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Panel: Trying Enemy Combatants

*Introduction provided by Ida Bostian**

Since the terrorist attacks of September 11, 2001, there has been a fierce debate among policymakers and others regarding the appropriate treatment of suspected terrorists who are detained by the United States. Among the hottest issues in this debate is whether these suspects should be tried for war crimes or other offenses and, if so, what substantive and procedural protections should apply in their trials. While some suspects have been processed through the civilian criminal justice system, the Bush Administration has also sought to try others by special military commissions. The Administration's first efforts in this respect were struck down by the Supreme Court in June 2006, in part because the President's plans violated both domestic statutes as well as the Third Geneva Convention of 1949. However, within a few short months Congress passed the Military Commissions Act of 2006, which not only authorized the trial of non-citizens by military commissions, but also severely weakened the ability of these suspects to access U.S. civilian courts or to invoke international law in any forum.

At the ILW-West panel on "Trying Enemy Combatants," panel members discussed the legality and wisdom of the various Executive and Congressional plans that have emerged in this debate. Professor Allison Danner highlighted the distinction between the various definitions of "enemy combatant" as used by the U.S. government over the past several years, as well as the importance of these shifting definitions. Professor Jennifer Martinez discussed the government's technique of "trying" out various policies in this arena by deploying questionable techniques, getting away with as much as it can, and then working strenuously to avoid review of these tactics by the courts. Professor Geoffrey Corn argued that the Military Commissions Act illegitimately attempts to extend military commission jurisdiction over offenses that are not derived from the law applicable to non-international armed conflicts. And Professor Diane Marie Amann focused

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on the way that the Executive's policies in this area have "tried" the legal system and affected the relationship between the federal judiciary and the executive branch. Through their presentations and in response to questions, a consensus emerged among the panelists that while the struggle against terrorism presents many real and difficult challenges to this country, the current system of executive detention and trial by military commissions is unsatisfactory from both legal and policy-making perspectives.

Ida Bostian, Moderator

Our panel today is regarding trying enemy combatants. I am sure that anyone who has been paying attention to anything in the last five years has heard the phrase enemy combatants and knows that this term raises many legal and policy issues. I find it useful to divide these legal and policy issues into four categories.

The first category is targeting; when is it lawful for us to militarily target these individuals as opposed to arresting them as civilians? The second category is detention, particularly preventive detention. When is it lawful for our military, or our executive, to detain these individuals, not because of something they have done, but because we are afraid of something that they plan to do or we think they want to do. The third broad issue is interrogation and treatment; what are the rules for how we can interrogate or how we must treat these individuals once we have them in custody. Finally, the fourth is trial. When and how may we actually try and punish some of these individuals for committing crimes, either war crimes or other crimes?

Our focus in this panel will be more or less on this fourth problem, on trying these individuals although I find it impossible to talk about any of these problems without them bleeding into each other, and I am sure that we will end up touching on each of these issues as we go forward.

Soon after 9/11, the President set up a system by military order to try enemy combatants and set up ad hoc special procedures for the trial of these individuals by military commissions instead of by the federal criminal system or by courts martial. Some of these individuals were indicted, and a few trials were actually started. However, last summer in *Hamdan v. Rumsfeld*, the Supreme Court struck down the President's plan to hold these trials.¹ In a very long, somewhat fractured opinion, the Supreme Court said that the President could not hold these commissions without some additional congressional authorization. The Supreme Court relied both on domestic statutes and in part on international law, including

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

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the Geneva Convention for the Treatment of Prisoners of War, Common Article 3 of that Convention in particular.² A plurality of the justices also relied in part on customary international law and even gave a brief nod to a human rights law treaty, particularly in looking at whether the procedures that were being followed by these presidential military commissions were lawful under international law.

As important as this decision was, it was followed with almost lightning speed by the Military Commissions Act of 2006, in which Congress undid or overruled many of the holdings of *Hamdan*.³ The Act, among other things, grants the President the explicit authority to create military commissions to try and punish non-citizen “unlawful enemy combatants.” The Act establishes some procedural protections for these individuals, but there is an outstanding issue of whether these are still sufficient, either under our Constitution or international law, or both. Interestingly, the Act says that none of the defendants in these military commissions may invoke the Geneva Conventions as a source of rights.

The Act sets out several crimes for which these individuals may be tried by commission, including the crime of conspiracy, which is the specific crime that was rejected at least by a plurality in the *Hamdan* decision. The Act also severely limits access to civilian courts, although one narrow method of access for these individuals would be a direct appeal if they were found guilty by one of these military commissions. Although, it is very limited: in this direct appeal procedure to the D.C. Circuit, the Court of Appeals may act only with respect to matters of law, and shall limit its consideration to whether the final decision of the military commission was consistent with the standards and procedures specified in the law itself, and, “to the extent applicable,” the Constitution and laws of the United States.

There has been some talk about whether the new Democratic Congress will repeal some aspects of the Military Commissions Act, but most of that focus has been on the aspects of the Military Commissions Act that prohibit non-citizen military detainees or enemy combatants from bringing habeas corpus challenges to their detention or to their trial. It appears that even if there are some changes made to this Act, the trials will proceed with these new congressionally authorized executive military commissions.

The goal in this panel is to go, more or less, from the specific to the general; from somewhat more narrow, though extremely important issues, to more of a

2. Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, August 12, 1949.

3. Military Commission Act, 10 U.S.C.A. § 948b (2006).

meta-analysis of the entire system.

Our panel begins with Professor Allison Danner of Vanderbilt University Law School. She is an expert on, among other things, international law and international criminal law, has authored numerous amicus briefs on the law of war and the enemy combatant cases, and has written many academic publications on these issues. She will examine the idea and term enemy combatants.

Professor Geoff Corn, who comes to us from South Texas College of Law, is our second speaker. He came to law teaching fairly recently after a long and distinguished career in the US Army, and he is already repeating that distinction and service that he had in his military career. He is an expert in, among other things, international law, national security law, and the international law of armed conflict. He is also an expert in criminal law. He will talk about the crimes that are currently subject to trial by military commission, and whether these are crimes that can legally be tried by these commissions.

