

THE BROOKINGS INSTITUTION

LAW AND THE LONG WAR:
THE FUTURE OF JUSTICE IN THE AGE OF TERROR

Washington, D.C.

Monday, June 23, 2008

Moderator:

STUART TAYLOR JR.
Nonresident Senior Fellow
The Brookings Institution

Panelists:

BENJAMIN WITTES
Fellow and Research Director in Public Law
The Brookings Institution

JACK GOLDSMITH
Henry L. Shattuck Professor of Law
Harvard Law School

SETH WAXMAN
Partner, WilmerHale

* * * * *

P R O C E E D I N G S

MR. TAYLOR: Good afternoon. I think we'll start. My name is Stuart Taylor. I'm the moderator, and the important folks are to my right. I'll introduce them in sequence. First and foremost since we're celebrating or at least launching his book is Benjamin Wittes who is now, let me see if I get the title right, Fellow and Research Director in Public Law, at the Brookings Institution and was previously a *Washington Post* editorial writer specializing in legal affairs. I should note that I first met Ben Wittes when he was a young twentysomething reporter at *Legal Times* and I was writing columns there and I noticed quite quickly that he had an uncommon analytical ability and covered the Justice Department better than anyone else I thought at the time. When he moved to the *Washington Post* in 1997, I think it was, he was then hired by the late great Meg Greenfield, I think he was writing all of their editorials on the biggest story of the latter part of the Clinton administration, Monica and impeachment and all that, at the age of 28 or so which was remarkable. He was also offending mightily the Republicans in the Senate and elsewhere by writing about how they should give a fair shake to Clinton's judicial nominees which got him a reputation as all too liberal, and when he started saying the same thing about the Democrats should give a fair shake to Bush's nominees, he became a right-wing nut.

But he has been pretty consistent and I think this book that Ben has written is consistent with his nonpartisan, nonideological, down-the-middle, fact-specific, empirical-based, pragmatic approach to things. Ben is going to summarize the book, so I will just read a couple of the blurbs that I think were striking. First from Jeffrey Rosen one of the distinguished legal commentators, "In this path-breaking book, Benjamin Wittes undertakes a bold project in a polarized age charting a moderate course in the war on terror. Rejecting the extremes of executive unilateralism and judicial supremacy, he argues that Congress has a crucial role to play in striking a sensible balance." And Jeff Rosen goes on to call it an "invaluable roadmap for adults who want thoughtful guidance about how to protect liberty and security at the same time." There is a similar encomium from Jamie Gorelik, member of the 9/11 Commission and Deputy Attorney General during the Clinton administration, "At last a book that strips away the polemics that have distracted us from what should be an important national debate about security and liberty. Wittes explains without the political hype the real choices we face about surveillance, preemptive military action, interrogation and detention." I will not read more encomiums, but now that she has done that laundry list, of course that underscores the timeliness of the book.

The Supreme Court's June 12 very big decision in *Boumediene v. Bush* about detention, habeas corpus of people at

Guantanamo, opens questions that are addressed as to how we should solve them very intelligently in this book. We're having lots of commotion lately about interrogation and alleged torture and whether administration officials are war criminals. There is a good chapter in the book about how to deal with those issues. Again, it is forward-looking and there has been too little forward-looking discussion in these areas. The same as to government spying, wiretapping, the Foreign Intelligence Surveillance Act. The Congress just reached an interim deal on something to patch it together for a while, very controversial, Ben discusses at some length perhaps how to fix it for the long-term.

We have also two of the best-qualified people I can imagine having in the country to comment on the book and each will speak for about 10 minutes after Ben speaks for about 20 minutes. First to my immediate right is Jack Goldsmith whose law schools if you begin with Yale where he matriculated and Oxford where he got an MA include teaching at the University of Chicago Law School, the University of Virginia Law School, now Harvard Law School. In between he served with great distinction in the Bush administration Defense and Justice Departments leading what some simplistic journalists such as *moi* have called a rebellion of senior Justice Department officials, and Jack would object I think to that characterization against some of the worst ideas that the Bush administration had, the great hospital bedroom scene involving

Deputy Attorney General James Comey and Attorney General Ashcroft which ended with Mrs. Ashcroft sticking her tongue out at Alberto Gonzales et al. Jack was the instigator of all that I think. Truly he was. And he is also the editor of a great book called "The Terror Presidency" that not only reflects on his experiences but also addresses the substantive issues with great wisdom.

Seth Waxman who is at the end, speaking of *Boumediene v. Bush*, the late Supreme Court decision, Seth won that case. He was the guy who argued in the Supreme Court on behalf of Boumediene and other detainees who had been snatched in Bosnia which puts them in a little bit different category. He is quite simply universally recognized as being one of the premier if not the premier Supreme Court and appellate advocates in the country. I think he has argued more than 45 cases in the Supreme Court. He is now an attorney with WilmerHale, one of the major law firms in town. He was Solicitor General in the Clinton administration for an unusually long term, 4 years toward the end, previously an Associate Deputy Attorney General, and has had a career of great distinction.

With that I will pass it to Ben who is going to summarize his book, and then in order, Jack and Seth will discuss it. Then I will ask them some questions and then I will open the floor for you all to ask questions and we will stop promptly at 3 o'clock. Thanks.

MR. WITTES: People really should come fill up seats rather than standing in the back there, however, I won't wait until you sit down.

Thanks very much for that kind introduction, Stuart. I am going to talk a little bit about the book which is actually rather difficult to do briefly for me because it covers a lot of ground. But before I turn to it, there are a few people who I really should acknowledge. There are actually many more such people than I have time to thank here, but there are a few and it would be very remiss of me not to acknowledge the contributions they made to this. The first is institutionally Brookings itself which really provided me a wonderful home to do this work. In particular, Pietro Nivola who I believe is at jury duty now was kind enough to bring me here to have time to think about this stuff and actually write it down and I can't really tell you how important that was to me, and this book just wouldn't have happened without it. More generally, Strobe Talbott and Bill Antholis have been just unstinting in their support of the development of the Legal Affairs Program here which we are in the process of building, so it's a very exciting time to be here and doing that. The staff in Governance Studies, particularly Bethany Hase, Erin Carter, and Gladys Arrisueno put these events together and just would not function without them doing so, so heartfelt thanks there.

Finally, we got a lot of support for this project from the Smith Richardson Foundation and as you'll see in chapter three of the book,

there is a very substantial, at least I hope it's substantial, bit of empirical research about the nature of the Guantanamo detainee population, and Smith Richardson has been very helpful in trying to help us do a project that is a little broader than this book but is sort of an attempt to look very broadly at the statutory architecture of counterterrorism law.

I have no time to thank the many people individually who have consulted with me about aspects of the text here, but a chapter was not done until both Jonathan Rauch and Matt Waxman had been over it with a very fine-toothed comb, and the text simply wouldn't have been the same as it was. Then also I had a huge amount of research assistance, and I am going to spare you the names of everybody, but again the Guantanamo chapter really would not have been finished without Zaahira Wyne. So thank you everybody who has helped on that.

Then finally my wife, and now that I am here, Brookings colleague, Tammy Cofman Wittes has been an incredible support, and so with that I will go on.

