

LEGISLATION PANEL: DISCUSSION & COMMENTARY†

Professor Ash: The issue that I see with respect to the global War on Terrorism is that it is very confusing to know exactly what we have. Under international law, there is debate on whether you can have a war between a state and a non-state actor, except possibly under Common Article 3 of the 1949 Geneva Convention.¹ It seems to me, from my observations, that much of what has been said during this Symposium about the congressional role and its attempt to deal with this is that we are dealing with a great deal of ad hocery because what would normally happen under the law of armed conflict is relatively set. If we were in a traditional situation, those types of issues would seem to be relatively clear.

We are in a situation, however, where some people are not even sure that this can ever constitute a war under international law, but others have said it has. For instance, I do not need to tell everybody here that NATO, for the first time, triggered the mutual defense provision of the North Atlantic Treaty after the events of September 11, 2001,² and we had allied aircraft patrolling our skies for the defense of the United States.³ There were a lot of international organizations that recognized the severity of what had happened, and thought that even if it was not technically war, at least we should respond in a war-like manner.

One of the key issues is that there is a great deal of confusion over what law should apply in the international realm. What I would like to do is to ask that question and have comments from the panel. For instance, Admiral Clark, I am sure you had to testify numerous times before congressional committees, and to what degree did you find that a lot of what was discussed was based on confusion as to whether this was purely a criminal matter or was a law of armed conflict, and how do we deal with that? I think, Professor Radsan, some of your comments deal

† This panel discussion was presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent legislation affecting national security. Speakers included: Admiral Vern Clark (ret.), Chief of U.S. Naval Operations; Professor A. John Radsan, William Mitchell College of Law; and Professor Gregory S. McNeal, Penn State Dickinson School of Law. The panel was moderated by Professor Robert W. Ash, Regent University School of Law.

¹ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

² Suzanne Daley, *A Pause to Ponder Washington's Tough Talk*, N.Y. TIMES, Sept. 16, 2001, at 4.

³ JOYCE P. KAUFMAN, *A CONCISE HISTORY OF U.S. FOREIGN POLICY* 154 (2006).

with the same type of thing. I would like to open that up to members of the panel to address.

Admiral Clark: Well, that is really a terrific question, and I am reminded that I have spent some time talking about fourth generation warfare. I do that from a historical perspective. While I am not allowed to speak for the Joint Chiefs, I can speak for one person who was in that body. Think about what happened right after 9/11 and we can start wrapping up some of the players—for example, Khalid Sheikh Mohammed. One of the guys who worked for me said that he does not look like a warrior; he looks like someone who slept in a bakery all night. But he is a warrior in a new world order. He is what a new warrior looks like.

Think about what happened right after 9/11. We went to work and started wrapping up some of the players involved in the attacks—for example, Khalid Sheikh Mohammed. One of the guys who worked for me said “He does not look like a warrior; he looks like someone who slept in a bakery all night.” But Khalid Sheikh Mohammed is a warrior in a new world order. He is what the new warrior looks like.

And so 9/11 goes down and we have activity that is not represented by a state, but by non-state actors. I want to tell you that it causes tremendous confusion about how you organize. Who do you present your demarche to if you want to employ diplomacy so that you can tell them how disappointed you are by the activity that has just occurred? It is a very real and serious problem.

Of course, fourth generation warfare is part of this. To speak to this effectively would be a one-hour lecture, but let us just summarize it like this: first generation warfare was equated to the Civil War—hand-to-hand combat. Second generation warfare was during World War I and the introduction of mass combat. Third generation warfare started with the introduction of maneuver and goes all the way to Desert Storm and Schwarzkopf's big left hook—coming around the side. Another example is Rommel in North Africa—introducing speed into the equation. All of that activity was conducted since the 1600s. Our body of law about warfare is based upon the supposition that we are talking about state versus state activity. Fourth generation warfare falls out of that model and introduces a brand of warfare conducted by non-state players.

So what is the body of law and record to fall back on and refer to in the non-state actor, fourth generation arena? In fourth generation warfare, it is about ideals and principles and values and people operating independently. The last thing the non-state wants is to be tied to a particular state. Consider, for example, Osama bin Laden. You cannot go file your demarche with any specific country to deal with him, which was what President Bush was trying to deal with in establishing

the principle of “and all who harbor them.”⁴ He was trying to create a link that would allow him to work, state with state, in a very difficult part of the world that was being presented to us when we were dealing with state versus non-state kinds of players. It then gets you to dysfunctional states, and states that are eroding and do not have the ability to govern themselves. How are we supposed to deal with them? This is definitely a significant challenge for us.

Professor Radsan: I found out after fifteen years of being a practitioner that Sandra Day O’Connor is not popular in the legal academy. She is too pragmatic. She was messy in her decisions. But I think if you go back and look at the *Hamdi v. Rumsfeld* decision in 2004, you will see a key to unlocking this question.⁵ The issue there was whether the Government had the authority to designate a United States citizen as an enemy combatant; and if so, what sort of process was owed to that individual?⁶

What I like about that opinion, the plurality opinion, is that Justice O’Connor recognizes and tries to weave these two threads. One is the law of armed conflict and the other is an international human rights or a due process model. It is a messy opinion, but I think to deal with the problem of terrorism we are going to have to find solutions between systems. I agree with Professor Ash, or maybe what he is implying, that neither the law of armed conflict nor international human rights law; nor what we would call in the United States the due process model, take care of this issue of terrorism. Maybe we are broadening the topic because not only do we need legislative changes, we need changes in customary international law practices. And the opinion of some scholars is that we might need changes in treaties. I am looking to the experts as to what changes should be made to the Geneva Conventions to deal with this issue, but I disagree with the Bush Administration—you cannot neatly place this within the law of armed conflict.

