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## **An Interview with Guantánamo Whistleblower Stephen Abraham, Part 2** **by Andy Worthington**

In the first part of this interview with Lt. Col. Stephen Abraham, Andy Worthington, the author of [\*The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison\*](#), examined why the government's allegations against the prisoners at Guantánamo are unreliable.

A veteran of U.S. Army intelligence, Lt. Col. Abraham worked for OARDEC (the Office for the Administrative Review of the Detention of Enemy Combatants), which was responsible for conducting the Combatant Status Review Tribunals (CSRTs) at Guantánamo, from September 2004 to March 2005. The tribunals, which were tasked with determining whether the prisoners at Guantánamo had been correctly designated as “enemy combatants,” who could be held without charge or trial, have been widely criticized for preventing the prisoners from having legal representation and for relying on secret evidence that was withheld from the prisoners.

However, it was not until last June, when Lt. Col. Abraham filed a [statement](#) in connection with one of the Guantánamo cases, that a former insider confirmed that the gathering of materials for use in the tribunals was severely flawed, consisting of intelligence “of a generalized nature — often outdated, often ‘generic,’ rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals’ status,” that “what purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence,” and that the whole system was geared towards rubber-stamping the detainees’ prior designation as “enemy combatants.”

As I mentioned in Part One, Lt. Col. Abraham's analysis of the failures of the tribunal process has recently assumed renewed significance, as a number of commentators — including reporters at the [\*Weekly Standard\*](#), and researchers at the Brookings Institution ([PDF](#)) — have made the mistake of taking the government's allegations at face value, and have stepped forward to warn Barack Obama that his promise to [close Guantánamo](#) will be difficult to fulfill, because, according to the government's allegations against the remaining 252 prisoners, a significant number of them are connected with al-Qaeda, or were otherwise involved in militant activity.

In the second part of the interview, Lt. Col. Abraham continues to demonstrate — on many different levels — why the government’s apologists are misguided.

**Andy Worthington:** Moving on the judicial decisions in the last six months, I wondered if you could talk a little about the Supreme Court’s ruling, in June, in [Boumediene v. Bush](#), that the prisoners had constitutional habeas corpus rights, and another important ruling in the same month, when, in [Parhat v. Gates](#), an appeals court ruled that the evidence against Huzaiifa Parhat, one of 17 Uighurs at Guantánamo (Muslims who had traveled to Afghanistan to escape Chinese oppression in their home province, had been caught up in the chaos of the US-led invasion in October 2001, and had then been sold to US forces) was inadequate, and that the government had failed to establish that he was an “enemy combatant.”

**Stephen Abraham:** These two decisions represent a remarkable moment in our history, not merely for what they have to say about the rights of a few detainees, but, instead, because of what they say about us, individually and as a nation. In *Boumediene*, the Supreme Court upheld the habeas rights of the detainees. But what was implied in the opinion is the notion that such a right can be denied no one, if not a detainee. Importantly, from this emerges the principle that certain rights really are inalienable, that they are not created by governments, that they are not indulgences to be dispensed and easily withdrawn, and that they may be abridged only under the most extraordinary circumstances.

*Parhat* represents, perhaps, an even more extraordinary moment, because of the judges’ comment that the government was not to be taken at its word. That is, just because it was said does not make it so. This statement resonated strongly with me because of the presumptions that overshadowed everything done at OARDEC. The tribunals were conducted in the shadow of irrebuttable presumptions, rules of play that could not be challenged. We were to presume the information we were given to be complete, accurate, uncontestable, and applicable. With that as the starting ground for the tribunals — or, for that matter, any administrative or judicial hearing — how could you possibly have an outcome other than was dictated by the convening authority, in this case the very government intent on keeping the detainees indefinitely?

If you’re engaging in a criticism of the administration, the CSRTs are such a small thing that they’re barely noticeable, but if you talk about *Parhat* as the clearest demonstration of hubris, of indifference to the Constitution, of antagonism towards constant principles, it is perhaps, in the eight years of this administration, the best example you will ever find, and probably the best example in the history of our nation.

These two decisions, separately and together, represent an incredible moment in our history, a moment when our government was reminded of the fact that it was and is not an institution above the laws by which we all exist and not an institution beyond the limits that we as citizens granted.