This book is sort of a modest little effort to rewrite the entirety of the law of the war on terrorism, and as such it's sort of hopelessly ambitious. To be more precise, it's an attempt at once to analyze and to try to explain how we came to the impasse that we are in now from a moment of incredible unity over what was necessary and what we had to do circa 9/12/2001 when we really started thinking about these

questions, and it's also an argument over how we might think about thinking about breaking that impasse. Specifically, it's an argument for a greater congressional role in designing what really for lack of a better term I call the legal architecture of the conflict. It is not a report, an effort to draft a counterterrorism, fixing all the problems act of 2009, but it's really an effort to look at these questions comprehensively and from the point of view of first principles and talk about them in a way that is both meaningful in terms of guiding statutory development but also comprehensible to lay reader and honest about the stakes and consequences of various policy choices that are quite at war with one another.

It attempts to address essentially all of the major issues that are currently in contest in the American political system, all these questions that we have been fighting about so earnestly from detention which is obviously today the most timely of them, to the mechanism for trial, to what interrogation standards ought to look like, and to surveillance standards which we have suddenly a big development in last week. I call it in the book a sketch, an outline of a first draft of the statutory regimes that might undergird a sound, long-term structure for a conflict that is not going away anytime soon, and I think that sums up what I tried to do which is to actually start a set of discussions and to start a framework for how we might think about developing statutory language in these areas but not actually to do the statutory language itself.

I want to talk a little bit about the impasse that we're at which I think is quite remarkable when you step back and look at it. When I started writing about national security law, which was as Stuart alluded as a young reporter at *Legal Times* in the fall of 1994, these issues were almost entirely nonideological. That is, FISA which was my introduction to this subject had been developed as a bipartisan compromise from the beginning. It was maintained and cultivated under successive administrations of both parties. As far as I know, there had never been a partisan vote over any matter related to FISA prior to the September 11 attacks, and you see this continuing actually in the Patriot Act where for all that there was controversy about Patriot Act, there was never a partisan dispute about it. A Democratic-led Senate and a Republican-led House produced a bill that was opposed by one senator and the opposition to it in the House or rather which forced some changes, the senator in question, Russ Feingold was a Democrat, the House opposition which forced some substantial changes to it was from the conservative wing of the Republican Party, specifically Bob Barr and Dick Armey. Somehow between then and now we have arrived at a situation in which these issues are pervasively partisan, as a remarkable change in a very short period of time. I think it's fair to say that we're growing further apart, not closer together.

So if you think about just to take the example of detention, in January 2002 when Guantanamo opens, Guantanamo was controversial from the beginning and yet the nature of the controversy has changed pretty dramatically. So in January 2002 when it opens, Human Rights Watch criticizes Guantanamo quite fiercely, but the list of things that it criticizes are the following. One, that detainees are being held in wire-mesh cages. The second is that they are being denied process under Article 5 of the Geneva Convention. And the third is that in theory, holding out the possibility that detainees would be entitled to POW status. What was not in dispute in that, and I think this is fascinating, is that one might hold these people as enemy combatants, one might hold them indefinitely as enemy combatants, and one might hold them without the privileges as POWs, and all of that is a matter of consensus at that point and as is quite obvious is no longer a matter of consensus.

I think one of the things about this devolution to a more polarized environment is that it is easier this way. Our whole rhetoric about the subject can very neatly track preexisting political fault lines. Conservatives deride liberals as weak, as insufficiently serious about security. You have this importation of what conservatives used to talk about liberals as soft on crime and this is with a nice little wrinkle on it that says of terrorism with the wrinkle that the terrorism is treated as crime, but it conveys the same thing, an insufficient seriousness about the problem.

Similarly, liberals get to throw around language like shredding the Constitution, insufficient attention to liberty. The vocabulary tracks the way we want to think about each other as a political society.

But I think it is analytically wrong and I think it is actually analytically unfair to both sides in some ways, and I think it is also very dangerous. You have as a result a world in which we have no basic agreement on the ground rules under which we are going to fight a conflict that everybody agrees we need to fight and the result of this is pretty striking. If we caught Osama bin-Laden tomorrow or Ayman al-Zawahiri tomorrow, we have no universally agreed upon rules under which we would detain them, we have no universally agreed upon rules in which we would interrogate them, we have no universally agreed upon rules in which they would face trial if in fact they faced trial. That is a pretty striking failure as a political society, that 6 years after the advent of the conflict we are really not that much closer to answering the fundamental questions that we all knew existed right at the beginning than we were the day troops first went into Afghanistan.

I think and I argue in the book that there is actually enough blame for this to go around. The administration, as others have argued before I have, including Jack, tried to do everything unilaterally, did not try to work with Congress to create a statutory environment that was conducive to what it felt it needed to do. I also think there is a lot of

responsibility that accrues to some of the critics of the administration who often in a way that paralleled the administration itself confused the substance of what the administration was trying to do with the procedural mechanisms they used to do it. That is, the administration claims if we need to do it, then it is an inherent feature of the constitution that we get to and therefore we do. And a lot of critics took the mirror image position of that, if they say they need to do it, we oppose not merely the unilateral exercise of the authority, but the substance of the authority, and I think we are sometimes very blinded to the necessity of some of the steps in question.

I will get myself in trouble with Seth when I say that I think the courts have often used the litigation that has developed less to establish clear rules of play than to carve themselves a seat at the table and ensure that they have the final say, and I think the courts have played a very peculiar and interesting role in this in which they have established very little other than the fact of their own presence in the conversation.

Finally, I think the institution that gets the least blame and arguably deserves the most relative to what it gets is Congress itself. We live in a system that is predicated, and you see this over and over in the "Federalist Papers" and the Constitution itself on the idea that you separate powers and you let each branch jealously guard its authorities and by doing that you prevent the accrual of too much power in one

branch. And there is this assumption behind this which is that people are going to actually do that, and the amazing failure of Congress over many, many years now to assert itself in this and to think about who is the branch of government that in a conflict like this is actually poised and capable of imagining new regimes and creating them, that's us. We should be doing that. We should be pushing for that. The amazing failure to do that has been incredibly deleterious in terms of ceding this whole conversation to the other two branches.

Behind the effort to think past this are three assumptions, and I want to be very up front about all three of them. The first is that the administration and many of its critics are both correct that this is a conflict fundamentally unlike anything else we have faced before; that easy analogies either to the criminal law or to the laws of war do not quite work all the time; and that this begs problems that we have never really confronted before.

The second, and this is something that both the administration and its critics often deny, is that if you buy the premise of premise number one, it follows from it that we have to create new things, new institutions, new procedures, new ways of thinking legally about the conflict; that this involves the creation of new legal regimes and that if the analogies fail, creating law by analogy to them will also produce a suboptimal outcome.

And number three, that when you are talking in the language of creating new legal regimes, when you are thinking about a new situation that requires new law, the proper venue, the presumptive proper venue to do that, is the Congress of the United States, it is not a common-law dialogue between the executive and the courts.