Two comments, though, about the references. When people retreat to the law of armed conflict, they tend to think everything is neat and tidy. It is not even tidy, as I think the Admiral is saying here, within conventional war. What do we do with targeted killings within the law of armed conflict? What do we do with insurgents and guerillas? What do we do with the use of nuclear weapons? What do we do with people who will use civilians as shields and who will hide in mosques to fight us?

⁴ 147 CONG. REC. 17,321 (2001) (statement of President George W. Bush) (“[W]e will pursue nations that provide aid or safe haven to terrorism. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”).

⁵ 542 U.S. 507 (2004).

⁶ *Id.* at 509.

These are very difficult questions even within a conventional battle, even in the battle that goes on in Iraq.

One other comment about the criminal justice system is that we talk about it as an alternative or as the baseline for some of these issues that I discussed, such as rendition and aggressive interrogation.⁷ When we talk about the criminal justice system, we forget that coercion is allowed in interrogations. The due process model allows coercion of suspects. What Federal Bureau of Investigation (“FBI”) agents do within the law is not going to seem tidy and polite. It is not all about telling the suspect what is in his best interest. When the FBI agent says, “Do you want a turkey sandwich with swiss or mozzarella?” he does not mean that with respect; he is trying to establish rapport. That can be coercive.

The other point about the criminal justice system is that it is not infallible. We make mistakes all the time in the criminal justice system. You will hear about the mistakes that are made in the intelligence world when we do not have as many checks. The criminal justice system is not an answer to all this. You can go to various law schools with their innocence projects; we have innocent people on death row. I think there is a blend needed between the systems, but I do not think either system fully answers the questions.

Professor Ash: Professor McNeal?

Professor McNeal: There are two points that are important for the audience to recognize, and I think all the panelists recognize these. When discussing the issue of what body of law should apply, it is critical for us to separate the detention issues—particularly, the detention of individuals found on the battlefield versus trial issues. One of the reasons that we are in the circumstance that we are in is because a memo came out during the Afghanistan conflict—most likely from the Office of Legal Counsel—suggesting that there was no requirement to do in-the-field determinations of an individual’s status under the Geneva Conventions. Specifically, administration lawyers agreed that “al Qaeda or Taliban soldiers [were] presumptively not POWs” the practical result of that determination was that in the field status adjudications were foregone.⁸ Had we done those determinations in the field, we may not have brought the number of detainees that we did to Guantanamo. Considering the population of detainees in Guantanamo, it is hard to argue with the fact that there may have been some mistakes made since

⁷ A. John Radsan, *Change Versus Continuity at Obama’s CIA*, 21 REGENT U. L. REV. 299 (2009).

⁸ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 113 (2007) (quotation marks omitted).

I think the population has dropped from around 670 to 264 detainees.⁹ Of those who are left, the Government has affirmatively stated that it only seeks to try eighty.¹⁰ There is another indeterminate group of about one hundred who are dangerous, but we do not have evidence to try them on,¹¹ which sounds like a fraud, but there are actually some circumstances where that would occur.¹² There is another group we would like to release but we cannot find anyone who will take them.¹³ The Chinese Uighurs, for example, would get off of the plane in China, and their trip would likely end on the tarmac because the Chinese government would likely execute them.¹⁴ There are a series of issues there.

But with regard to the eighty who may be tried, this is where an interesting secondary issue comes up. If one of the eighty was in a standard criminal justice context, knowing that the Government was going to try him, the fact that the Government had not yet charged him would be an exercise of prosecutorial mercy. It is the equivalent of saying “I am not being charged; I will go free. Thank you very much.”

Here, though, the Government says there is a group of eighty people we seek to try, and they are going to stay in detention while we conduct our extensive seven-year investigation through our Criminal Investigation Task Force,¹⁵ build a case file filled with evidence to use against them, preserve our witnesses, preserve our testimony, and someday seven to ten years down the road we will bring charges against them—and somehow expect that it will be a fair trial. The model of speedy trial that would apply in the standard criminal justice system somehow does not translate back into this system, yet we still think that it is a fair trial. While *Hamdan v. Rumsfeld* looked to the requirements of Common Article 3 for a fair trial,¹⁶ I think as these military

⁹ See Sherwood Ross, *U.S. May Not Release Any Acquitted Gitmo Prisoners*, OPEdNEWS.COM, Apr. 12, 2008, http://www.opednews.com/articles/genera_sherwood_080412_u_s_may_not_release.htm.

¹⁰ *Id.*

¹¹ *See id.*

¹² See Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/28/LRColl2008n28McNeal.pdf>.

¹³ *See id.*

¹⁴ Peter Spiegel & Barbara Demick, *Uighur Detainees at Guantanamo Pose a Problem for Obama*, L.A. TIMES, Feb. 18, 2009, at A5, available at <http://articles.latimes.com/2009/feb/18/world/fg-uighurs-gitmo18>.