Third, we have Jenny Martinez of Stanford Law School. Among her many accomplishments, Professor Martinez argued the 2004 *Rumsfeld v. Padilla* enemy combatant case before the United States Supreme Court.⁴ She is an expert in, among other things, international criminal law and international tribunals. Professor Martinez will talk about some of the patterns that have been emerging in this administration's policies and tactics in this war on terror or global conflict with terror and the implications of some of these tactics.

We will conclude with Diane Marie Amann, who is a professor at the University of California, Davis. Her expertise includes domestic and international criminal law, public international law, international human rights, and constitutional law and federal courts. She has recently been focusing on legal responses to the U.S. policies on executive detention at Guantánamo Bay and elsewhere and on the use of foreign and international law in U.S. constitutional cases. She is going to talk broadly about the system that has been set up and how the system of trying enemy combatants has been affecting other aspects of the political and legal system.

4. *Rumsfeld v. Padilla*, 542 U.S. 426.

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*Allison Danner, Panelist**

The definition of enemy combatant carries enormous implications, particularly if one is identified as an enemy combatant. The most important of these consequences is that you can be detained, perhaps indefinitely, without being charged with a crime. In addition, American citizenship will not shield you from such a designation.⁵ While having enormous implications, the scope of the term remains unclear. I want to focus on two aspects of the concept of enemy combatant. The first is its definition. The second is how the term melds the criminal and law of war aspects of the war on terrorism.

The phrase enemy combatant is not used in the Geneva Conventions. There is a definition of “combatant” in the original protocols, but there is no definition of “enemy combatant.” There are other categories of individuals, like civilians, so just because someone is not a combatant does not mean they are necessarily an enemy combatant.

There is, therefore, no basis in treaty law for this idea. Turning to other offered definitions, the *Hamdi* plurality opinion noted with regard to whether Hamdi is an enemy combatant, that he was carrying a weapon against American troops on a foreign battlefield.⁶ The Supreme Court seems to think, therefore, that if you are carrying a weapon against American troops on a foreign battlefield, you can be called an enemy combatant. That definition is relatively uncontroversial, although the idea of an enemy combatant itself may be contested. The Supreme Court went on to say the legal category of enemy combatant has not been elaborated upon in great detail, and the permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.

The Executive Branch has asserted a much broader definition of the category than that used in *Hamdi*. They have offered a few different definitions in different contexts. The military combatant status review tribunals at Guantánamo, for example, which determine whether or not someone is properly held as an enemy combatant, gives the following definition: “an individual who is part of or supporting Taliban or Al Qaeda forces, or associated forces, that are engaged in hostilities against the United States or against coalition partners.”⁷ It goes on to

* Professor Danner is an authority on international criminal law. She has authored amicus briefs on the law of war in litigation over the rights of enemy combatants and has published articles in leading journals, including the *Stanford Law Review*, the *Virginia Law Review*, and the *American Journal of International Law*.

5. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

6. *Hamdi*, 542 U.S. 507, 522 n.1 (2004).

7. *Quoted in* Memorandum on Implementation of Combatant Status Review Tribunal

say this includes, but does not say it is defined by, any person who has committed a belligerent act or who has directly supported hostilities in aid of enemy armed forces. This definition has a huge potential scope — anyone who is associated with a group that is associated with Al Qaeda can be an enemy combatant. Given the sort of network aspect of transactional terrorism, that could potentially implicate a lot of people.

The Military Commissions Act of 2006, and the Manual for Military Commissions that incorporates it, offers a different definition. These military commissions are designed to criminally punish individuals who have violated the law. Under the Military Commissions Act, an enemy combatant is someone “who has engaged in hostilities, or who has purposefully and materially supported hostility against the United States or its cobelligerents, who is not a lawful enemy combatant, including a person who is part of the Taliban, Al Qaeda, or associated forces.”

This definition is also very broad by purposefully using the word “materially” to modify supported hostilities. Additionally, it is actually grammatically very curious because the last phrase seems to modify lawful enemy combatant, and suggests that a person who is part of Taliban or Al Qaeda is a lawful enemy combatant, and we know they did not mean that.

Furthermore, it is not clear how the definitions from the CSRT’s and the MCA relate to one another. In litigation, lawyers for the executive branch have offered other definitions, the most infamous occurring in oral argument a couple of years ago with the court asking about the parameters of this concept. In that case, the judge tried to determine the meaning of unlawful enemy combatant by posing hypothetical examples. For example, whether a little old lady in Switzerland writes checks to what she thinks is a charity that helps orphans in Afghanistan, but really is a front to finance Al Qaeda activity. Would she be considered an enemy combatant?⁸

These are real questions. In the situation above, the government lawyer would likely express doubt as to how much the little old lady really knew about the so-called charity for orphans. Her case would be up to the military to decide, and great deference would need to be paid to its judgment as to what to believe in that scenario. This poor little old lady could even be taken into custody. The little old lady, who does not know she is contributing to terrorism, could be detained as an

Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

8. *In Re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 475 (D. D.C. 2005)

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enemy combatant. That is sort of the outer bounds.

In the *Al-Marri* case,⁹ which was argued yesterday in the Fourth Circuit, we have a citizen of Qatar, who is pursuing a graduate degree at Bradley University in Peoria, Illinois, where he also received his undergraduate degree. He was detained as a material witness with the 9/11 investigation, then charged with making false statements to the FBI and bank fraud. He was then designated an enemy combatant and put into the enemy combatant system, the justification being that he is closely associated with Al Qaeda and that he has engaged in hostile and warlike acts. It was also alleged that he possesses intelligence about Al Qaeda and the government claims he trained in a terrorist camp in Afghanistan between 1996 and 1997. It says he was sent to the U.S. by Khalid Sheik Mohammed to explore computer hacking methods in order to disrupt bank records. When he was arrested the FBI say they found bookmarked websites on his computer that provide information about how to make cyanide, how to mask your identity on the computer, and how to get false credit card numbers.