The question of how exactly is a fascinating one, but somehow we have gotten bogged down in this very, very earnest and serious and very heartfelt debate over what the law is rather than what the law should be. We talk about the scope and reach of the historic *habeas corpus* instead or largely instead of talking about the substance of what rules we want to govern detention. We ask whether the CIA is violating these very vague and ethereally written prohibitions against inhumane treatments of one sort or another instead of saying, wait a minute, we have a problem. We have a problem in which we are asking people to conduct interrogations against vaguely worded guidance in which we will fault them if they do not go far enough, we will have a 9/11 Commission that will have a chapter about missed opportunities about that interrogation, and if they go too far, we will fault them for that too. Instead of saying we need to do better and give a set of guidance that actually tells you what we demand that you do, what we forbid that you do, what we tolerate that you do under what circumstances, we argue about how to

parse words like cruel, degrading, and inhumane which can mean a great deal of different things to a great deal of different people.

My proposition is that we actually do not have enough law, that the law we do have largely was not written with our current problems in mind, and that the attempt to reason by analogy based on things we have done in the past and things we have tolerated in the past largely fails. There is a wonderful moment in the oral argument in *Boumediene* in which Justice Scalia, and I believe it was Seth have this exchange about whether the Isle of Jersey is or is not British sovereign territory for purposes of *habeas* in the 16th century or something. This is somehow supposed to tell us what to do with somebody captured in Bosnia of Algerian nationality who the government alleges but will not produce any public evidence for being a major al-Qaeda figure. It is interesting that the Isle of Jersey shows up in Scalia's dissent as a kind of trump card, see, told you, and when I saw this part of the argument my reaction to it was this kind of a picturesque moment, we need to figure out what to do with these detainees and we are talking about the Isle of Jersey. If it is a new kind of conflict and it requires a new kind of law, and I think it is and I think it does, it would not surprise your average fifth-grade class in a basic civics class lesson that you want to design a new set of rules for it, and the basic proposition of this book is it is time we seriously started thinking about how to write that law.

Everybody wants this project to be easy. That is why the rhetoric is so heated, because the principles to all sides of this are so obvious that it justifies this kind of very heated rhetoric. I think none of these questions are easy. I think they are very, very profound questions of allocation of risk and creations of process based on very imperfect information at any given time. But what I have tried to do in the book is to sketch out theories of how to legislate in these various respective areas and I am going to go over them extremely briefly and cursorily now so as not to take up a whole lot of time.

On detentions my basic proposition is that we should not be thinking about certain categories of these detentions under the laws of war at all and that we ought to treat them honestly and straightforwardly as preventive detentions that are supervised directly by federal courts. I want to give the detainees a lot more process than they have even under *Boumediene* and I want that process to take place right up front, not as a habeas review of an administrative decision later to detain them. And I want the court that authorizes that detention to retain jurisdiction over it for as long as it persists.

Concerning trials, I propose a hybrid regime that has elements of what are now called military commissions and elements of federal court practice. My basic proposition about interrogation is that we have actually solved a fair bit of the problem and that the residual problem

which is largely about the CIA should be resolved on the basis not of applying the military's rules to the agency, I think that the needs are genuinely and legitimately different, but having a parallel rule to the rule that now governs the military in which the agency is permitted to have its own procedures for interrogation, but it has to be much more about them than it is and that it has to have its own field manual like the Army Field Manual to which it is bound as a matter of law.

Finally, in my opinion surveillance is actually the most difficult area that we face, and this notwithstanding our compromise last week in the new legislation. It is an area that is pervasively hampered by secrecy and in which the technology has changed so fast that all of the underlying premises or many of the underlying premises that existed first in 1968 when we enacted domestic wiretapping law and then in 1978 when we enacted the FISA are at best very questionable today and I think the compromise that we reached last week which is an interim step I think is going to be relatively short-lived and we need a very, very serious set of conversations like the ones that we had in the late 1960s through the mid 1970s that produced both Title III and FISA about what the shape of a surveillance regime for the next 100 years is going to look like. This is going to be an enormously difficult project because the one thing we are certain of is that technology will continue to develop at a rate that eclipses our ability to imagine it and so how you build a surveillance apparatus that

is not immediately obsolete is a very profound policy problem and I offer some sort of ways of thinking about that in one of the chapters.

I am going to stop there and hear from Jack and Seth.

MR. GOLDSMITH: "Law and the Long War" is is truly great book. A lot of us have a lot of views about how interrogation policy should run of what the FISA Court's role should be and surveillance policy or whether we should have military commissions or UCMJs or criminal trials. What Ben has done in this book is he has gotten into the weeds of all of these issues and he understands what is going on down the weeds as well as anyone I know about the whole array of legal policy issues thrown up by the war on terrorism. And he has looked as honestly as fairly as anyone I know at the problems that we face, the costs and benefits of various courses of action, the strengths and weaknesses of different arguments. He does not take any predictable path in the book. He puts all of these disparate war and terrorism issues in a framework of separation of powers in which he has a theory that he articulates about the respective roles of each of the branches of government, so he is both down in the weeds and he has a coherent and attractive theoretical apparatus for understanding these issues. And on top of all of that, he has written a book that is immensely readable, even a joy to read, so it is really an extraordinary book and I think it is the best book written on these issues by a long shot.

One of the chapters in the book, one of the best chapters, is called chapter four, "The Necessity and Impossibility of Judicial Review." This is an important chapter in light of the Supreme Court's decision in *Boumediene*, obviously. Briefly, and I am sure Ben would not agree with this characterization, he would say more than this, I am summarizing, but judicial review is necessary in his view for a lot of reasons, one, because as the Supreme Court once again reminded us a couple of weeks ago, it is going to be at the table no matter what the political branches do, so judicial review is going to be necessary because the courts are going to make it necessary. Two, judicial review is necessary in the war on terrorism to lend credibility and legitimacy to a lot of these hard policy questions that the executive especially and the Congress to a much lesser degree are trying to work out. And third, Ben proposes that judicial review is necessary because the courts have a distinctive fact-finding role and should be used in monitoring an adversary process to find facts related to detention, surveillance and the like, and that is why judicial review is necessary in the war on terrorism. It is impossible in the war on terrorism which is the other half of the chapter's title because I think what he means by the impossibility of judicial review is really the courts as the unelected branch of our government as the least-knowledgeable and least-expert branch of the government when it comes to war on terrorism issues in terms of the facts and the policy tradeoffs in the war on terrorism issues,

as the least informed as Justice Kennedy said at the end of his *Boumediene* opinion, we do not read classified briefings every morning and we really do not know what is going on, he said, in terms of the nature of the threats. So Ben thinks that for those reasons it is impossible for the courts not to have the roles described earlier, but to make big systemic policy decisions about what types of trials we should have, what the exact detention policy should look like, and the systemic questions about policy tradeoffs.