¹⁵ See L.J. “Jim” Powlen, *Criminal Investigation Task Force*, MIL. POLICE (U.S. Army Military Police, Fort Leonard Wood, Mo.) Spring 2007, at 1, 1–2, available at <http://www.wood.army.mil/mpbulletin/pdfs/Spring%2007%20pdfs/Powlen.pdf> (describing the role and functions of the Criminal Investigation Task Force).

¹⁶ 548 U.S. 557 *passim* (2006).

commissions continue, we are going to see that there are other fundamental fair trial guarantees—in a normative sense of what a trial should be—separated from constitutional values that will likely undermine this process.¹⁷ This again speaks to Professor Radsan's point that we need some sort of resolution of how we will try, not only those currently detained (which is a *sui generis* mess in and of itself), but also future detainees.

Professor Ash: Okay, thank you.

Professor Radsan: Professor Ash, could I make a comment?

Professor Ash: Certainly.

Professor Radsan: I thank Professor McNeal for agreeing with me; but now, once he hears my comments, maybe he will disagree with me.

Professor McNeal: That is good. It keeps it exciting.

Professor Radsan: We will stir it up. About the National Security Division, I do not know that I would make too much of it. I agree it is a worthy area of scholarship, but if we are looking at terrorism prosecutions that exist, I would recommend going to the Southern District of New York, the Eastern District of Virginia, the U.S. Attorney's Office in Miami, and even the U.S. Attorney's Office in Detroit to ask them the question with a camera: what do you think about main Justice? The eyes will roll; and then if you ask them about the National Security Division, it will be like a slot machine in Las Vegas. The eyes will just spin. I still think the center of the action in terrorism prosecution will be in those U.S. Attorney's Offices where there is experience. But I do understand that your focus is on the National Security Division.

That is the first point, and the second is that I do not know that I would make so much of this tension about surveillance or arrest as a problem that exists between the criminal justice system and the intelligence world. This is an issue that also exists strictly within the criminal justice system for organized crime prosecutors, for narcotics prosecutors, and for white collar prosecutors. If you leave some suspects

¹⁷ See Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. (forthcoming 2009) (discussing how the legitimate form for a criminal trial is one which complies with the practice of Article III courts, although in the case of counterterrorism this may not be the most effective tribunal).

out they will take you to the information and they will take you to other people. There is a risk that they might get away and that may complicate your case, but there is an intelligence value in building your case. What investigators and prosecutors are always faced with is the question: when do we take down the organization? Because, if we start arresting people, we may have suspects leave and we may have evidence disappear. I think you recognize this would be a box within the box that you are talking about.

Professor McNeal: The only point of clarification that I wanted to offer—I agree with you on the U.S. Attorney’s Offices point—is that this is the precise issue that was created by the reorganization.¹⁸ The U.S. Attorney’s Offices have now been organized in such a manner that every U.S. Attorney has an Anti-Terrorism Coordinator for the area, which I gather you are familiar with.¹⁹ The reorganization created a series of local Anti-Terrorism Coordinators, all of whom report to main Justice.²⁰ A U.S. Attorney in the Southern District of New York or in the Eastern District of Virginia can no longer bring a case as the line attorney in the U.S. Attorney’s Office without main Justice approving how the charges will be brought, or supervising the investigation. In the words of the Department of Justice, according to their most recent White Paper, the Counterterrorism Section, which is located at Main Justice “has the lead for managing the ATAC Program, a National ATAC Coordinator and six Regional Coordinators . . . [who] provide, receive and exchange terrorism-related information in regard to threats, litigation, criminal enforcement, intelligence and training.”²¹ So the control mechanisms are in place, and the tentacles have gone out to control the U.S. Attorney’s Offices from Main Justice, the action may be in the U.S. Attorney’s offices, but the control is centralized.

On the second point, I agree with you that there is a problem of supervision that extends to the criminal justice system. It is not unique to counterterrorism cases. The distinction being, of course, the potential

¹⁸ See generally Gregory S. McNeal, *Organizational Theory and Counterterrorism Prosecutions: A Preliminary Inquiry*, 21 REGENT U. L. REV. 307 (2009) (explaining that the DOJ sought to implement an organizational structure which centralized all national security functions at main Justice).

¹⁹ Memorandum from John Ashcroft, Att’y Gen., U.S. Dep’t of Justice, to All United States Attorneys (Sept. 17, 2001) (“[I]nstruct[ing] each United States Attorney’s Office to implement . . . measures to enhance our capacity to combat terrorism.”), available at <http://www.usdoj.gov/ag/readingroom/ag-091701.pdf>.

²⁰ See *id.* at 1–3.

²¹ U.S. DEPT OF JUSTICE, COUNTERTERRORISM WHITE PAPER 7 (2006), available at <http://trac.syr.edu/tracereports/terrorism/169/include/terrorism.whitepaper.pdf>.

harm that comes about if a plot slips through. But I think we are in agreement.