**Andy Worthington:** As you and I know, *Parhat* was one of the hollowest stories of the lot, but in general I know that the whole saga of the “classified evidence” is also hollow in so many cases, and that the vast majority of the prisoners were either completely innocent men caught in the wrong place at the wrong time or a bunch of Taliban foot soldiers who knew nothing about al-Qaeda.

**Stephen Abraham:** OK, but if what you want to do is make the story of Guantánamo about people wrongfully held, then to my mind it is not only ultimately not a compelling story, it’s not a very significant story. By that I mean, this world has seen millions of injustices. Even now, we could limit it to a day and find a million injustices. What is so amazing about this story is that a President, an administration — with the complicity of every citizen — was allowed to absolutely shred the limitations on executive power, and in doing so show a flagrant disregard for fundamental human liberties. Not just rights, but the very essence of what entitles a human being to be respected as such.

Think of Guantánamo as the first experiment in a much larger experiment, in which the ultimate conclusion that the administration hoped to reach was that human beings are little more than vassals, that they exist, they stand on the earth, only as the result of a royal indulgence. I mean, that’s really the issue. And as *Parhat* demonstrated, the presumptions of the validity of the evidence melted away. Finally, here was a Court that got it. Just because the government says it’s so doesn’t make it so.

**Andy Worthington:** Well, exactly, but also because it took so long to get to point where a court was enabled to review the evidence.

**Stephen Abraham:** What we ultimately need to get to, where you have an adversarial process, is a declaration by a court that there are, firstly, no irrebuttable presumptions, that irrebuttable presumptions are an anathema in a system that, at its core, relies on, and claims to give regard to due process. You can’t have due process and irrebuttable presumptions, which lead to the certainty of a conviction, or a designation [as an “enemy combatant”]. Secondly, with respect to rebuttable presumptions, there must be certain limitations: they cannot relate to the weight of the evidence, to the quality of the evidence. You can’t say, “I *presume* this evidence to be valid, I presume the source to be beyond reproach,” because in that regard all you’ve done is give another name to an irrebuttable presumption.

And this is what OARDEC did. You can say anything you want as a detainee, but you may not contradict any of our “facts.” Why participate? That was the truly offensive element of what was going on. It wasn’t that we were told to reach a decision; rather it was that we were told to reach a decision based on a one-sided presentation of evidence that we were not allowed to question. And our tribunal — the tribunal I served on — said no.

**Andy Worthington:** Could you explain just a little bit about the tribunal that you served on, in which you and your fellow tribunal members decided that the prisoner in question was not

an “enemy combatant”? This is another extremely important aspect of the rigged nature of the tribunals, of course, because you were then asked to change your opinion, and when you refused, you were never asked to serve on a tribunal again, and a new tribunal was convened which reversed your decision.

**Stephen Abraham:** Deciding the fate — what we thought would be deciding the fate of a Libyan of no particular significance [[Abdul Hamid al-Ghizzawi](#), still imprisoned at Guantánamo]. We were given information relating to, or what I presumed would be relating to the individual that was the subject of our tribunal. The information related in very few respects to his pre-detention history. It spoke in very general terms of the organization of which he was said to be a member [the Libyan Islamic Fighting Group]. The information on the organization was extremely generic. It related to an organization that was antithetical to the interests of the standing government of Libya, a rather curious situation, in that I always thought that the enemy of my enemy is my friend. And yet, for whatever reason, it had been listed as an organization associated with terrorist activities. There was absolutely nothing in the information to suggest that he had in any way been closely associated with, or had acted in any way that facilitated or contributed to terrorist activities. Nor was there any information that was linked to him directly, or that linked him to al-Qaeda, to the Taliban, or to anything else.

**Andy Worthington:** So there was not even any kind of thread drawn to any terrorist organization?

**Stephen Abraham:** No, it was absurd. Six Degrees of Separation.

**Andy Worthington:** But with Huzaifa Parhat, for example, the allegation was that the Uighur resistance group (the East Turkistan Independence Movement) was associated with al-Qaeda by two degrees of separation, even though there was no evidence linking Parhat or any of the other Uighurs to the group itself. Was it not the same with the LIFG?

**Stephen Abraham:** Let me give you an extraordinary connection, the very nature of which I think is irrefutable. I was in Paris in 1975. So was Ayatollah Khomeini. Do I need to go any further?