That in a nutshell is what that chapter is about, and he talks about Supreme Court decisions before *Boumediene* and he basically says that what the court have done so far, and other people have made this point, is what the courts had done until *Boumediene* was basically try to urge the political branches to do better, try to nudge the executive to work with Congress to establish a more sensible and detailed and long-term structure for dealing with all of the issues in the war on terrorism especially with regard to detention and trials, so the Hamdi decision and all of these decisions had a certain quality. When they came down they were thought to be gigantic defeats for the executive and they were going to change the nature of the executive's -- that undermine the executive's approach to the war on terrorism and that we were going to change the nature of the Executive Branch's approach to war on terrorism issues. If you look at the headlines after *Hamdi* in 2004 and after *Hamdan* in 2006, *Hamdi* was the

case involving the detention of the American citizen in Afghanistan, *Hamdan* was the case striking down President Bush's military commissions, both of those decisions had the same arc. When they were first announced they were giant defeats for the executive that undermined his war on terrorism policies, but a couple of years later they looked quite different. They looked like they were not really defeats for the executive. Yes, they nudged the executive along both to develop better policies in terms of providing better and more rigorous procedures for screening of detainees and enforcing the Executive Branch to go to Congress and work with Congress to establish military commissions that looked very much like the Bush military commission before going to Congress, but both of those decisions were like nudges. They were not really the courts telling the president you cannot do something, you have got to really reverse course on the war on terrorism, and really not much happened with regard to the detainees. There were sensible policy innovations, but no real red lights about you cannot do this or that.

Which brings us to *Boumediene* because *Boemediene* seems like something different. It is a really remarkable decision for many reasons, and congratulations to Seth for an extraordinary victory. Many people have pointed out that it is the first time that habeas corpus has been extended to enemy aliens captured on a battlefield and detained outside the United States, and it is remarkable for that reason. But I think

it is remarkable for a more important reason that has not been commented on as much that is relevant to this theory about what courts are and should be doing in the war on terrorism. That is that the court for the first time, I believe, someone correct me if I am wrong, in war time struck down a military measure that Congress and the president agreed on as unconstitutional. This is the first time this has ever happened. Justice Jackson as the lawyers in the room know famously said in his famous Youngstown Sheet opinion that, "When the Congress and the president act together in setting national policy especially related to war and national security they warrant from the courts the most extraordinary presumptions of constitutionality." The story about the Supreme Court until the *Boumediene* case has been the courts defer when the political branches get together and decide on a policy course and this decision for the first time I believe, and *Milligan* if any of you experts in the room want to talk about it we can, but *Milligan* was a decision that arguably did something similar in a military commission context but it was after the war. In any event, for the first time really courts struck down an act of Congress when the Congress worked together on a process for monitoring affairs in war time. They did so all the more remarkably without really as Justice Roberts I think persuasively showed telling us why the act of Congress is unconstitutional.

I do not want to talk too much about that, we can talk about it if you want to in the questions and answers. What I wanted to suggest though is this decision looks to many people. This looks like a decision not where the court is trying to nudge the political branches to do something, to push them along for the political branches to resolve a hard policy debate, it looks like the court is really saying, and this is the way a lot of people interpreted it and it is the way I interpreted it at first, we are fed up with the president doing things unilaterally, Congress coming in late and not doing much, these detainees have not gotten enough process, we are going to start giving them process. The opinion seems to read that way and it does not really on its face seem to invite further political branch action.

But I want to suggest that in a couple of years when we are in this room talking legal policy issues and the war on terrorism that *Boumediene* will despite Justice Kennedy's rhetoric and despite its potential transformative effect in giving the courts a much larger role than many thought was possible in war time scrutiny of the political branches, I want to suggest that it probably, this is a prediction, will come to look like a nudge just like *Hamdi* and *Hamdan*. The reason I think this is because, one, it is clear what the court was saying as many people have said is we want a seat at the table. As Ben said in his book as he predicted the outcome of *Boumediene* almost exactly, the court does not take well to

claims that it does not have jurisdiction over something and it is clearly saying that it is going to have seat at the table in reviewing political branch action in the war on terrorism, and the court clearly asserted that, but it is remarkable that it did not really tell us anything or much of anything about what the executive and the political branches had to do other than to give the detainees in Gitmo habeas corpus rights. It did not tell us the extraterritorial scope of the habeas writ beyond Gitmo, it did not tell us about the substance of the due-process right. All we know is that the courts are going to have a seat at the table. But at the end of the opinion, I think an opinion that is really hard to parse before you get to the end in terms of what exactly it means, Justice Kennedy probably I am guessing in response to some of the sharp charges in the dissents really backs away a bit and I think does invite political branch action. It says, and I think this is I am guessing probably written after the dissents circulated, it is remarkable, "In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches." They were not giving any deference to the political branches here, but he is trying to reiterate that they do get some deference. Then he says, "Unlike the president and some designated members of Congress, neither the members of this court nor most federal judges begin the day with briefings that may describe new and serious threats to our nation and its people.

The law must accord the executive substantial authority to apprehend and detail those who pose a real danger to our security." This I think points up one of the many incoherences in the opinion because earlier in the opinion Justice Kennedy told us that the courts needed to decide the nature of the flexible habeas corpus remedy and that it really depended on the nature of the threat and the tradeoffs and exigencies of the threat as to what the habeas would be and would look like, and here is saying quite rightly we do not really have access to all the facts, we are not really competent to, I think he is implying, I do not think it is inconsistent with what he is saying, that we are not really competent to assess those tradeoffs, we do not have all the information that is in the hands of the political branches; "Our opinion does not undermine the executive's powers as commander in chief" the court tries to reiterate. And then he says before emphasizing that they really have not decided anything of substance, "The political branches consistent with their independent obligations to interpret and uphold the constitution can engage in a genuine debate about how best to preserve constitutional values while protecting the nation from terrorism." I suspect that we are going to have a big push between now and the election to try to get finally some substantial legislation about how exactly we are going to deal with the problem of longer-term detention of enemy combatants. Whether it will happen before or after the election I do not know, that is going to be a big political issue, Republicans are going to

want to make it an issue because they think it will help them, and I think the Democrats are going to want to try to put it off because they think it will hurt them to have to take a stand on that issue, but we are going to either before or after the election it seems clear that the political branches are going to come in once again and try to provide more guidance which they really did not do with regard to the treatment of detainees in Gitmo to date, will try to provide more guidance, and I suspect if they read the tea leaves from the court, if they give a little bit more process and make the process more overt and make it a little bit more transparent, give the detainees more counsel rights and procedural rights which is really the way we have been moving slowly but surely since the *Hamdi* opinion of 2004 in any event, I suspect that the court will defer to that and that the world will not look terribly different than it does today in terms of the procedural protections that the detainees get or the number of who we detain without trial and that *Boumediene* in this possible world, and I could be wrong, will come to look more like a nudge on the political branches and less like the court slamming its foot down than it seems today. But one thing that is certain is that the courts will at least until there is another attack, and even after that, certainly assert the last word in determining that they do have a seat at the table. That is clear from *Boumediene*, it is exactly what one of the points of Ben's chapter was, and with that I will turn it over to Seth.

MR. WAXMAN: I appreciate very much Ben's invitation to come speak about his book. I have to say that I am both perplexed and torn. I am perplexed because unlike everybody else on the podium with me I have neither really had the professional opportunity nor I think probably the mental acuity to do what they have all done which is to think deeply about the very profound issues in Ben's book and to write lucidly and persuasively about it. I know why I accepted the invitation which is that I thought it would force me not only to read Ben's book and Jack's book and Stuart's columns, but to in fact do what I have been meaning to do for so long and what I think responsible citizens must do which is to force yourself to do that, and it turns out that it did not really require much forcing.