Admiral Clark: I would like to piggyback on these thoughts a bit. First of all, I want you to know that as a practitioner, I do not know what we would have done without rendition well before 9/11 ever happened. Generally, people do not know all the circumstances where rendition did things for our nation, and they do not ever hear about it because those things are all done in classified channels and, if they are disclosed, they are no longer going to be channels that we can exploit—necessarily exploit—in a globalized world. Way before 9/11, when I was the Director for Operations and worked for the Chairman of the Joint Chiefs as a three-star officer, rendition was a tool that, if we did not have it, we would be trying to figure out how to get it as a tool.

I want to talk about the Guantanamo Bay U.S. Naval Base (“Gitmo”). I guess I should talk about the National Security Division. If you are a practitioner, this confusing line between criminal activity and terrorist activity really gets to be a problem for somebody like me who was in the military. The challenge is figuring out where that line is, and so let us translate. I was certainly not inside the Justice Department, but I was in a number of places in government, where you can see the move to create a security operation and separate it from a criminal operation to try to do something about where that line is drawn. It is classic when you get to Gitmo. I want to state publicly that Gitmo was on the naval base, but it was not operated by the Navy. I do not know if I should take comfort in that or not, but I do.

Here is a reality: there were numbers of prisoners at Gitmo that we wanted to let go, but either their country would not take them back or, from a human rights point of view, releasing them could become a problem for us. We knew that the moment we sent them back they were going to be stood against a wall and be executed because they came from a bad neighborhood. So there were a lot of things going on at Guantanamo that people do not necessarily know how to put in context.

I am back to whether I call this activity criminal or if it is under the rule of war, and whether we declare somebody a combatant. To begin with, we did not know, from a practitioner’s point of view, where to go and how to define this. But we were pretty sure that if no one could figure out a magical way to define when the end of the war was going to occur, and whether a person should be classified as a prisoner of war (“POW”), the POWs would someday be released and just go home. If Khalid Sheikh Mohammed was classified as a POW and we had not gotten through the process, then we were going to have to release him. To me, and people like me, that’s a real problem.

For the record, of the persons we have returned and those who went back to home base, we have encountered numbers of them in the field again and captured them—again—a second time. This is where the body of law and nations decide to deal with the fuzzy line question Professor Ash has asked, and it has certainly not reached a resolution.

Professor Ash: Thank you. What I would like to do now is open to questions from the public. We have at least two people with microphones. Please direct your questions to an individual or to the whole panel, whichever you prefer.

Question 1: This is Jordan Paust. I will be on the second panel.²² This question is really directed to all of the panelists. It is a counter-thought or counter-consideration. It starts off with Admiral Clark's recognized need to use all of our national power resources. One of those resources I would emphasize that has not been emphasized enough is our respect abroad. Professor Radsan started to mention that at the beginning of his talk. I think that our respect abroad should definitely be part of the conditioning of choices with respect to the types of interrogation tactics that are used and whether we should have a national security court. I think our respect abroad has been based in part on our national values, our commitment to human dignity, and human rights. Whether you agree with human rights or human dignity, I think from a practical point of view you can see that our own self-interests are connected with retaining our commitment, especially in a war of values, or conflict of values, which terrorism often raises. That we need to at least think, Professor Radsan, about the consequences of a national security court when we have JAG officers resigning in protest over the Gitmo military commissions that are already approved by Congress. We have clearly had problems with gaining extradition of certain persons from other countries because of problems of rendition and the interrogation tactics that became public at Abu Ghraib and obviously at Gitmo. Then came the two memos from our former Secretary of Defense and the list continues. So it is a caution in terms of our own self-interest and retainment of our fundamental American values. I would actually say that some of your suggestions are dangerously nonconservative—you are not conserving enough of traditional American values. What do you think about my comment?

Professor Radsan: Could I take the first crack?

²² *Supreme Court Panel: Discussion & Commentary*, 21 REGENT U. L. REV. 385 (2009).

Professor Ash: Sure, please.

Professor Radsan: I agree with you. At the William Mitchell College of Law, we have on our National Security Forum advisory council Doug Johnson,²³ who is the executive director for the Center for Victims of Torture, based in Minneapolis.²⁴ He is in touch with the victims of torture. He has been a big proponent of the rule of law working there, and he said that what has happened in the last two presidential terms has set us back decades. It is, I agree, one of our great advantages that we stand for hope, freedom, decency, and the rule of law. I also agree with your point that perhaps my proposals are politically unpalatable because of what has occurred in the last two terms. But professor to professor, let us consider it as a thought experiment. Would Radsan's proposals today seem so outrageous if we had put them in effect in the year 2002? We did go through a period when it was just executive supremacy—the Commander-in-Chief Clause was used to answer all of our questions. So I am looking back at it and asking what could have been done? What sort of compromise could have been reached? Recognizing these values, but also recognizing the need to gather intelligence because of the nature of the threat—we need to try to come up with some construct that satisfies our concerns about civil liberties, but also satisfies the concerns of the American people and practitioners to make ourselves safe. So I will put my ideas out there, but you can hear in my tone that I am pragmatic in a negotiated way. But where I hold firm is that I do not think that the pure model of the criminal justice system by itself is going to handle all of these questions. I think we are going to have to go back and forth in this middle ground, and I respect your comments and your work on that to push me back to something that you would consider more conservative—more truly conservative.