**Andy Worthington:** But this is interesting as well, Stephen. Just to digress for a moment, the study of the prisoners that the Seton Hall Law School undertook ([PDF](#)) — and I also covered this topic in *The Guantánamo Files* — established that prisoners were accused of associations with supposed terrorist groups that weren't on any official terrorist exclusion lists.

**Stephen Abraham:** OK, but I have to say this: We need to be very careful, because, in having tallied the indicators of criteria that were set forth within the Unclassified Summaries of Evidence that were presumed to form part of the basis for the determination of whether somebody was or was not an “enemy combatant,” what people need to understand is that many of the criteria that were used came from a static checklist. So in terms of a more refined narrative, there in fact might have been no indicators that the criteria used were most appropriate. The problem

was that they were the only criteria that were available, so they essentially were checked off. They were close enough.

So we have to be very careful not so much for the individuals for whom there was an absence of the criteria, but those for whom there is alleged to have been a presence of the criteria, because to say that somebody is associated with the Taliban is fine as a checklist response, but the problem is that, unless you know what the evidence is that led to that conclusion you really can't even decide from the presence of the checkmark in that box that it is a valid assessment. And the problem is that for most of the detainees, even the criteria by which they were ultimately concluded to be "enemy combatants" are, I think, based on incomplete information — on information that doesn't rise to the level of probative, competent, material evidence — and a lot of false syllogisms.

**Andy Worthington:** And you know, presumably, about the "low evidentiary hurdle" that was established as part of the tribunals.

**Stephen Abraham:** The evidence — you know, I wish that we would stop using the word "evidence" because we give to the material that presented the imprimatur of validity. Most of the information, most of the material didn't rise — in terms of a lawyer's perspective, a litigator's perspective — to the level of evidence, either qualitatively or quantitatively.

I think if we want to describe what OARDEC did, first it's OK to call it a tribunal, but I think there are other words that should not be used. I think "findings" should not be used. For example, you can reach a conclusion on fundamentally or inherently unreliable information, but I wouldn't call it a finding of fact. I wouldn't call what was done a legal process. I would avoid using words that really are terms of art within the legal community, because they give a false sense of comfort: "They received evidence, so it must have been OK." No, they didn't receive evidence; they received material, the quality of which was never competently vetted. Nobody could speak for any of the necessary elements of information before it would be admitted in any court, and it's fine to say, "well, this isn't a court of law," but at the very least it was a body — presumably of sound reason and of judgment well exercised — and if that was going to be the case you would certainly not have expected that what would be accepted would be the word of anybody who could just walk off the street and say, "That man's guilty." What is this, the Queen of Hearts?

**Andy Worthington:** That's a very good point. And given that this was not supposed to be a legal process, but was supposed to be an administrative process that would stand up to outside scrutiny and that would justify itself, the important thing that you did, as somebody who had taken part in the process, was to say, "this does not stand up to any outside scrutiny whatsoever, so how could this possibly be any substitute for a valid legal process?"

**Stephen Abraham:** And really, in your last comment, you make the point. Let's get rid of the notion of an administrative board, because, you know, it's terms of art again. It's a board that's

going to reach a decision based upon the presentation of factual matters. At the end of the day it has to be only one thing: fair. It only has to be fair. The problem was, these hearings were never set up to be fair, and when there is the risk that a hearing will not be fair, it is important that it be transparent, it is important that it be capable of review, it is important that the processes can be evaluated for the degree to which they comport with clearly defined procedures established before the hearings begin. You can't take a person and say, "I will now give you the kind of proceeding to which you're entitled based on what I've already decided about you."

**Andy Worthington:** Moving on, I wanted to ask if you thought that your statement about the tribunals, which was included as a submission to the Supreme Court, made a difference to what the judges decided about the rights of the prisoners in *Boumediene*.

**Stephen Abraham:** I don't know. Unfortunately, the Supreme Court didn't decide that the tribunal proceedings — which were the subject of its review — were a sham. The judges didn't argue the quality of the evidence. If they had, I would have said, "My God, I guess my submission made a difference, because I said the stuff was a joke." All I can say is that the Supreme Court had denied the petition for review, had denied the petition for writ for certiorari, then there was the request to reconsider. Now these are *always* denied, but in this case it wasn't.