Ben's book is long and it is printed in at least for 56-1/2 year old eyes impossibly small type, but it was a pure pleasure to read and it is a tour de force. You obviously do not have me up just for the purpose of singing encomiums, but it deserves them and it deserves careful attention. Would that we lived in a world and a country where we would have such an engaged citizenry that people would say this is part of my civic duty and I am going to engage with these issues. If you are going to do that, I cannot think of a better place to start and not finish, that is going to be the balance of the rest of my comments, but to start with Ben's book.

I am torn because Stuart in setting out the ground rules of today's program in an email that he circulated yesterday afternoon said that Jack and I were each to speak for 10 minutes. When I told him that because I had not written really or read all that much in this area I did not think I would make it, he told me, and I have the email printed out, that if I did speak for fewer than 10 minutes I would get an award because no one in this auditorium or any other place has ever not taken the time allocated, and I would like to get an award, and I have my watch here. On the other hand, I have way more than as it turns out 10 minutes of things to say about Ben's book, and that does not even begin to cover all the provocative and in some ways I think not quite correct things that all the people who have preceded me at the podium have said. So I am not exactly sure how this is going to work out, but if I just stop in mid-sentence or mid-syllable it is because I am going for the gold medal.

Having said all the nice things that I have said about Ben's book, and I do not mean to take away from it at all, I have to say that I came away profoundly appreciative of the extent, the breadth and depth of the writing and thinking and research about of the interrelated issues that Ben has addressed but with a number of feelings that I think are worth mentioning.

First of all, I entirely agree that there is a lot of criticism in hindsight that is properly attributed to the Executive Branch as all three of

my predecessors have said. There was a degree of unilateralism here and unilateralism that went far beyond the immediate aftermath of 9/11 that seems very difficult to justify and I think has proven counterproductive even as Jack has written and Ben has written and Stuart has written even viewed in the context of an Article 2 view of the world and view of separation of powers. There is no doubt that there is criticism properly leveled at the other political branch. I remember thinking years ago how stunning it was that Congress had not held a single hearing, no committee had ever seriously been willing to look at the issue of Guantanamo and detention and what the prescriptive standards ought to be, what the prescriptive procedures ought to be. It seemed to me to be an astonishing abdication of constitutional responsibility. There are lots of reasons why that occurred and I would like to think that if I were a member of that great deliberative body I would have pushed to have such hearings, but we are all human beings and we are all fallible and I believe that I am more fallible than most.

Having said that the criticisms about the Article 1 and Article 2 branches are fair, I think that overall the underlying criticism of the courts, and we have heard it repeated here like a drumbeat as insisting that they have a seat at the table and sort of muscling their way into a role that is inappropriate for the judiciary, I find it perplexing and just dead wrong. If there has been an abdication of responsibility by the Article 1

branch and an arrogation of undue constitutional responsibility by the Article 2 branch and there is a case or controversy before a court, what on earth would we want courts to do in a properly functioning constitutional system? The notion that the court has not decided very much but somehow decided too much because it should not have a seat at the table but has not decided enough to prescribe what the substantive standards should be and how the tried and true habeas corpus procedural rules ought to work once the cases go back to the district courts seems to me utterly to misconceive the reactive and circumscribed nature of courts. Of course Justice Kennedy's majority opinion in *Boumediene* just like Justice O'Connors's plurality opinion in *Hamdi* and the justices' opinion in *Rasul* and in *Hamdan*, they almost reflect a *cri de coeur* to the political branches and particularly the Legislative Branch to do what it is supposed to do which is prescribe. That is not what courts do. Courts arrogate undue authority to themselves when they write prescriptive rules.

In our brief for the *Boumediene* petitioners in the Supreme Court we included a section and included a discussion that so far as I know no one else did which was how do you answer the question of what the substantive standard is for detention. That is, once you get in front of a court or a CSRT or an administrative tribunal, against what standard is the executive's assertion of a right to engage in a war time detention to be measured? I suppose I could criticize the Supreme Court for not having

breathed one word of an answer to that. On the other hand, I do not think that I am so unrealistic to claim that I thought it would. I thought it was important to lay out on the table that this is an issue that has not been resolved by U.S. courts and will have to be resolved by the courts in the District of Columbia. I am holding what is surely the most seductive and mysterious filing I have ever seen which is a notice from the D.C. Circuit this morning about a ruling that apparently soon will be released in unclassified form which may contain an explication of what the substantive standard is. On the other hand, it may not. And if it does not, it will be up to the district courts. But I think it is entirely unfair to proceed from I would say an assumption it sounds more like an assertion that the courts have muscled their way into this debate and arrogated to themselves a power that they otherwise would not have. I agree with Jack. I am not a constitutional historian, but to my knowledge this with the exception of *Milligan* which was decided after the war was over, if one accepts the assumption that we are and always will be engaged in the war on terror and therefore we are in the midst of a war, I believe this is the first time that the Supreme Court has struck down the constitutionality of a decision that reflected agreement among the two political branches. It is also like *Milligan* the only time when that agreed-upon authority has been challenged on the basis of a claimed violation of the Suspension Clause which is one of the only provisions of the constitution as originally

adopted, that is without the Bill of Rights, that actually contained an individual guarantee of liberty and judicial review.

I did not bring up the Isle of Man or the Isle of Jersey in the Supreme Court, Justice Scalia did, and we had what I think for both of us was quite an illuminating or at least an entertaining discussion about the precedence where he kept saying you cannot cite me one case in which X, and I would say, yes, I can, there is this and that, and then he would say, oh yeah, well, you cannot cite one case about this or that, and I would say, yes, and eventually I begged leave to move on to some of the other issues in the case and we did. But the notion that this is an extraordinary decision historically because it allows enemy aliens to have judicial review under habeas corpus assumes as its premise the answer to the question, that is, many of these people and certainly the six Bosnians that I represent deny that they are enemy aliens, they deny that they are enemy combatants under any standard recognized by international law and certainly by the standard of the AUMF, and that is the predicate in question and whether the Supreme Court was or was not correct in asserting that Guantanamo, it is not always 7-year detention of these people in Guantanamo, given all of the peculiarities of that base and that jurisdiction fell within the historic core of habeas corpus is something on which there is quite a mature dispute among the justices of the Supreme Court, but they could not avoid addressing that issue and they could not

and I think properly did not avoid the further question of whether the provision of the Detainee Treatment Act that provided for review of the CSRTs was an adequate substitute. The notion as was mentioned by one of the panelists that they did not really tell us what was missing or what was wrong with the CSRT provisions and the DTA review I think is quite wrong. I think that the opinion did a good job and to the extent that it fell short, please read my brief of articulating the respects in which if you adopt the premise that habeas corpus does apply, that is that these detainees after all these years have a right to demand that some tribunal that is not subject to command influence review the available evidence and determine simply whether they are enemy aliens, after all, these are all citizens of nations that are not at war with us, it was pretty clear to me the respects in which the CSRT regime and the DTA review fell short, and I do not fault the Supreme Court for not taking the Chief Justice's invitation that we simply wait and see what the lower courts would decide. If you would accept as a premise, and I suppose there is no reason to accept it because nobody in this room other than me has seen the classified CSRT information and I have only seen it with respect to the six Bosnians, but if you accept as a premise that there may be one or more people who are not enemy combatants and who are not enemy aliens, they surely ought to have some opportunity before they are detained for the rest of their

lives to put the government to the proof that there is any evidence to the contrary and that is really all that the Supreme Court has decided.