Is Al-Marri an enemy combatant? He was not arrested on a foreign battlefield; he was arrested in Peoria, Illinois. There is no allegation about a gun, he is not a member of Al Qaeda. But they say he is associated with Al Qaeda, that he is a sleeper agent, and, therefore, he is an enemy combatant. What are the possible limitations on this definition? You are carrying a gun on a battlefield, Supreme Court says that puts you in the category. Is attending a terrorist training camp enough? Does that make you an enemy combatant? Engaging in credit card fraud, does that make you a combatant? Geographical limitations: does it matter where you are? Where you are apprehended? Where you engage in your activities? Is the battlefield of the war on terrorism everywhere?

In addition, who gets to decide who is an enemy combatant? The farther you get from the battlefield, the harder it is to tell who is an enemy combatant. Is it the military who should get to decide? The President? The judiciary? These raise important separation of powers concerns, and also it probably suggests how broadly the category will be construed.

These issues have not yet been resolved six years into the war on terrorism. Some of the problems about this category stem from whether we think of the war on terrorism as a military or criminal response. Many academics and others thinking about the war on terrorism have noted that this is a central problem. In the military paradigm, the purpose of detention is incapacitation, to prevent these

9. *Al-Marri v. Wright*, 443 F.Supp.2d 774 (D.S.C. 2006).

individuals from engaging in future harmful acts and to keep them from rejoining the battle. Here, however, we have a war whose parameters itself are deeply contested. There is good reason to believe it could last much longer than a traditional war. If you take out the wars in Iraq and Afghanistan, it does not take that many people to engage in the war on terrorism. It does not take many people for the U.S. to respond to it. Under these conditions one could imagine the war could extend for a long time.

Further, it is unclear how to determine whether the war is over. Terrorism has been around for a long time and there is no reason to think it is going away anytime soon. In addition, the methods that the government has engaged in suggest purposes other than pure incapacitation for detention of these individuals. There is kind of a retributive aspect, in the sense that for Al-Marri, for example, was already in the criminal system. He was already charged with fraud. He could be held in jail, unable to return to the battlefield, for years if convicted.

Nevertheless, he was designated as an enemy combatant in the military system. Why? Not for incapacitation reasons, because he did not plead guilty. One of the allegations is that this is used as a club against individuals accused of terrorism activities, or because there is a desire to interrogate him to find more information about Al Qaeda. Again, this is a criminal law technique, trying to investigate through questioning of individuals. It is not one of the preventive detention purposes of the Geneva Conventions, which bar coercive questioning.

In the *Al-Marri* argument, one of the Fourth Circuit judges was very troubled by the scope of enemy combatant and asked if the President could detain people affiliated with the People for the Ethical Treatment of Animals. Could we have the war on People for the Ethical Treatment of Animals? They engage in violence, and could one of their members, or all their members, be accused of being enemy combatants?

The concern is not just with the category, but that it could be subject to abuse and capricious application. Most people believe that it is hard to call this a war. There is evidence of military activity, military response, and the killing of 3,000 people in the U.S. So it is not that the military paradigm does not apply at all, but it is different from our traditional ideas about military conflict.

So does that mean, therefore, we need to be more careful about how we define the terms? At least some judges have suggested that we do need to be especially careful about these terms, given the vague parameters of the war, although certainly not all judges have endorsed this view.

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*Geoffrey Corn, Panelist**

I will address the jurisdiction that Congress has established for the military commissions and why I think it is impermissibly broad. I will address this through three different perspectives. The first is the perspective of a conflict and the perspective of a soldier and a former legal advisor who was immersed in that subject. The second is the perspective of a criminal defense lawyer. The third is the perspective of the authority of Congress to define and punish violations of the law of nations, and what that really means.

There are aspects of the war on terror that do fit into the military paradigm. When I refer to the jurisdiction of the military commission, I would like to qualify these comments on the condition that we are talking about the type of enemy combatant that falls into the *Hamdi* category — an enemy combatant that is captured by American forces on the battlefield carrying weapons. I agree absolutely that this term is ill-defined, and potentially overbroad. The term is unnecessary, misleading, confusing and it sends the wrong message to the force.

To me, an enemy combatant is an enemy operative who is captured during the course of a military operation where armed forces are ordered to engage in combat operations, to apply destructive combat power. I proposed, in an article that is coming out in the Vanderbilt Journal of Transnational Law, that one of the ways we should define the line between law enforcement and conflict operations is to focus on the rules of engagement that the armed forces are operating under.¹⁰ When the rules of engagement authorize the application of combat power based on status, the soldiers know they are in a conflict. They do not debate it. When their commanders say once you identify the target, you can destroy it regardless of what

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10. *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT J. TRANSNAT'L L. (2007).

that target is doing whether it presents an immediate threat to you or not. They understand that they are in combat operations.

I believe that the use of a military tribunal or military commission is a valid venue for holding individuals accountable for their battlefield misconduct. However, the jurisdiction granted to the current military commissions is invalid. The reason a military commission is an appropriate forum for adjudging alleged misconduct on the battlefield is because historically international law has recognized that warriors are uniquely competent to judge the misconduct of other warriors.

We do not normally talk anymore about the principle of chivalry as a foundational principle of the law of war, but the reality is that so many of the rules that apply on the battlefield flow from this principle of chivalry. The profession of arms is indeed a profession, and it requires the individuals who participate in that profession to be able to distinguish between situations where the application of destructive power is legitimate, and when it is prohibited. Crimes like inhumane treatment, murder of protected persons, pillage, perfidy, treachery, and misuse of a protective emblem all flow from the original concept of chivalry. The notion of allowing a military tribunal to adjudge battlefield misconduct is linked to the proposition that members of the military profession understand the consequences of breaching these basic rules.

This means that the jurisdiction of a military commission should be limited to those type of crimes and not to any crime that Congress simply chooses to subject to the jurisdiction of a military commission, which is what the Military Commissions Act purports to do. Article 18 of the Uniform Code of Military Justice has long recognized the competence of military courts to sit in judgment of law of war violations.¹¹ The predecessor to Article 18 also recognizes that authority. It is a custom of military law, or the law of armed conflict, or the law of war, that military tribunals are competent to adjudge battlefield misconduct. It is no mistake that Article 18 establishes jurisdiction that is limited to violations of the laws and customs of war, not to any crime that Congress may choose to subject to the jurisdiction of military commissions. Valid jurisdiction for a military commission should be based on battlefield misconduct, violations of the law that applies to a given military operation.