Admiral Clark: I really could not agree more that the international standing of the United States of America has paid a price. Sometimes you pay a price for taking the right stand, and sometimes you pay a price for taking the wrong stand. Or maybe it is not a stand—maybe it is activity. I will tell you that one of the lowest days of my entire life was the day that the information about Abu Ghraib became public, and I found out about it on television. I am not a person given to

²³ About the National Security Forum, <http://www.wmitchell.edu/national-security-forum/?page=88> (last visited Apr. 10, 2009).

²⁴ The Center for Victims of Torture, CVT Staff, <http://www.cvt.org/main.php/InsideCVT/WhoWeAre/Staff> (last visited Apr. 10, 2009); The Center for Victims of Torture, The History of CVT, <http://www.cvt.org/main.php/InsideCVT/WhoWeAre/History> (last visited Apr. 10, 2009).

anger, but I was first angry and then it made me sick. I just could not believe that that could be us. I am thankful, however, that we live in a country where those kinds of disclosures not only could be made, but were made, and that the individuals responsible for getting that into the public domain had a sense of protection that was positive.

Here is what I believe one of the major challenges is for us, though. I agree with you completely about our standing and our loss of good will. Somewhere, we have to figure out how to bridge the divide that has us hamstrung in areas such as what I call “ISR”—intelligence, surveillance, and reconnaissance. We cannot succeed without successful ISR. It crosses lines all the time. For example, for most Americans, the global War on Terrorism started on 9/11; it did not for me. It started on October 12, 2000, when the USS *Cole* was hit and bombed in Yemen.²⁵ The confusing lines between intelligence, surveillance, and reconnaissance immediately were in question. And did I go to Congress? Was I in a bunch of hearings about that? You better believe I was. The question of the day was, did anybody have intelligence that would have led us to understand that this was headed our direction? That very day I sat down at my computer and wrote a message to the entire Navy telling them that the world had changed and that we were not going to wait for a two-year investigation to tell us what we were going to do about it.²⁶ I set into motion a series of things that we had to do differently the very next moment.

I do not know if the national security court is the right answer. If Professor Radsan has this right, then hooray. But if he does not, we will keep working on it. In any case, we have to have some methodologies that allow us to have a check-and-balance system in this new fourth generation warfare world that allows us to function in an era where success in the ISR challenge is necessary for us to survive. That will enable us to maintain our good will globally and rebuild it globally. Whatever kind of mechanism that is, it is not a singular—it is certainly a plural. We have to figure out how to put it in place, and to me, that is one of the greatest challenges facing Congress.

Professor Radsan: Could I add a note of optimism? I am thinking of who the heroes are during this time. More and more of the reporting

²⁵ “On October 12, 2000, a small boat piloted by two suicide bombers and carrying between 400 and 700 pounds of explosives rammed the hull of the U.S. Navy’s guided missile destroyer, the USS *Cole*.” MARTIN C. LIBICKI ET AL., EXPLORING TERRORIST TARGETING PREFERENCES 37 (2007). Seventeen servicemen were killed and twenty-nine were injured in the attack, which Bin Laden denied responsibility for, while indicating support for the attackers. *Id.*

²⁶ See Joseph Gunder, *After Cole—New Initiatives Taken*, NAVY NEWS SERVICE, Dec. 20, 2000, <http://www.navy.mil/navydata/cno/news/clark001220.txt>.

has shown us what happened at the Justice Department. I worked there. When people talk about “the Department,” they speak with a sense of respect and honor for that word. If you look at what Attorney General Ashcroft did, what Deputy Attorney General James Comey did, and what the head of the Office of Legal Counsel Jack Goldsmith did, I think whether you are a Democrat or a Republican, you can be proud of those people because at very difficult times—standing up to the Vice President or the President—they stood for the rule of law rather than laws of men. That goes back to our founding decision, *Marbury v. Madison*.²⁷ It is not a partisan note that shows that lawyers—and you mentioned the lawyers in the JAG Corps—can play a very important role. They defend our liberties at the same time that they defend our security. I think we all owe our gratitude to John Ashcroft, Jim Comey, and Jack Goldsmith.

Professor McNeal: I am similarly optimistic despite the ground that we may have lost in the esteem of our allies. In my prior position before coming to Penn State, I supervised an eighteen-month-long counterterrorism program with the U.S. Department of Justice (“DOJ”), where we brought together counterterrorism prosecutors from the DOJ and their counterparts in Germany, the Netherlands, and the United Kingdom. This issue actually came up in one of our discussions and our European attendees were confident that there are enough review mechanisms in place on their end, such as through the European Court of Human Rights, there is judicial review that they can feel comfortable with.

America’s most controversial policies seem to have largely come from circumstances where there are no checks, as the Admiral has pointed out. That does not necessarily mean that it needs to be a judicial check. As I suggested, you could have institutionally designed checks.²⁸ There could be a mechanism by which Congress can exercise greater oversight over some of our activities.

But some check is necessary to bring us in line with what our allies expect. That is not a fundamentally liberal principle—I am actually a pretty conservative guy. You would not know it from my comments today, but I worked as an academic consultant to Colonel Morris Davis, the chief prosecutor in Guantanamo, until he resigned from his position for reasons similar to those Professor Radsan has stated. I believe that when people stand up and say this is not working, those resignations, taken together start to suggest that we have institutional design problems. Such problems can be remedied I think, if the next President decides to take the reins and do something about them.