I see that I have foregone my opportunity for a medal. I only want to make one other point. Well, two other points. One, this may be inferred from what I have already said, but much of the discussion and a fair amount of the discussion in Ben's book proceeds from an attitude about habeas corpus and the Suspension Clause, that it is either a problem or a nonproblem, but there is very little appreciation of the role that habeas corpus has played both in the life of this country and in all of Anglo-American jurisprudence as a fundamental guarantee against arbitrary and excessive detention and I think we can genuinely argue whether habeas should or should not extend beyond the sovereign limits of the territory of the executive or not, but if you accept that it applies, it is a part of our basic charter I think we should be celebrating and should not be afraid of. One of the things that Ben's book does not have the time I think to discuss as an analog is, for example, the habeas review that exists in federal courts of immigration detentions. We can argue and debate about whether we have an immigration law that allows for long-term administrative detention that either is or is not sufficiently respectful of constitutional values, but there is a process and always has been a process for habeas review of these detentions, administrative executive

detentions, that provides at least a model to look at for the exercise of habeas jurisdiction for these and other national security detainees.

I also think that the debate here would benefit from more of a reflection on comparative law examples, and I am not just talking about the immigration context. There is obviously a highly underdeveloped body of international law and national law of other sovereigns on preventive detention and enemy combatants and for that matter detention under the laws of war, but there is some law in the United Kingdom that I think is worth pausing over. Canada has taken a stab recently at this, and there is a very mature and very thoughtful body of law not only on the procedures for judicial review of administrative detention and detention of enemy combatants, but also the substantive standards in the courts of the State of Israel and there is I think in many respects what I found to be the most enlightening brief that was filed in the *Boumediene* case and it is one that I commend everybody's attention, one that was written by Professor Schulhoffer on behalf of a pretty wide range of Israeli military and constitutional law specialists that goes through both the procedures and the substantive standards against which administrative and military detentions are measured in the civilian courts of Israel and I think we would be very well advised to take account of whatever one thinks about Israel foreign policy, et cetera, one would be very well advised to take account of the very mature decisional and statutory law in Israel which

after all has had a regrettably long experience in dealing with terrorism and unlawful combatants. Having gone over my 10 minutes, I realize I went way over.

MR. TAYLOR: Thank you, Seth. Silver medal maybe. I am going to ask maybe one question of each panelist and urge short answers so that we will have time for some of you to ask questions.

I will start with Ben. The obvious question is if you are not dead wrong about the role of the courts, why aren't you? Seth made a lot of points and I do not want you to respond to all of them, but one is what would you have the courts do? If the executive and Congress blew it, do you really want the court to sit back and say not our problem?

MR. WITTES: First of all, thanks to all of you for the kind words but, yes, there is a gauntlet that has been thrown down so let me pick it up.

A couple of things off the bat the first of which is that I actually do not make an argument in the book against habeas review. The policy argument that I make in the book is for a robust regime of judicial review of detentions, actually for reasons that I can go into if you want, what would amount to a more substantial substantive review than exists even under *Boumediene* so I want to say that up front, that what I am talking about is not actually what Justice Scalia is talking about in his dissent which is this kind of resistance to the idea that judges have any

role in this discussion at all, and in fact, the premise of the discussion is that there is a very substantial role. My anxiety is over the role of the judiciary and habeas review as a sort of policy-making engine for the design of the architecture that we are going to live with. That distinction is, and I admit this up front in the book, a bit theoretical at this point because in fact Seth is quite right, what the courts have done so far is if you leave aside *Hamdi* which is really a *sui generis* case, what it has done on Guantanamo is there are three cases. *Rasul* we have jurisdiction. Congress turns around in the DTA and says no, you do not. The court says in *Hamdan*, actually, yes, we do, and by the way, the military commissions order is unlawful absent an act of Congress. The administration goes back to Congress and says please write the military commissions into law and get these cases thrown out again. So Congress comes back in the MCA and says, no, you really do not have jurisdiction. We really mean it. And last week the court in *Boumediene* says we know you really mean it but so do we. We really do have jurisdiction. And by the way, it is in the constitution and there is nothing further you can do about it. All of this, Seth is quite right, in one sense leaves the substantive questions to the political branches and says nothing more than it is intolerable that 7 years after 9/11, 7 years after we started detaining people, some of these people still have not had a chance to argue their innocence which they in fact claim.

I have two anxieties about this as a posture for the courts. The first is that it ends up if you have a regime in which the central organ of decision making regarding what our detention system is going to look like is decided not with the executive going to the legislature and saying we have a problem we have never dealt with before, here is what we need, and the Legislative Branch responding you cannot have all that. Here is what we can give you. This is the sort of basic give and take like, for example, what we have just seen with FISA where you actually did have that discussion go on. Instead the only analogy I think of is a first date kind of thing or an early date where the hand is creeping and the court goes like that, and then the hand creeps and the court smacks it back again, and this is a terrible, terribly way to design a complicated system. It starts with the assumption that we are going to make the executive guess and guess what we can get away with. That creates an incentive for the executive not to ask the question what is the ideal, what is the good, the question that they ask, and granted the point of agreement between Seth and I which is actually a substantial component of the argument has to do with the critique of the executive's role in this so I do not want this to come out as me making a case for the behavior of the executive which I do not do. But it creates an incentive, instead of asking what is the good, what is the system that we want, the executive will ask

instead what can we get away with. They will try to do the minimum they can to satisfy the judiciary.

Congress is in a position to do something much more substantial than that. They are in a position to look and say when the executive tries to deny a system on its own, it is constrained to some degree by the analogies that it uses. So if we are going to operate in the framework of the laws of war, you are constrained in some sense by the contours of the laws of war. You can push those contours as in fact the executive has tried to do, but to some degree to the extent that the argument is trivial, you are not going to make that argument. When you go to Congress you can say the core of the problem here is not that this is a military party with which we are at war and we need detention authority based on the law. The core of the problem is that we have some incredibly dangerous people who want to kill as many Americans as they possibly can and we are detaining them if we are totally honest about it not because they are enemy combatants, but because we are prospectively terrified of what they are going to do either in their capacity as members of al-Qaeda or if we are really honest about it in their individual capacities, and when you state it that way you realize how far from the premises of the laws of war you are. You are not talking about until the end of hostilities whatever that means in this context. You are not talking about membership as a criteria necessarily. You are talking about

something very different, and when you go to Congress you can have that conversation on the basis of here is what we really need, here is the policy problem we face and here is how we are thinking about answering it. When you go to the courts you are constrained in a different way and you are constrained by the analogies that you can draw plausibly from case law or in some cases implausibly from case law. I think that is a very dangerous way to think about the design of the system in this area. So if the question is do judges, does judicial review of executive detention in this war, conflict, whatever you want to call it, have a very important role to play? Yes. There is no disagreement between Seth and I about that. If the question is might some of that review be in the context of traditional habeas corpus? Yes. I do not have a problem with that. If the question is should the development of the system emerge from the dialogue that takes place between the Executive Branch and Seth in the context of a series of oral arguments over individual cases rather than somebody stepping back and thinking about what we want the system to look like, writing that system into law, I am uncomfortable with that. And I think to the extent that the court has stood for the idea that A, we will not tell you what the rules are, and B, we will tell you that we will tell you that we reserve the right to tell you what the rules are, I am uncomfortable with the court's posture in this line of cases.