Fist, the armed conflict with non-state entities like Al Qaeda is not international armed conflict within the meaning of international law, rather it is non-

11. 10 U.S.C.S. §818.

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international armed conflict. Second, the fact that non-international armed conflict is global in scope does not remove it from the category of either non-international armed conflict like the Bush Administration first proposed, or put it into the category of an Article 2 international conflict like some scholars and practitioners propose. Third, military commissions are fundamentally a creature of the law of armed conflict, again, reflected in Article 18 of the Uniform Code of Military Justice. The Military Commissions Act acknowledges that its purpose is to grant military commissions jurisdiction over violations of the law of war. It then says other offenses may be subject to the jurisdiction of military commissions by this Act. Later at the point where it begins to enumerate the specific offenses, the Military Commissions Act says nothing enumerated in this statute creates new law suggesting that the crimes that are enumerated in the Act or specified were previously specified violations of the laws and customs of war. Otherwise they would not have been subject to the jurisdiction of a military commission under Article 18 of the Uniform Code of Military Justice.

Legitimate jurisdiction of a military commission is predicated on establishing that the offense you allege is in fact a violation of the laws and customs of war applicable to the fight you are engaged in. If the fight we are engaged in with Al Qaeda, with that enemy combatant, the *Hamdi* enemy combatant, is a non-international armed conflict then that limits the scope of viable offenses that can be alleged.

Now certainly, violations of Common Article 3 of the Geneva Conventions would fall into that category. I do not think there are many military defense lawyers working in the military commissions who would strongly dispute that proposition. If their clients summarily executed an American prisoner of war, or tortured an American prisoner of war, or deliberately targeted non-combatants, or civilians to spread terror, then those would be viable offenses.

The principal focus of the Military Commissions Act is to vest the military commissions with jurisdiction over what are quintessentially domestic criminal violations: terrorism, hijacking, and inchoate offenses that have no historical connections to the laws and customs of war unless characterized as violations of Common Article 3. Under this interpretation an attack on the World Trade Center could be characterized as a violation of Common Article 3, deliberately attacking civilians, or turning a civilian aircraft into a weapon of war. But to characterize it as terrorism suggests something very different. Then, of course, there is material support for terrorism. In addition to conspiracy, this crime of terrorism, that many civilian defense practitioners would assert is of nebulous legitimacy even in a

domestic criminal context, has been incorporated.

I also think the principal objective of the Military Commissions Act was to foreclose any ability of defense lawyers to challenge the application of the criminal offense of being an unlawful belligerent. For me, that is extremely troubling because I do not believe there is a legitimate historical basis to categorize or classify operating without privilege on a battlefield in the context of a non-international armed conflict as a violation of international law.

I acknowledge that if an individual fights against his or her own government, without the status of a lawful combatant, he or she could be subject to domestic criminal law. For example, I began my military career in Central America. So when the Salvadoran rebels were fighting their government, they were operating without the privilege of being a lawful combatant in the sense of being able to obtain prisoner of war status. That lack of status subjected them to the domestic criminal jurisdiction of their country. If they killed a Salvadoran soldier, and the Salvadoran government wanted to try them for treason or for murder, they would have no basis in international law to challenge the assertion of that jurisdiction, or to assert an immunity from that offense.

But operating as an enemy combatant in a non-international conflict did not turn such behavior into an international law violation, which is what the Military Commissions Act purports to do. The reason that I am troubled by the Act's assertion is because it has the flavor of either collective punishment or maybe even a Bill of Attainder. What we have to remember is that if these offenses occurred in the context of a non-international armed conflict, it is legally impossible for the enemy combatant to be a lawful combatant. If merely operating as an unlawful combatant is an international law crime, and we allege it in the context of a non-international armed conflict, we have created the ultimate form of strict liability. The minute you pick up that weapon, you are a war criminal subject to sanction by a military commission. I do not think that such a charge is valid in that context. Some critics argue that it is not an invalid charge in the context of international armed conflict, but at least in that context there is a symmetry between operating within the rules for warriors and the sanctions for violating those rules. It is an incentive to operate within the parameters of being a lawful combatant, and if you fail to, you incur sanction. In my mind it is invalid to simply transfer that whole cloth from the context of international armed conflict where that symmetry exists to the context of non-international armed conflict.

I will very briefly discuss my last point. I can assure you that when the military defense lawyers at the commission raise this challenge, the response is going to be

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it does not matter anymore because Congress has made that an offense in the Act. I think this requires us all to question whether the Article I authority of Congress to define and punish felonies and violations of the law of nations lets Congress make up felonies and violations of the law of nations. I do not think it does.

Defense lawyers should still be entitled to raise a legitimate claim that the government has subverted the process of establishing the jurisdictional predicate for bringing a person into court. The jurisdictional predicate for the use of a military commission is that the alleged offense was a crime in violation of international law that applied to that context. Simply codifying it in a statute and transplanting it from one context to another is insufficient to serve that purpose for the government.

*Jenny Martinez, Panelist**

The title of our panel today is “Trying Enemy Combatants,” and I am going to talk about how the government has tried out the category of enemy combatants, and indeed has tried out other global war on terror policies in a way that has undermined the rule of law and separation of powers. I am going to describe a specific dance the government has done where it throws out very extreme policies to see if they will work, to see if the courts and public will buy it, and then has used a variety of procedural maneuvers to avoid any adjudication on the merits of its policies, particularly when it appears that the government is going to lose on the merits.