My declaration was not on the first brief. It was on the last brief. It was after the government had responded. You know, you look to what is unique about this, that in some way affected the minds of two justices — or at least one — and you know the declaration was unique, but it spoke to facts, and I know, as somebody who's practiced before the Supreme Court, that they rarely listen to the factual pleas. They want to know something broader, they want to know something that relates to legal issues, constitutional issues, and here's this crazy brief that's arguing facts. Certainly, it's different, and I wonder how many petitioners are now going to submit declarations with their petitions for reconsideration, but the fact is that I don't know if it had any influence. What I do think is that the justices looked at all of the briefs together, with all the materials that were submitted, and they said, "Enough is enough."

**Andy Worthington:** Excellent. I really wanted to ask about that, because it was my understanding that you came from a slightly different field from the habeas lawyers, and you were somebody who had been there — inside the tribunal process — who said, "By the way, while you're thinking about this, you might want to read my dozens of reasons that I'm going to put before you explaining why the whole tribunal process was a sham."

I think we're going to have to wind up soon, Stephen, so thank you very much indeed for your time. Before we finish, however, is there anything we haven't touched upon that you wanted to mention?

**Stephen Abraham:** I was thinking about habeas corpus, and I was thinking that when we say habeas corpus, we understand it to be inseparable from notions of fundamental human rights, and when the Supreme Court was [discussing](#) this, a year ago, six months before they delivered

their verdict in *Boumediene*, I couldn't understand how they were having a debate for a half-hour about what I think was, by the nature of their discussion, a profound limitation of that right. To ask what the statutory basis is, or what the common law basis is, for the notion that a person is not born free, and does not have an immutable right to dignity and liberty (absent the legitimate exercise of the powers of state) was, I thought, a confession of the absence of the appreciation of that right.

**Andy Worthington:** Do you not think that Justice Scalia was playing into the hands of [Dick Cheney and David Addington](#), and their desire to institute unfettered executive power? What struck me most about some of the exchanges in the oral hearing last December was that to varying degrees some of the justices were perturbed or outraged about the fact that they understood that that's what the executive was trying to do, that the executive branch was trying to eliminate their part in the balance of powers in the United States.

**Stephen Abraham:** And that was really the funniest thing. If you look at what the Supreme Court did, 50 years from now people are going to wonder how this case should be characterized. And it will not be a fundamental liberties case; it will be a separation of powers case. And that's the problem with it, because what gave rise to *Boumediene* was an administration that was turning an immutable right into a conferred right. That is the danger of the exercise of power, manifested by Guantánamo. Guantánamo's merely an example of it, but the fact is that the moment you make liberty a conferred right you can eliminate it, you can suspend it, you can terminate it, but more importantly you can identify the moment of its creation.

That's the worst part about it, because our government exists not by right but by consent, and it never had the power to create the right of liberty and of due process. Those are constraints on its exercise of power, and what the administration did was it reversed that, it said we have due process because we give it to you, because we created it and we can take it away. You have liberty, not because it is an immutable, fundamental right, but because we created it, and we gave it to you and we can take it away. And I hope that the five justices understood that to be the linchpin, the core, the thrust of the decision, and not a separation of powers issue.

The administration will change. Change is inevitable. But like a stream, the passage of water alone does nothing to change the nature of the water itself. If we make the issues of the last eight years the fault of particular men in a particular time and at a particular location, we will have missed an important lesson of what happened.

The rights of individuals were denied, the essence of those rights disparaged. This happened not because men made it happen, but because we let it happen. It happened not because we surrendered our rights but because we allowed others to redefine them in a way that foreclosed their exercise by others. It happened not because Guantánamo existed but because we allowed such institutions to be created. Closing Guantánamo is a symbolic act that will do nothing to eliminate the ground on which tyranny gains its foothold.

As we are reminded in the words of [Martin Niemöller](#), each of us has the duty to speak for those for whom no one else has spoken. Where silence reigned, injustice found foothold. It is up to each of us to speak. It is up to us to ensure that institutions beyond the reach of laws exist nowhere on this earth. But more importantly than the bricks and mortar by which we build prisons, it is up to us to demand respect of law by all who govern and the dignity of all humans by all who are governed.

*Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison](#) (published by Pluto Press). Visit his website at: [www.andyworthington.co.uk](http://www.andyworthington.co.uk).*

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