MR. TAYLOR: Thanks. Since we are running late with about 15 minutes to go, I am going to skip the questions at least for now that I was going to ask the other panelists and open it to questions from the floor, and I may succumb to the temptation to come back later.

SPEAKER: If your questions are not good enough.

MR. TAYLOR: Right.

SPEAKER: I am Emily and I think that it sounds like your book -- I agree with it completely and I hope it can -- for Congress, but I feel like you have not really given us a lot of guidance or your insight into if you are a member of the Executive Branch like you are a soldier or you are in the Department of Justice or the CIA and trying to apply the law as it is now and not as it should be, or you are a Supreme Court justice trying to guard people against infringement on their rights and you are trying to apply the law or interpret the law as it is now, I do not want to say your book -- because I think your book is going to do what you want it to do, but what would you say to those people? Is this war on terror a -- war like the war on poverty or the war on drugs where the Executive Branch does not get war time powers? Or is this a real war where there is a conflict where people are wearing uniforms and there are soldiers and there is the Uniform Code of Military Justice and you have military trials, are these people, civilian criminals like Timothy McVeigh or are these people in the Army even if they do not have a uniform that we recognize?

I think the law right now is you are either a soldier or you are a civilian and I do not really understand an enemy combatant as either one of those. So I think that if you are trying to apply the law as it is now, you have to categorize those people and I am wondering what you would do with the law as it is now for the Executive or Judicial Branch since they cannot change it the way Congress can.

MR. WITTES: It is an exceptionally difficult question but let me try to sketch out the answer that I propose in the book to it. The first thing is in the aftermath of 9/11 I believe there was absolutely no alternative to the law of war paradigm for thinking about this, and I believe that for a number of reasons not the least of which is that the principal response to 9/11 was the deployment of a large number of U.S. troops overseas and if you really thought about this in the criminal context there would simply be no authority. Once you want to do that you are invoking a war power, and you also want to kill the enemy which was part of the project of ousting Taliban was to capture or kill a lot of al-Qaeda. We do not actually generally see killing or attacking the enemy as a feature of the criminal justice system. So I think there is some period of time, and it is an interesting question of how long it goes on, when there is simply no alternative to a fairly pure and unadulterated war approach to this.

It is also true that very quickly it becomes clear that there are real deficiencies in this model as a long-term model. You start catching

people and unlike under the basic premises of the laws of war you do not know who they are. A lot of them claim to be innocent or noncombatants, some very plausibly, some highly implausibly. And you have this other problem which is that the laws of war make it very easy to detain people, and probably in the context of this conflict too easy given how murky some of these factual settings are. And they also require release at some point which is something that realistically we are not going to do. Mohammed Kahtani who the military recently discovered that it is going to have a very hard time bringing a criminal case against because of the circumstances of his interrogation, this guy, allegedly according to if you believe the 9/11 Commission report, was a 9/11 conspirator. They are not going to let him go as a result of the observation that they are going to have trouble bringing criminal charges against him. So you find yourself in the setting in which you are using many of the premises of the laws of war but not all of them, some of them are false, and you are using many of the premises of the criminal law but not all of them and some of them do not apply. The question becomes how long do you want to rely on this imperfect model and what do you want to replace it with? I think where I really fault the Executive Branch is in not realizing very early or at least moderately early or even ever that the model that they were insisting upon had immense deficiencies and was insufficient for the task.

MR. TAYLOR: Thanks. We are down to 10 minutes so let's have please short questions and short answers.

SPEAKER: My question is why Congress abdicated its power over the Executive Branch, and why it failed to create new rules to make things clearer?

MR. WITTES: I think the task of not doing is very seductive. When Congress does nothing and lets the executive do its own thing, this is kind of win-win for the Congress. If things go well they can join the credit in some sense, they authorized the military action, they did not get in the way. It is a big victory. If things go badly they are not accountable for it. The thing that forces congressional action, and we see this over and over again in this conflict, is executive leadership, and ironically I believe that executive leadership is a prerequisite for strong congressional action, and similarly, strong congressional action is a prerequisite for a significantly empowered executive capable of doing the things that we want it to do and restrained from the things that we do not want it to do.

MR. HIATT: I am Fred Hiatt. I want to go back to a related question which was Ben's first assumption that this is a different kind of conflict and we need a different kind of law. I think most people accepted that in 2002 and it seems less obvious to many people now, and I would like to ask the two commentators whether they agree with that or whether the law of war could apply to people captured in Afghanistan and Iraq on

battlefields and criminal law to people captured elsewhere and if that is not satisfactory why not? What is the evidence that it is not 7 years later?

MR. WAXMAN: I spent 7 years working in the Executive Branch and I was not always Solicitor General, and before I was Solicitor General I had a number of responsibilities in the national security area, and I do not doubt for a minute that there are people in the world who the United States has an absolutely sovereign right to detain in order to protect its citizenry. And I also do not doubt for a minute that if that is the basis on which the executive wants to do that, it simply needs to go to Congress and say there are instances in which we feel that we do not want to justify detention under the laws and practices of war. The Mohammed Kahtani example, everything I know about him I read in Ben's book and undoubtedly in the newspapers, but assuming that there is evidence that he was a 9/11 plotter, I think that the international law of war which applies a standard that we think has to be imported in the AUMF since that is what the administration said would be fully sufficient to detain a 9/11 plotter or Osama bin-Laden as somebody who was directly involved and there is every reason to believe will continue if free to be directly involved in gross hostilities against the United States and American citizens. What concerns Ben I think is that there may be people who the executive would and perhaps would properly want to detain notwithstanding an inability to justify the detention under the substantive

laws of war such as it is. I am not here simply to flog the Israeli Supreme Court's jurisprudence one way or the other, but they have dealt with a number of very, very difficult situations and have released some people who I personally if I were an Israeli would just as soon not have released. But I do not think we know yet because the executive has only claimed that these are all enemy combatants who are detainable under the orthodox law of war standard and we have had very little testing of that, certainly no testing of it outside the administrative CSRT context with the possibly exception of this elusive not yet issued decision in the *Parhat* case today. So it may well be, and I agree that it is entirely for the executive to come and say we think there is an imperative to administratively or preventively detain enemy aliens or unlawful combatants. We think should be able to detain them but we do not think we can or we demonstrably cannot under existing standards. I do not think we know and that is why I am not as willing as Ben is suggesting that we need to have a new standard. We may well, but I have not heard anybody including the administration argue that case yet.

SPEAKER: Detain anybody from any country?

MR. WAXMAN: Do I?

SPEAKER: Is that like the Israelis seizing Eichmann? You can go anywhere and grab anybody?