I want to begin by talking about something the previous two speakers highlighted which is just how much we do not know five years after September 11th about what is or is not legal with regards to enemy combatants. It has been five years since the Guantánamo enemy combatant detention center was set up, and the Supreme Court has now heard four enemy combatant cases; but we still do not know, as Allison discussed, what an enemy combatant is. We have almost no sense from the courts of who is encompassed in that category. We still do not know how long enemy combatants can be detained, although many of them have now been detained for five years. We still have no idea what process is due to any of them, beyond the minimal notion that U.S. citizens at least are entitled to notice

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of the allegations against them and an opportunity to be heard before a neutral decisionmaker. Are they allowed to call witnesses? Can the government use triple hearsay obtained through torture against them? We still have almost no idea what is permissible with regard to the process.

In addition, we still have no idea, as far as the courts are concerned, of what rights many of these individuals possess. Are the people at Guantánamo protected by the U.S. Constitution? Are there treaty rights that are directly enforceable? We have no idea five years after the detention center there was first set up, and three years after the Supreme Court's first decision about the detainees there in *Rasul*.

Finally, we still do not really know how they can be tried and punished, what the lawful scope of military commissions' jurisdiction is, what kinds of offenses can be lawfully tried in a military commission, and what procedures must be used. Although the Supreme Court issued the *Hamdan* decision striking down the military commissions constituted by executive order, because of the way in which that case was decided as a matter of statutory interpretation and because of the subsequent legislation,¹² we still have no answers to any of these questions.

How is it possible that on issues of such substantial importance to the U.S., and indeed to other countries around the world, that have been in the public sphere for five years, that we still know almost nothing about what the law is with regard to any of this? I submit that the reason we know almost nothing is a very deliberate strategy employed by the government of avoiding adjudication on the merits of these cases. It is a strategy in which the courts have been complicit or cooperative; although it appears that some of them are becoming less patient. It remains to be seen what will ultimately happen.

Let me talk about what I mean by the government strategy. I am going to use a couple of different examples, some involving enemy combatant cases. I will also explain how these government strategies are not limited to the enemy combatant cases but are also present in other areas of the war on terror, like the wiretapping.

The strategy of government actions I am going to describe is to try out something that has very little legal support and then to do as much as possible to delay litigation as long as possible using various procedural devices. After litigation has been delayed, the government then uses a variety of procedural devices to try to continue to avoid any adjudication on the merits. Then, if it looks like things are not going well for the government, either because of judicial decisions or other events that signal the government is going to lose, then the

12. Military Commissions Act, *supra* note 3.

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government makes the switch. They change the factual story of what they are doing. Or they change their legal strategy. They claim that things are moot and they retreat until they see another opportunity to try again in a slightly different way or go back to Congress.

I am going to talk about some specific examples of what the government has done, and then talk about why I think these actions are problematic. The first case is that of Yasser Hamdi, the U.S. citizen who was picked up on the battlefield in Afghanistan and then detained at Guantánamo until they realized he was a U.S. citizen. They brought him into the U.S. and held him in a Naval brig until his case reached the Supreme Court in 2004.

What was the government's first strategy in the *Hamdi* case? First they tried to delay and avoid adjudication on the merits by challenging who exactly could bring a lawsuit for Mr. Hamdi. There was a whole round of initial litigation that consumed many months over whether the federal public defender could sue on Mr. Hamdi's behalf or whether his father from Saudi Arabia actually had to appear in court. That course of action delayed the case by a number of months. The government's next stratagem related to access to counsel. For months they claimed, both in district court litigation and in time-consuming interlocutory appeals to the Fourth Circuit, that Mr. Hamdi could not be allowed any access to a lawyer, and that to even allow him to speak to a lawyer would gravely threaten national security.

Surprisingly, on the day before their brief was due at the Supreme Court, perhaps contemplating the unappetizing possibility of arguing to the Supreme Court that they could indefinitely deny an American citizen access to counsel, the government conveniently decided that, by a remarkable coincidence, the national security threat presented by allowing Mr. Hamdi access to counsel had suddenly evaporated. The government thus determined that, as a matter of executive grace, they could allow him to speak to a lawyer, and therefore the issue was moot and the Supreme Court need not consider it.

That seemed fine to the Court. Then what happened next? The Supreme Court held that Mr. Hamdi was entitled to due process of law. Due process usually entails notice of the allegations and an opportunity to be heard before a neutral decision-maker. However, the government again changed tactics. They did not want to have a hearing in front of a neutral decision-maker; they did not want to have to come up with evidence against Mr. Hamdi. So what did they do? They let him go. This guy who had been so dangerous that he could not even speak to a lawyer just a few months earlier was simply let go. No charges were filed and he

was sent home to Saudi Arabia, where it is my understanding that he married a very nice young woman and is living quite happily.

Now I will move on to Case Number Two, the *Padilla* case, one with which I am most familiar. *Padilla* shows something that the *Al-Marri* case shows as well, which is that the government has been trying out a lot of different ways to hold people indefinitely, not just by using the enemy combatant category, but also the material witness category. They were holding a lot of people as material witnesses for a while, in addition to the many immigration detainees.

Like Mr. Hamdi, Mr. Padilla is also a U.S. citizen. He was arrested at Chicago O'Hare airport on a material witness warrant. He was initially detained for a month as a material witness and was given court-appointed counsel. His counsel challenged the material witness warrant. A hearing was set down for federal court in New York on a Tuesday morning. On the Sunday night before the hearing, the government, once again just before a crucial court hearing, made a huge change in strategy. They declared Mr. Padilla to be an enemy combatant, removed him from New York and took him to a military brig in South Carolina. At that time, Attorney General John Ashcroft held a press conference saying that they had evidence that Mr. Padilla was planning to set off a dirty bomb in the United States, which was the basis for his detention.

After the change came the delay. The government interposed a number of procedural barriers, again objecting to this next friend issue as to who could sue for Mr. Padilla in the lower courts. Again, the access to counsel issue was litigated. In addition, there was a jurisdictional challenge as to whether the case could continue in New York, where the government had brought Mr. Padilla, where he was held initially and where the court hearing was supposed to be held on that Tuesday morning, or whether instead it had to be brought in South Carolina. Once again the government delayed. Mr. Padilla had also been denied access to counsel, much like Mr. Hamdi, on grounds of national security. The issue was litigated all the way up to the Supreme Court, which is when an amazing coincidence occurred. Shockingly, the national security concerns in Mr. Padilla's case evaporated the day before the government's briefs were due in the Supreme Court, just as they had in Mr. Hamdi's case. Once again the government was able to argue that that issue was moot.