²⁷ 5 U.S. (1 Cranch) 137 (1803).

²⁸ See generally McNeal, *supra* note 17; McNeal, *supra* note 18.

Professor Ash: Professor Wagner.

Question 2: I am David Wagner. I teach constitutional law here,²⁹ and I have a question about a constitutional debate. There is a debate among constitutional law professors, but I am interested in getting a practitioner's view point on it, especially Admiral Clark's view. But I would like to hear the other panelists' views on it, too.

This question occurred to me when Admiral Clark was talking about Congress as one of his key touchstones. The bookends for this debate in the academy, as far as I can tell, are Professors John Yoo³⁰ and Neal Katyal³¹—good, solid bookends. The issue is the extent of presidential war power, and according to Professor Yoo, it is essentially totally in the Executive.³² The only congressional check is the appropriation process. Congress can cut off the funds. Professor Katyal says that is unrealistic because if the President commits troops to battle, there is no way politically that Congress can do anything other than—as the bumper sticker says—support the troops.³³

It strikes me that we may have a different situation between the way it was, the way things looked in 1787, and the way things are now. In other words, we may have a difference between original meaning and present application. It could be that complete authority was vested in the Executive because Congress did not meet full time. It might have been an emergency. There was more suspicion about armed forces generally in the founding generation, however, so I especially want to get the Admiral's perspective on how that cashes out today.

Is Professor Katyal's suspicion correct, or is his view incorrect, that the appropriation process is completely unrealistic as a check on the Executive's power? Also, what would Professors Radsan and McNeal say about that?

Admiral Clark: I thought we might get into what kind of things need to happen in Congress. I am a great believer that we have got to

²⁹ Regent Law, Faculty Profiles, David M. Wagner, http://www.regent.edu/acad/schlaw/faculty_staff/wagner.cfm (last visited Apr. 10, 2009).

³⁰ Berkeley Law, Faculty Profiles, John Choon Yoo, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235> (last visited Apr. 10, 2009).

³¹ Georgetown Law, Full Time Faculty, Neal K. Katyal, Paul and Patricia Saunders Professor of National Security Law http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=272 (last visited Apr. 10, 2009).

³² See Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003), available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

³³ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006).

have a breadth of reform. Let me give you an example. With all of the elements of national power, and the expansion that has occurred in every one of the departments where a cabinet member sits in the cabinet room, look at what has happened. As a result, has the methodology and the approach on the Hill changed one bit? No. We have more committees to go to, and more subcommittees, but is the oversight better? If the oversight is better, it has escaped me. I do not think that it is. The oversight process was built around the banker role (the appropriators), but on the defense side, half of the activity is in the authorizing side. Some years the authorizers do not even pass a bill before the appropriators do, and do you think it slows anybody down who wore uniforms? They do not wait for it, or hold the check and say to themselves that maybe they will not cash it because the authorizers have not passed their bill yet. That is not the way it works.

I could not agree more that we have a dilemma. The model that we have was not designed for a time when jet airplane provided rapid transportation to the home district every weekend—nobody had ever heard of rapid transportation. At those times, the Pony Express was rapid. I was in meetings this week where the discussion was about the role of the jet aircraft and its type of speed being too slow for the game. Think of it. And if that is the case, what does that mean to us as decisionmakers and the policymakers who are behind it? To be sure, the model is difficult, and so I think it ends up having a debilitating effect upon the ability of the branches of the government to effectively partner, because now the Executive is always seen as stretching beyond and reaching for more and more.

It is similar to a discussion I was recently participated in which asked, are we going to wait for the State Department to engage and solve the problems through diplomacy? You cannot win in fourth generation warfare if you do not play. Eighty percent of winning the fourth generation war is not kinetic. It is all the other stuff—and the other stuff should include big-time diplomacy. In this new world where speed of response is paramount, is the Commander-in-Chief going to wait? Probably not. And one of the reasons diplomacy is slow to respond is that Congress has not given them the new tools to respond more effectively.

As I said earlier, it too often falls back to the fact that the defense arm of our government has been overused. It is overused not because anybody who founded and created it intended it to be this way, but it has become this way in the world that we have, which is moving too fast. The scheme for response that we have is moving too fast for it to be limited to Congress getting together and deciding it is going to pass an authorization bill.

Professor Radsan: From a practical perspective, and a constitutional law professor's perspective, I think that Neal Katyal has it more right than John Yoo. I do not disagree with John Yoo on everything, however, and I do not agree with Katyal on everything.

On our topic about legislative proposals, I laid out my proposal.³⁴ If you want a more restrictive proposal on irregular rendition, you can look at a bill that was put forward by Senator Biden in the year 2007.³⁵ He is more restrictive; rendition would be a last resort in his proposal. As I read his proposal, even if there is a chance of cruel, inhuman, or degrading treatment—which is an intermediate category under the Convention Against Torture³⁶—he would prevent those transfers. Article 3 of the Convention Against Torture prohibits transfers if there are substantial grounds for believing that torture would occur.³⁷ There is some reading out there for you on Article 3 in the Convention Against Torture. If you are very kind, you can go to my Social Science Research Network website and you will see a couple of articles on rendition.³⁸

Professor Ash: Yes sir.