MR. WAXMAN: I am not defending a prescriptive set of rules. What I am saying is in response to Mr. Hiatt's question that there is an international law of war. It may not be the most fully developed set of legal standards that we have around but there is one and it is the one that the executive in these cases has asked the court to -- against which it has sought to justify their detention. If there is a national imperative to justify detention or killing outside of the laws of war, it seems to me that is a matter that has to be laid before the legislature.

MR. TAYLOR: Unfortunately we are down to 3 minutes before Jack Goldsmith has to leave and I would love to hear his answer to Fred Hiatt's question, and if there is time to the extent that a premise of Ben's book is that Congress should make sense of this, is Congress up to the job in your opinion?

MR. GOLDSMITH: Answer that question or Fred's question?

MR. TAYLOR: Both.

MR. GOLDSMITH: Quickly on the last question, I think Congress is up to the job if the executive forces it. I agree with Ben that Congress will do its best to sit on the sidelines in most circumstances related to national security and only the president I think in our system can force it in most circumstances to step up to the plate and exercise its

responsibilities. That is one of the things President Bush did not do and I think he has suffered from it and the country has suffered from it.

On Fred's question real fast, the short answer on the criminal trials is information, either we do not have enough to try them under criminal standards or would have to reveal information that would undermine the point. That is a long story. On the laws of war side there are two problems, not protective enough and too protective. If you take one kind of law of war paradigm, you can capture the detainees, and this is basically what *Hamdi* said, you can keep them forever with a very minimal showing. You do not require much process, the laws of war do not require much process to make that determination, and once you have determined that they are a member of the enemy and that is the big question, then you can detain them until the end of the conflict. So one problem with the law of war paradigm is it is not protective enough applied in a war that really has different assumptions because the enemy does not wear a uniform, there is a heightened chance of mistake, and there is a heightened chance that the error will last forever and you will detain someone forever because of the nature of the enemy. So in one sense the laws of war are not protective enough and we are in fact giving them a lot more protections than the Geneva Conventions require.

On the other hand as Seth suggested and as Ben suggested, the laws of war really are not crystallized with regard to this

problem. A nonstate actor terrorist who is out of uniform, in most of the laws of war the clarity in the laws of war is with regard to state actor military forces and this problem about an enemy not associated with a state who goes in and out of civilian garb is not something that the law of war has really addressed. So in some sense the traditional laws of war are not protective enough and do not address the question and so that is probably why the war paradigm framework is not enough.

MR. TAYLOR: Let me stop here because I know that Jack and Seth both have appointments and have to leave now I think. So I would love to thank both of them for their very distinguished contribution to this discussion. And of course you are welcome to stay if I misunderstood, but Ben and I will hang here for a while in case more people would like to ask a few questions for another 5 minutes or so.

SPEAKER: Thanks. Gary Mitchell from the "Mitchell Report." I am struck, Ben, by your three assumptions, and I will not repeat them. The question that it raises for me is when you were thinking about that set of three assumptions, did you have in mind or have you subsequently thought about times in our past, hopefully relatively recent past, when we did just exactly what it is with a whole new array of problems that are completely new and we say we have to develop a new body of law for this and then we do. So in that sense I think this problem one way or another, whether you think it as developed in a common-law context or whether

you think of it as developed in a legislative context is going to be different and I can't cite you to an example where one day we woke up and sort of all agreed that the world looked really different and it was going to require entire new bodies of law to deal with and then we dealt with it either successfully or unsuccessfully, I think that's just an oddity of the current environment.

SPEAKER: Some other legal scholars dealing with national security law, namely I'm thinking of Donohue from Stanford have made admittedly somewhat controversial suggestions that part of the possibility for the reason that the Legislative Branch has not been as active as it should might have to do with the fact that the Judicial Branch has so much power and that maybe they expect the courts to clean up the mess. Do you agree with that? And also largely do you think that Boumediene given that it has been a pretty bold step for the courts is going to hinder or help Congress in waking up and playing more of an active role now that the courts are taking more of a significant --

MR. WITTES: I both agree and disagree with that depending on how the statement is meant. I agree with it in the sense that I do think when you have a very active judicial posture it does tend to induce habits or laziness in the other branches. The thing it induces in the executive is as I said before the sort of let's see what we can get away with attitude, and what it induces in the legislature is just kind of a shrug,

let's let the executive do it and let's let the judiciary say whether it's okay and if it is we don't have to take it on our hands and if it's not maybe we have to get involved at some point but certainly not now.

What I don't think is that you have in December 2001 and November 2001 that Congress was inhibited by fear of the judiciary, and I think to the extent that the question suggested that, I just don't believe that. I think in November and December 2001 as it did in the Patriot Act, Congress was in a position to act quite boldly with a fair degree of confidence that the courts would defer to it, and the reason it did not act in these areas was partly a failure of imagination to anticipate what the set of issues that were coming down the pike looked like. We knew some of the answer to that question within 6 months, but I can certainly forgive Congress for not getting involved right away.

But second was just political cowardice and a sense that the executive was claiming all the authority it needed, and what does that mean for us? It means that we don't have to deal with it and so they didn't.

MR. CHEN: Chow Chen, freelance correspondent. I have an observation. Bush has many creative lawyers in the White House, in the Justice Department, and in the Department of Defense, so they invent the new term and accepted the new detention system. So far all the arguments are just based around that and then you will get nowhere. The

important thing is this, you got to have some innovation process based on the constitutional government. Now you suggest a one-branch government and also based on good governance and American values in addition to international, without based on those things and to have an innovation process, I think we'll get nowhere.

MR. TAYLOR: Does anyone want to respond or --

MR. WITTES: I don't think we have a one-branch government and I think at different times all three branches have been active in this.

SPEAKER: Ben, there have been a number of questions obviously about this whole notion of the war on terror and obviously it has some very consequential implications. I wondered if you thought about that as you put "The Long War" in the title of your book and what your thinking was in ceding that point.

MR. WITTES: Law and the Long War is in the title, but the way I described the war at the end is as a long war, a war that isn't quite a war but isn't quite anything else either, a war that we still have not compellingly defined and may never fully define and yet we'll need to regulate and prosecute anyway. So I do think that the proper answer to that question is the admission of confusion. This conflict obviously partakes of many of the core elements of warfare, the use of military force, the killing of people. We don't generally send cruise missiles into criminal

suspects' houses. The detention of people outside of criminal-justice norms is something that we think of as a wartime authority. And yet there are elements of it that simply defy conventional understanding of warfare, the ability to -- a very large number of the major victories that we've declared in the war on terrorism have been through the operation of law enforcement of one sort or another including foreign law-enforcement agencies. And so I think that in many ways the answer to that question is it partakes of certain aspects of warfare, it does not partake of certain other aspects of warfare, we are not going to give up the aspects of warfare that it involves, and so whether you call it a war or not is really a definitional question. I think of it as a war sort of almost for spiritual reasons, but I wouldn't base the law on that.

MR. TAYLOR: I'd like to thank Bill for a lucid presentation and thank the audience for good questions and patience. I think we need to close the formal event now and I leave it to Ben how long he might be available to answer any questions people want to ask on an informal basis. For now the formal event is over. Thank you all for coming.

* * * * *

CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

Notary Public # 351998
in and for the
Commonwealth of Virginia
My Commission Expires:
November 30, 2008