At the Supreme Court, the government successfully argued the issue of jurisdiction and venue in South Carolina thereby avoiding adjudication on the merits. After that the government made another big change, this time a factual one. While the case was pending in the Supreme Court, they had held a press

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conference in which they announced that perhaps the plot in question had not involved setting off a dirty bomb, but rather possibly dealt with plans to blow up apartment buildings with natural gas. Following the Supreme Court's decision in *Hamdi*, in which the Court offered the definition of an enemy combatant as being someone who had been fighting on the battlefield in Afghanistan, the government did another turn around.

Suddenly Mr. Padilla, the government argued in its briefs, was no longer being held as an enemy combatant primarily because of the dirty bomb plot or because of the apartment buildings, but rather because they alleged that he was in Afghanistan after September 11th — a totally new story. They progressed through the lower courts again. They lost in the district court, went on to the Fourth Circuit, and two days before their brief was due in the Supreme Court, they made yet another drastic switch. Rather than risk the chance that the Supreme Court would hear the case on the merits this time and rule against them, they decided to charge Mr. Padilla with a crime in federal court, to add him to a case that had already been pending in the courts in Florida for more than a year, and thereby argue that his Supreme Court appeal was moot. Following this maneuver, they got some push-back from the Fourth Circuit, in an opinion by Judge Luttig,¹³ one of the most conservative members of the bench. Judge Luttig said that the government had created the appearance that it was attempting to avoid judicial review and cast doubt on its credibility. In the end, however, the government got away with it, and the Supreme Court denied review, although with some hint of warning in the opinions accompanying the denial of review.

Case Number Three, which deals with wiretapping, is another clear a demonstration of the tactics used by the government to delay justice and avoid judgment. All of you are no doubt familiar with the stories that have appeared in our press of the government's practice of wiretapping persons in the United States without a warrant. When challenged in court, the government raised defenses such as the state secrets doctrine and the issue of standing. When it appeared that the government might lose in court, it asserted that it was submitting its policies to the supervision of the Foreign Intelligence Surveillance Act ("FISA")¹⁴ court and therefore was able to argue in the Sixth Circuit, as well as in the other cases, that the issue was now moot.

I could give you other examples as well, from cases involving the Guantánamo

13. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

14. Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801 et seq. (2007).

detainees, the military commissions, and Al-Marri's enemy combatant case. But the question remains, why is all this a problem? On the one hand, the government has backed off, in the end, from its most extreme policies. It has allowed people access to counsel, charged Mr. Padilla with a crime, and said it was going to submit its wiretapping to a FISA court. Those all might be considered good things.

Additionally, there are theoretical reasons, as some scholars have asserted, that avoidance of adjudication on the merits of controversial issues can be a desirable thing in a democracy. Alexander Bickel, in his classic book *The Least Dangerous Branch*,¹⁵ talked about the passive virtues, the ways that courts can use procedural doctrines like standing, mootness, ripeness, abstention, and things like that to avoid confrontation with the political branches on the merits of controversial issues. These tactics avoid inter-branch conflict. They delay final adjudication until more information is available, perhaps increasing the accuracy of the court's ability to weigh competing societal interests, and they avoid premature bad rulings. In *Korematsu*,¹⁶ the Japanese internment case, Justice Jackson wrote that the decision would lie around like a loaded gun for future generations to abuse. To the extent that we avoided rulings on the merits, perhaps we have avoided those rulings that might lie around like loaded guns for future generations, subject to potential abuse. At the same time, despite the potential virtues of the approach that the courts have taken in accepting the executive branch's delay policies, or avoidance tactics, I will say there are also some vices associated with the passive approach.

One problem is that this approach reduces government accountability and the values inherent in democracy by making it unclear where the responsibility lies for the continuing policies. People have now been held at Guantánamo for five years and it is still unclear who exactly is responsible for that. The executive branch is definitely responsible, but it is uncertain whether or not Congress and the courts share any of the responsibility. Because of the strategy of avoidance it is unclear in what measure each branch of government and particular actors within those branches of government bear responsibility.

There has also been harm to individual rights, in the sense of individuals who have been deprived of their liberty for five years without receiving any due process of law, and in the sense of people who have been wiretapped for unknown periods of time without court supervision. Finally, this approach may not in fact be that passive, insofar as the types of decision-making the courts have been forced to

15. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

16. *Korematsu v. U.S.* 323 U.S. 214 (1944).

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engage in may ultimately affect the way the issues come out.

For example in the *Hamdan* case, the Supreme Court avoided the ultimate questions of what was lawful for Congress to do and what was lawful to be done in general to enemy combatants by simply ruling on a separation of powers issue, finding that Congress had not authorized the military commissions in question. In *Hamdan*, had the Court reached the underlying issues of the validity of the policy as a matter of individual rights, they would have been placing the courts against the executive branch. Now, post-*Hamdan*, in order for the Court to strike down what has been done, the court must stand up not only to the executive branch, but also to Congress, making it that much more difficult. In other words, the Court has to some extent already dictated how a rights-based challenge will come out, without ever fully considering the arguments for that rights-based challenge.

There are some signs that the courts are not happy with the government's tactics, as shown in the *Al-Marri* argument in the Fourth Circuit yesterday, as well as Judge Luttig's decision in the *Padilla* case. So, we are five years into it, and I think the government will still keep trying different things, and it remains to be seen just what they will get away with.

*Diane Marie Amann, Panelist**

"National Security Court." How do those words sound? Now circulating are proposals for institution of a national security court in the United States.¹⁷ The proposals remind one of the history of the Guantánamo military commissions. Recall that these commissions were not invented sometime between September 11, 2001, and President George W. Bush's order of November 13, 2001.¹⁸ Rather, the groundwork for military commissions had been laid in one or two law review articles published in the preceding five or ten years. The fact that now exist proposals to establish a national security court within the United States suggests that it is time to get "meta" – to borrow Professor Bostian's term – to begin to think about the architecture of efforts to try persons suspected of terrorist offenses,

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17. One such proposal already has been published. Glenn M. Sulmasy, *The Legal Landscape after Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1 (2006).

