
Vice President Cheney says the Guantánamo Detainees are "people we picked up on the battlefield, primarily in Afghanistan. They're terrorists. They're bomb makers. They're facilitators of terror. They're members of al Qaeda and the Taliban."
Former Chairman of the Joint Chiefs of Staff General Richard Meyers said "these are people that would gnaw through hydraulic lines in the back of transport plane to bring it down."

I don't think you will be surprised to learn that the rhetoric does not line up with the facts.
Scholars looking at this question – Who is being held at Guantánamo –published a comprehensive study analyzing the Military's own records of the "Combatant Status Review Tribunals" that were conducted in Guantánamo to separate the enemy combatants from the chicken farmers.

Here is what they found.

VP Cheney says the men are Al Qaeda fighters. What do the Military's records show? Only 8 percent are accused of being al Qaeda fighters.

VP Cheney says the men at Guantánamo were picked up on the battlefield. What do the military's own data say? Only 7% were picked up by U.S. forces.

A reasonable person might say, well wait a minute. If that's so, how did all the rest of them get there?"

Consider a leaflet that US forces distributed throughout Afghanistan and Pakistan in 2001 and 2002, written in the local languages: And I quote: "Get wealth and power beyond your dreams. You can receive millions of dollars helping the anti-Taliban forces catch al Qaeda and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life." That's right - Leaflets and bounties. That's how these men got there. And how do we know these leaflets were really distributed? Let me give you another quote: "These leaflets are falling like snowflakes in December in Chicago." Thank you Don Rumsfeld.

Now consider another statistic. Vice President Cheney says that the Guantánamo detainees are there because they committed a hostile act against Americans or their allies. What do the military's records show? 55% committed no hostile act at all. Now when I first saw this statistic I thought to myself, well, that's still 45% who DID commit a hostile act. Until I saw the kicker – running to seek shelter from bombs falling on your village is a hostile act. And consider some of the other factors on which the military based its decision to detain someone as an "enemy combatant". People who wear a Casio watch. Anyone wearing olive colored clothing. Visitors at a hostel or guest house. These are the allegations on which the CSRT panels were asked to, and did, determine that the men at Guantanamo are enemy combatants.
Do you know how many have been charged with a crime? 10.
Know how many have been convicted? Australian David Hicks

> Vicious enemy combatant. Too dangerous to let him see the inside of a real court. He pled guilty. The sentence handed down by our military? 9 months. By agreement, he is now serving his sentence in Australia and will be free by Christmas. A vicious killer, we are told.

One of the unluckier men at Guantanamo was "liberated" by US forces from a Taliban Dungeon, where he had been held for three years because Taliban believed he was a Saudi Spy sent assassinate Osama bin Laden. I have heard it said that the enemy of my enemy, is my friend. At Guantanamo, it seems, the enemy of my enemy is an Enemy Combatant subject to indefinite imprisonment.

But, on to my clients. The Uighurs, an ethnic Muslim minority from the far western reaches of China, a region they call East Turkistan and the Chinese call Xinjiang province. They have long sought greater autonomy from Beijing, and have suffered brutal repression for their peaceful political dissent. They look to the United States as a beacon of hope.
So, how in the world did these men get to Guantanamo?
My clients are among those who were picked up by bounty hunters and sold to US forces in Pakistan, we believe for $5000/head. You see, a group of 18 Uighurs had been living in a settlement in Afghanistan. When the bombs fell in late 2001, they fled and eventually made it to Pakistan. A friendly tribe took them in, fed them, bathed them, and handed them to the authorities in the dark of night. All 18 Uighurs were shipped to Guantánamo.
As a reasonable person you might ask, what did our government care about these hapless Uighurs? The answer lies in China.
Since 9/11, Communist China has been exploiting our "war on terror" to condemn its political dissident Uighurs as terrorists. But the State Department's annual human Rights report said this was wrong. In December 2001 a department spokesman said "We don't consider the Uighur groups as terrorists."
In the summer of 2002, everything changed. The administration had begun a massive diplomatic press to prepare for the invasion of Iraq.
On August 25, both Deputy Secretary of State Richard Armitage and Saddam Hussein's foreign minister raced to Beijing seeking support for their respective positions. Armitage beat him there by a nose. We know they discussed the topic of the Uighurs.