Question 3: As you know, Admiral, for many, many months—if not for years—the former Chairman of the Joint Chiefs, General Pace, was saying we needed a Goldwater-Nichols for the civilian side of the house.³⁹ That was the military's cry. The first big question is, where do you all stand on Goldwater-Nichols reform vis-à-vis what is required for the civilian side of the house? The question is whether it is possible? Constitutional?

The second issue is the tension that the Admiral raised—and also is raised by Professor Radsan's question of the Article III court—about a real confusion over covert operations and overt operations. If you are the General Counsel for the Central Intelligence Agency, the biggest issue you have dealt with for the last number of years is, what is Title 10 authority?⁴⁰ What is Title 50 authority?⁴¹ The answer is basically the

³⁴ See Radsan, *supra* note 7.

³⁵ National Security with Justice Act, S. 1876, 110th Cong. (2007), available at <http://www.govtrack.us/congress/billtext.xpd?bill=s110-1876>.

³⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

³⁷ *Id.* art. 3.

³⁸ Social Science Research Network, John Radsan, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=453088 (last visited Apr. 10, 2009).

³⁹ See, e.g., Jim Garamone, *Pace Urges Interagency Cooperation in Government*, AM. FORCES PRESS SERVICE, Aug. 8, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=46991>.

⁴⁰ 10 U.S.C. (2006).

difference between whether it is an agency matter or a military matter. What must you report to Congress? What do you not have to report to Congress? Those are major issues that the new world is forcing us to think about. I leave you those two little questions for you to think about vis-à-vis.

Admiral Clark: Number one, if we do not have a Goldwater-Nichols Act for the civilian side of government, we will never get to where we need to go. We are simply unable to execute the way we are required to deal with the fourth generation warfare world.

Here are a couple of statistics. I said the military is overused. (By the way, this is not just my view. The Chairman of the Joint Chiefs of Staff two back said it,⁴² then one back said it⁴³—this is widely held. I think it is unusual for you to hear military persons talking like that. Usually that is not the way they come at it.) If you are going to apply diplomacy to the game, you have got to have resources. I said we have 1.2 to 1.3 million in our military structure. Do you know how many foreign State Department officers we have? Unrestricted, a little over 6,000. We needed at least a couple thousand to go into Iraq the day after the war so that they could begin the process of establishing a new government. When we went to Baghdad to help them establish a new government, from a civilian side of the house instead of a military side of the house, Ambassador Bremer was tremendously under resourced. We were never able to fill the human resource roster. But if you have 1,200,000 or 1,300,000 people do it, then by default you go there because the resources are there.

This was a proposal: establish a civilian reserve. Just like we have a military reserve. The reason that is important is if I need somebody to establish a judicial system or to be a city manager in Baghdad, am I going to get that out of the military? Why not sign up a professor here and say, congratulations here are your orders? Therein lies the problem—they are orders and not invitations. But the Department of State put forward a proposal to create such a civilian reserve. Did you know the bill was approximately fifteen or twenty million dollars to start the program? And Congress would not enact it. I do not understand. We have to have new thinking.⁴⁴

⁴¹ 50 U.S.C. (2000 & Supp. V 2006).

⁴² See Thom Shanker, *Iraq Role Limits Military Ability, Congress is Told*, N.Y. TIMES, May 3, 2005, at A1.

⁴³ See Lolita C. Baldor, *Gen. Pace: Military Capability Eroding*, ASSOCIATED PRESS, Feb. 27, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/02/26/national/w163538S85.DTL>.

⁴⁴ Reconstruction and Stabilization Civilian Management Act of 2007, S. 613, 110th Cong. (2007) (as reported by S. Comm. on Foreign Relations, Feb. 15, 2007); Reconstruction

Let me talk briefly about the line between covert and overt. I do not want any American citizen to ever look at a military person in uniform and say, “I wonder how many of them are here who are not in uniform or operating covertly.” This line that exists is part of our good standing in the world—we have carefully tried to keep the military out of the covert world. That does not mean that special operations people do not sneak around; we are not talking about that. We are talking about operating under cover and different kinds of things. The covert side has appropriately resided within the CIA. We want the citizens, when they look at men and women wearing the cloth of the nation, to know that that is who they are.

Professor Radsan: I have not thought enough about Goldwater-Nichols to give you an answer. But I do believe we have to sort out—even in the important area of human source networks—intelligence gathering and what the roles are going to be between the intelligence side and the military side. That has not been sorted out. It is a very important area, and I agree with your questions and the need for reform or thinking in this area.

I think where we differ is that my proposals were very specific and discrete. Implicit in that, I do not know that this is the time for structural changes. I do not think the structure is so bad, looking at it from somebody who worked in the intelligence community, and looking at our authorities and the legal structure. We have the Director of National Intelligence—that was a big reform that was rushed through in 2004.⁴⁵ Many people, including Judge Posner, believe all that did was add another layer of bureaucracy.⁴⁶ I do not know as much about the military area, but I am suggesting let us not add layers of bureaucracy and regulation to the CIA.

Embedded in your question is a question about oversight. I do not think you can blame the CIA for the breakdown of the oversight system. Let me defend the line officers, or the people who understand the lessons of the Church Committee, the reaction to abuses, and the reaction to the notion that the CIA was a rogue elephant.⁴⁷ What did the CIA learn from

and Stabilization Civilian Management Act of 2008, H.R. 1084, 110th Cong. (2007) (as introduced in the House of Representatives, Feb. 15, 2007).