18. U.S.: Presidential Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

while continuing to challenge the details of that architecture.

Professor Danner cited as a problem with the executive plan – a phrase used here somewhat inaptly, given that that the plan has been sanctioned in part by the U.S. Supreme Court and rubber-stamped in large part by Congress – that the plan blurs the line between the law of armed conflict and the ordinary criminal law. Something rather different has been going on, not a dichotomy between “armed conflict law” and “criminal law,” but rather a triangulation that encompasses those laws and the practices of the intelligence community.

The actual dichotomous relationship in place on September 10th, 2001, was one that my most recent article calls “punish or surveil.”¹⁹ The first term refers to what was an effective, relatively fair, American way of punishment. It involved of course the ordinary criminal courts. It also involved a sophisticated system of military justice – courts martial, and to a lesser extent military commissions, albeit military commissions established in a far different way than those that President Bush advocates. Taken together, these components of the punishment system managed to incapacitate the de facto ruler of one nation-state, Gen. Manuel Noriega of Panama; a number of war criminals, particularly in the World War II era; and sundry bombers, hijackers, and other terrorists throughout the mid-1980s and thereafter. It did so by means of established substantive and procedural laws. Judges in those cases by and large succeeded in accommodating the competing interests of national security and individual human security. This is not to say that all would agree with every balance that was struck, but rather that balances were struck, and that the system in large part worked.

One would expect that a society that embraces the rule of law as vocally as does the United States would have resorted without question to these established legal systems. Justice Anthony M. Kennedy said as much when he wrote in *Hamdan*: “The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”²⁰ And yet reliance was not placed on those standards. What was established was not a system of punishment, but rather a system of detention – detention for interrogation.²¹ The sad truth is that there are more people who pose threats to this country than the 700 or so who have endured

19. Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 769 (2007).

20. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring).

21. See Diane Marie Amann, *Interrogation Paradigm*, or *A Prince Unclothed*, unpublished manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955430 (last visited May 1, 2007).

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detention in Guantánamo; there are even more than the 10,000 or so who have endured detention globally since September 11, 2001. The fact that in the wake of the terrorist attacks of that day the United States instituted a policy of detention for interrogation, coupled with the possibility of unfair trials, poses a great challenge to the American way of punishment. In the past, detention before trial only had been justified as a way to secure presence at trial or secure absence of the detainee from the battlefield; neither justification is in play here.

The trials themselves are compromised, as each panelist today has stressed, with regard to the axis of fairness and other time-honored standards. They also are compromised on the axis of efficiency. As of the fifth anniversary of Guantánamo on January 11, 2007, at most ten individuals ever had stood charges in the military commissions. Ten people in five years is hardly efficient. Not one witness had been called in any trial before a military commission. At the same time, those sundry hijackers and bombers and terrorists – including Richard Reid, the so-called shoe-bomber, John Walker Lindh, the so-called American Taliban, and a number of other individuals who were brought into the ordinary federal criminal justice system after September 11 – are serving long terms at super-maximum-security prisons. Which system, then, was more effective in incapacitating those individuals?

If in fact the executive may, as it contends, engage in indefinite detention of individuals, one wonders why it is pressing for trials at all. Two considerations are likely. One may be a desire – a desire to look as if convictions at trial, or at in least trial-like proceedings, were the prerequisite for commitment of detainees to permanent incarceration. The other may be a fear – a fear that eventually either the Supreme Court or Congress will put a stop to indefinite executive detention without trial. Should that occur, no doubt the Administration would like to have available some mechanism for continuing to keep certain persons in custody. These considerations ought not to obscure the fact that the system that was in place before September 11 worked, and it worked well, securing convictions on the basis of evidence admitted according to established rules of fairness.

What about the unconvictables, one might ask – what about those individuals against whom the government, because of its own agents' actions during interrogation, might not possess admissible evidence sufficient to convict? Consider, for example, the *Padilla* case, with which Professor Martinez is of course most familiar. José Padilla, a Brooklyn-born American, soon will face trial on ordinary criminal charges in Miami. So far the federal case has not been a slam dunk for the prosecution. Though the presiding judge denied pretrial challenges

that had been based on the extremely harsh conditions Padilla endured during three and a half years in “enemy combatant” detention, as trial neared she reiterated concern that the “indictment is very light on facts.”²² Her comment might lead some to call Padilla “unconvictable.” But trial may prove that categorization hasty. There is an amorphous nature to charged offenses – not only conspiracy, but also the Clinton-era innovation, “material support for terrorism.” Moreover, the man who is about to stand trial has been made notorious – has been branded a “terrorist” – and it may prove difficult for jurors to ignore that brand.

Imagine for a moment that jurors were to acquit Padilla. That verdict would not, in itself, mean that the system had failed. Built into the American system of punishment is the notion that there are certain ways to go about convicting individuals – that doubt is to be resolved against the prosecutor. Justice John M. Harlan wrote nearly three decades ago, in the case that recognized the constitutional status of the burden of proof beyond reasonable doubt, that it is “a fundamental value determination of our society that it is far worse to convict an innocent man than let a guilty man go free.”²³ An acquittal resulting from a diminution in evidence admissible to support conviction, perhaps because some evidence was excluded or discounted because of the means by which it was obtained, would not undermine, but rather would comport with, the traditional value that Harlan expressed.

To say that application of the American punishment system may result in acquittal is not to say that the government has no means to regulate an individual. The article summarized in this presentation is entitled not simply *Punish*, but rather *Punish or Surveil*.²⁴ As a matter of tradition, when the government suspected someone of being up to no good but lacked evidence sufficient for conviction, its alternative was surveillance, both in the mundane sense of the vigilance expected of the officer on the beat and in the specialized sense of the duties imposed on a U.S. intelligence agent. Although one would have expected redoubled efforts in this regard after September 11, one suspects that the Administration’s post-September 11 policies in fact have not enhanced intelligence. The institution of policies that defy established legal regimes prompted new scrutiny of the surveillance establishment, and that scrutiny well may have limited intelligence agencies’ freedom to operate.