Two weeks later, the US declared that the Uighur political organizations were now terrorist. One week later, Chinese interrogators were welcomed to Gitmo to interrogate my clients. Five weeks later, President Jiang Zemin visited President Bush at the presidential ranch in Crawford Texas, and let it be known that if we invaded Iraq, China would remain on the sideline.
And my guys were stuck at Guantanamo.
But a good listener might say, wait, you told us about the CSRTs, the Combatant Status Review Tribunals. Everyone at Gitmo got one, Right? Your clients had a CSRT hearing, right?
Right! And here's how they worked.
The detainee sat in front of a panel of three military officers, his legs shackled and chained to an iron stud in the floor. The panel read a series of allegations to him, such as "you lived in Afghanistan, right? And you fled the bombing of your village, right?"
The prisoner is presumed to be an enemy combatant, and the government's allegations are presumed to be true.
If there was any actual evidence, the detainee was not allowed to see it. The detainee was not entitled to counsel. Translation was catastrophic. Because Uighur translators were hard to come by, an Arabic speaker was used for at least one of our clients. He kept told the panel that the Uighurs had long struggled for independence from China. The Uighur word for "struggle" unfortunately, is nearly identical to the Arabic word for "armed battle". And sure enough, in his hearing transcript it is reflected that he self-described as a soldier.
But I've not yet told you the worst part about the CSRT. It turns out that the CSRTs recognized the concept of "do-overs". We all remember do-overs from when we were kids right? If you foul something up the first time, just do it over until you get it right.
Well, the DoD imported that little trick into Gitmo. We know of one detainee whose CSRT panel found him to be a non-combatant. Washington did not like the result, and sent it back for another CSRT. The second CSRT also found him to be a non-combatant. Undeterred, DoD sent it back again, and a panel finally found him to be an EC. Third time is a charm, I guess.

Do-overs infected the Uighurs' CSRTs as well - we know of at least two Uighurs who were first found to be NEC, then later were labeled EC after a second CSRT. But the Uighurs presented an even bigger problem for DoD. Remember I told you that 18 Uighurs were captured together - as a factual matter, their stories and situations were identical. But different CSRT panels were reaching different results on indistinguishable facts.
Let me read you the text of an internal email among members of the DoD department supervising the CSRTs: "Inconsistent results will not reflect well on OARDEC (office for the administrative review of the detention of enemy combatants). By classifying the Uighurs as enemy Combatants there is an opportunity to further exploit them here at Gitmo." Regrettably, I am not making this stuff up.
And the most agonizing fact about my clients' situation? Since at least 2003, various representatives of the government, including then-Secretary of State Colin Powell, have publicly admitted that the Uighurs should never have been picked up in the first place. Nearly six years later, we still cannot get the military to release them.
So what is it like for an innocent man at Guantanamo?
My clients live in Camp VI
On the bright side, it is brand new, and sparkling clean. It is a state of the art facility. In the US, we call it a Super-Max facility.
The men are in solitary confinement. The live in solid metal cells. No windows. No natural light or air. No way to communicate with any other prisoners. Here they are kept for 22 hours a day. For the other two, they are offered the chance to move to a 3x4 meter space in the middle of the facility, surrounded by concrete walls two stories high. It is essentially a chimney. These two hours might be presented at any time, day or night. They can see the sky up above, and if it is day time, they might even catch a glimpse of the sun. With apparent irony, the military refers to these two hours as "rec time". During this time, there might be another prisoner in an adjacent rec pen, and for those two hours, the men can speak to another human being.
Otherwise, they are completely alone. The men are forbidden to have newspapers, radio, or news of any kind. The military forbids them even to possess English language learning materials, as though these men who were picked up by mistake might somehow become dangerous if they learn to say Please and Thank you. The men do not have names. They are known instead by a number. Nor do their jailors have names –

the name tag on each soldier's uniform is covered with a piece of black tape. They have had no contact with their family for nearly six years. One client asked us to tell his wife to remarry. Another is literally losing his mind - he hears voices, has uncontrollable ticks and body movements. He is utterly broken.

So, what have I and my colleagues been trying to do about all this. It used to be that lawless executive imprisonment could be remedied through a habeas corpus petition. It used to be that the Federal Courts were a refuge where such unlawful detention could be challenged, and ended. And so in 2005 we petitioned the Federal court in Washington DC for writs of habeas corpus directing the Executive to explain the legal basis for detaining our clients indefinitely, and without charges. In the absence of such legal basis, the law of Habeas Corpus requires the government to release our clients.
It might not surprise you to learn that the Executive has furiously opposed the petitions, and refused to explain itself.
What may surprise you, is that the courts have miserably failed to exercise their constitutional duty to stand up to the Executive. Judge after judge after judge has granted the government's requests to delay ever holding a hearing in which the government would be forced to justify the detention of the men at Guantánamo. Instead of ordering hearings, instead of ordering the Government to come forward with something, anything to justify the indefinite imprisonment of innocent men, the courts have by and large capitulated to the Executive's strategy of calculated delay. We could not make progress in the district court, and the court of appeals proved even more unwilling to stand up to the Executive branch.
This is not the first time in history that our courts have failed to come to the aid of innocent men like the Uighurs, and to do what we know justice requires.