⁴⁵ Intelligence Reform and Terrorism Prevention Act of 2004 § 1011, 50 U.S.C. § 403 (Supp. V 2006) (establishing a Director of National Intelligence position).

⁴⁶ See RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005).

⁴⁷ The Church Committee, a common reference for the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, published a number of reports that “contain a wealth of information on the formation, operation, and abuses of U.S. intelligence agencies. They were published in 1975 and 1976, after which recommendations for reform were debated in the Congress and in some cases

Church, from Iran-Contra? Two basic lessons—maybe three. One is that you need presidential authorization to do covert actions and to do sensitive programs. I am not revealing anything classified, nor has the Admiral, but it has been reported that President Bush signed a comprehensive covert action plan within a week of 9/11 that gave the CIA written authorities.⁴⁸ So the people who are doing these operations said President Bush has authorized this.

The second thing the CIA was taught, and rightly so, is the need to go to the oversight committees. We are not going to go into the public session of Congress, but the public record shows that the CIA went to both intelligence committees. People may be skeptical; they say maybe they limited it, but this is more a problem aimed at Congress. What did you do? There are ways to be squeaky without necessarily revealing classified information.

The third thing the CIA was taught to do is get legal advice to understand that the President, as a matter of constitutional law, may not necessarily be able to override statutes. Everything in the public record shows that the CIA received legal advice within the General Counsel's Office and went to the Justice Department. The Office of Legal Counsel was considered to be the gold standard, and I think it is fair to criticize the lawyers in the CIA for relying on perhaps what was flawed advice from John Yoo and others in the Office of Legal Counsel. But I think it is especially unfair to criticize a line officer, who is not a lawyer, for pursuing policies that were authorized, briefed on the Hill, and were supported by written memos from the Office of Legal Counsel. So when I talked about sweeping change, I am not thinking about those people who do the day-to-day work in the CIA—whether they are in the Directorate of Intelligence, or the National Clandestine Service.

Professor Ash: Okay. Do you have any comments?

Professor McNeal: I will try to be brief, but first regarding Goldwater-Nicholas reform. I think maybe the question is targeted at recommendations made by the Project on National Security Reform,⁴⁹ which is another possible interesting issue to discuss. Some of the points that the Admiral made were about the number of State Department

carried out." Assassination Archives and Research Center, Church Committee Reports, http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm (last visited Apr. 10, 2009).

⁴⁸ See, e.g., David Johnston & Todd S. Purdum, *Threats and Responses: Pursuing Intelligence*, N.Y. TIMES, Mar. 25, 2004, at A1.

⁴⁹ See Project on National Security Reform, Project Overview, <http://www.pnsr.org/web/page/578/sectionid/578/pagelevel/1/interior.asp> (last visited Apr. 10, 2009).

employees we have. Largely, the State Department gets relegated to second status because it does not have as great a seat at the table. The argument is that if you can integrate our national security structure—recognizing that there are soft power and hard power components of it—that integration could lead to some better policy outcomes. But that will require a major reorganization.

The Title 10 and Title 50 question is an interesting one because it is somewhat in the ether here academically. When the military goes out, there are JAGs who sit with intelligence agents or officials and advise on whether it is lawful strike a specific target or engage in a specific operation. If a JAG is seated in a targeting cell in a special operations unit, the first question will still be whether a certain target can be attacked. However, the second question that the officer in that cell will oftentimes ask is whether he is operating under Title 10 or Title 50 authority. If it is a CIA drone, the answer may be that it is fine to hit the target.⁵⁰ Under Title 10—the answer may be, no you cannot.⁵¹ Different authorities at the tip of the spear can create different outcomes. That can be a good thing, or it could potentially lead to abuse. It is a decision that involves resolving the difficult question of whether one wants that flexibility at the tip of the spear. I would argue you probably do want that operational flexibility.

Admiral Clark: Of course you have to have the flexibility to be able to operate in the environment you have. In the Navy, we cannot arrest drug smugglers because that is criminal kind of conduct. The Coast Guard, however, does have that authority because they operate under a law enforcement jurisdiction. And so, if we find ourselves in a position where we think we are assigned to that kind of surveillance role, we are going to be hooked up with and have a Coast Guard detachment aboard so we can execute our mission. We are then willing to have any kind of oversight that is required of us. The point goes back to Professor Radsan's point that I wanted to piggyback on. The challenge for the future in so many areas is figuring out the mechanisms to provide the kind of oversight that keeps us in good standing in the world—the mechanisms that would allow us to rebuild goodwill. The point to be made is we must have mechanisms that keep us in good standing—first of all with ourselves. We get to define who we are and who we are going to be as a people. We believe that we are going to be people who live under the rule of the law. It happens to make us a special people, and is why I am so proud to be a citizen of the United States of America.

⁵⁰ See 50 U.S.C. § 413b (2000 & Supp V. 2006).

⁵¹ See 10 U.S.C. § 167(g) (2006).

Professor Ash: I do not think I could have ended it any better than that, Admiral. I appreciate your sharing with us. Thank you very much.