22. Peter Whoriskey, *Few Specifics Evident As Padilla Trial Nears*, WASH. POST, Apr. 23, 2007, at A3 (quoting U.S. District Judge Marcia D. Cooke).

23. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

24. See Amann *supra* note 19.

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In short, the complex of policies adopted since September 11 by no means has solved the very real threats to individual and national security with which the United States must grapple. Reform is essential. Tinkering with the status quo – with, that is, the inefficient and unfair system instituted after September 11 – will not help matters. What is needed is a return, with adjustment as careful deliberations prove necessary, to the time-tested framework in place on September 10, 2001.

Geoffrey Corn: I feel that the new paradigm argument has been one of the most frustrating arguments from the perspective of the community that I used to be part of, because it is based on assumptions that I think are invalid. First off, the old paradigm could have effectively worked, even according to the 9/11 Commission, to mitigate the harm that was inflicted on the United States on 9/11. It was not a question of whether or not there was the ability to operate in different modalities to address this threat; it was a policy choice to follow one instead of the other. I think that there is wisdom in the rules that regulate the way we operate on all levels of executing national power, not just the military level, that are tried and true.

The notion of fighting a non-state entity that has no respect for the principles of humanity in a failed state that requires an international coalition to deal with it, causes everybody to assume oh, we are talking about Afghanistan. You could be talking about the Boxer Rebellion in 1900. This type of situation is nothing new. I have made the point that I think when soldiers went into those fights; they did not debate the wisdom of following these basic principles of chivalry. It was ipso facto. It was not, well is it the right type of conflict and have we triggered this rule or that rule. There were basic notions of what the profession of arms meant.

At the battlefield level, the suggestion that the new paradigm requires soldiers to “take the gloves off,” that we do not have to respect these basic principles of humanity is not a good idea. As Telford Taylor said, you might get a short term benefit out of it but what military professionals understand, and is often overlooked by the broader policymaking community, is that that has a corrosive effect on the armed forces themselves. I was a soldier for twenty-two years. I had to live with the consequences of my decisions. The rules served a purpose for me, my peers and my family members who are still in the service, to help them reconcile what they were doing in the name of national security with their own sense of what is right and moral in a culture that they are serving.

I think when you open the Pandora’s Box of new paradigm; it is a subterfuge for basically saying there is an easier way to do this. I will just close with one more comment; because I think it is connected to what Diane was saying.

Compliance with law oftentimes incurs a certain degree of risk. I think warriors know that probably better than anybody. When you are in battle and the rules say there is a limit to what you can do, it produces risk that you must incur, but it is a risk you are willing to incur because you understand there is a macro benefit.

I think that it is too simple to just say at the micro level we should not follow the rules, because we will get an immediate short term benefit. There are reverberating effects of that. If compliance with law means as Diane says, that maybe there is somebody who goes unpunished, and that creates a certain degree of risk for the nation, it is a risk that is worth the cost. .

Diane Marie Amann: I would add that the only thing “new” in the “new paradigm” is a new unwillingness among some in the United States to follow established law. I do not say that at all flippantly, nor do I think that that is an insignificant novelty.

But part of the reason that I painstakingly look at the systems in place, and try to stress cases like that of *Noriega* and those of skyjackers, is to demonstrate that within its established punishment system, the United States was dealing with these issues. The system, as exemplified in the quote by Justice Harlan, accepted that some individuals would not be convicted. This administration has a zero tolerance for that concept, and therefore is claiming to put in place a system that is foolproof. Yet it has failed miserably on this essential consideration of effectiveness. It has failed too in that its novel policies have diminished the standing of the United States in the world, both because of what has occurred in service of those policies and because of the way that the United States has rebuffed international scrutiny of what has occurred.²⁵

Allison Danner: I had a question for Geoffrey here, since he is an expert and I am curious what he is going to say to this argument. So international armed conflict does not define the idea of a combatant. International Law on armed conflict leaves it up to each nation state to define it. The U.S. has chosen to define it in these incredibly vague ways, but nevertheless, they have enacted a definition. Is it a violation of international law or international humanitarian law? Or that’s the working definition for purposes of the U.S.

Geoffrey Corn: I think it is contextual. I think there are arguments that in a certain context labeling somebody an enemy combatant produces the effect of removing them from a status that objectively they should have under another

25. See, e.g., Diane Marie Amann, *The Committee Against Torture Urges an End to Guantánamo Detention*, ASIL INSIGHT, June 8, 2006, <http://www.asil.org/insights/2006/06/insights060608.html> (last visited May 1, 2007).

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treaty. For example, the argument that individuals we captured in Afghanistan, who were associated with the Taliban, who we labeled enemy combatants and therefore were not prisoners of war, were then subject to any detention we might want to impose, but nobody ever contemplated that they might be protected under the Fourth Geneva Convention.

I think in certain contexts, it could violate international law. I do not know, broadly, whether or not coming up with a definition is a per se violation. I think that this whole notion of enemy combatant has distorted a term of convenience into something that has profound legal ramifications, and that could produce violations of domestic law, deprivations of liberty in violation of due process of law, international humanitarian law, transporting individuals who are protected by the Fourth Convention out of the territory of the conflict in violation of the treaty. It is potentially a grave breach.

The question I have always wondered is why the government chose this approach. What is the benefit we get from it? Is it simply to provide a label for somebody who is subject to being targeted and then if the threat is reduced, they can be captured? We did that in Panama. We did that in Bosnia. We did that in Kosovo. We just used the category hostile force under the rules of engagement. And I think the enemy combatant term, wherever it came from, whatever the original purpose was, it has just exploded into something that could produce a violation.

Why have the military commissions been so inefficient? Because they were not created consistently with the kind of underlying constitution that historically has guided military commissions. Of course they are inefficient, because as soon as they began, the defense lawyers started screaming that this is totally invalid both procedurally and substantively. If they had been narrowly tailored to their original purpose, I think we would have had some convictions. But then again, we could not have convicted people for just being there.