In 1949, the Supreme Court heard the case of a man named Ignatz Mezei. He was Romanian by birth, but had lived in the United States as a resident alien for 25 years. He traveled to Romania to visit his dying mother. Upon his return, he was stopped at the border and sent to Ellis Island. Mezei filed a habeas petition. Throughout the litigation in the district court, the court of appeals, and the US Supreme court, the government refused to reveal the grounds for excluding him from the country other than to say it was "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." Citing his travel "behind the Iron Curtain" the Supreme Court ultimately denied Mezei's petition and thereby authorized his indefinite detention at Ellis Island. Justice Jackson wrote a blistering dissent eerily predictive of where we find ourselves today. "Fortunately," he wrote, "it is still startling in this country to find a person held indefinitely in executive custody without accusation of crime or judicial trial." The constitution requires that no person shall be deprived of liberty without "a fair hearing and fair notice of the charges. It is inconceivable to me that this simple measure of justice and fair dealing would menace the security of this country. No one can make be believe that we are that far gone."
Back to the present day.
You may be aware that Congress too has tried its hand at ensuring that the men at Guantanamo will not see justice. In 2006, Congress passed and the president happily signed an act that strips the right of habeas corpus from all Guantánamo detainees. So if unlawful executive detention and impotent courts were not enough, just to put the nail in the coffin Congress acted to ensure that no detainee could ever even see the inside of a court room to challenge the legality of his detention. The DC Circuit court of appeals held that the statute is constitutional.
With that, I'd like to come back to the question a posed at the outset - Who is at Guantanamo, because I think we've got enough to take a stab at answering it.
A handful of al-Qaeda and Taliban, but for the most part, no terrorists at Guantanamo.
So who else?
Men such as my clients, whom the military admits were picked up by mistake.
Enemies of our enemy, like Saddiq, the man whom the Taliban accused of plotting to kill OBL.
Fehti Boucetta, an Algerian doctor who was picked up in Pakistan where he had been performing relief medical work for a charity akin to Doctors without Borders.
Goatherds, chicken farmers, drivers, cooks who have been branded terrorists, a stain they might never be able to scrub off as long as they live, assuming they ever see the outside of Guantánamo.
These are the men who are actually, physically detained at Guantánamo.

But I have thought about this question a lot over the two plus years I've been involved in these cases and beyond the men who are at Guantanamo, it has become clear to me that all three branches of our government are there in one way or another. All three are responsible for the horror that is Guantanamo. But this has led me to an even more uncomfortable realization.

This is not about republicans, and Democrats. It is not about an abstract concept called "the Government." It is about us. It is about we, the people. It is not enough to point a finger at the President, or his advisors, or Congress. We are the government.

And it is not enough to hope that regime change will make the difference. Did you read or hear in the past few days that the democratic congress is poised to reauthorize most of the worst of the worst of the Executive's eaves-dropping program? These are the people who were supposed to save us from this madness. And have you been listening to the presidential candidates, democrats and republicans? None of them is ready to lead us out of this. None of them is a leader. They all follow the political winds. Every word they choose is coldly, carefully calculated to win votes. And I am afraid that the sad truth is they have calculated that standing up for civil liberties is not the path to the White House.

So there is a great challenge here for us. There is a great challenge here for the ACLU. And it has to be a multi-faceted approach. We, the ACLU,. need to continue to use the courts, to use litigation to protect civil liberties. We need to continue to lobby and educate members of congress. And yes, I think we do need to work for regime change. But I think our biggest challenge is to get our fellow citizens on Board. Our elected officials need to hear the we the people insist on robust protection of our civil liberties, and that we the people believe if we treat civil liberties as optional, we have utterly failed and have given up the essence of what makes this a truly remarkable country. If we don't have our fellow citizens with us in that message, I don't believe many of our elected representatives have the courage to end the abuse of power that we see everywhere from Guantanamo to a lawyer's office in Vermont. It is our power. And we are witnessing the abuse of our power. We need to reclaim our power.

Now, I have to apologize. I've been preaching at you for some time now, and it's not even Sunday morning. So I'd like to end on a slightly lighter note. I've told about the nightmare my clients are living. But for the most part, these remarkable men, through it all, have managed to keep their humanity. And the evidence of this was no stronger than it was each time we said hello and goodbye in our meetings, with bear hugs, and with the Uighur words of greeting – Yakshi mu sisz, which means, roughly, Be Well. The words are spoken with a passion that says not just Be Well, but I am Well Too, and Things will be OK. And so, in a small sign of solidarity with the Uighurs who are in Camp VI tonight, I hope you won't mind repeating after me, in Uighur fashion Yakshi mu sisz! Thank you very much.