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# DUE PROCESS AND TERRORISM

A POST-WORKSHOP REPORT  
NOVEMBER 2007

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AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON  
LAW AND NATIONAL SECURITY

NATIONAL STRATEGY FORUM

MCCORMICK TRIBUNE FOUNDATION

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*The “Due Process and Terrorism” Workshop was not for attribution.*

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## WORKSHOP UNDERWRITTEN BY MCCORMICK TRIBUNE FOUNDATION

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# I. FOREWORD

The detention of suspected terrorists raises legal, moral, and international issues. The ABA Standing Committee on Law and National Security and the National Strategy Forum convened a one-day workshop on October 18, 2007 in Washington, DC to examine these issues. The workshop was underwritten by the McCormick Tribune Foundation.

The theme of the workshop was “Due Process and Terrorism.” Twenty-five participants with wide experience and expertise in U.S. national security matters discussed due process and terrorism from their respective perspectives. The group was composed of military lawyers, civil liberties advocates, lawyers specializing in criminal and military law, and specialists in the area of international affairs and national security. Although consensus was not the goal, there was a significant degree of agreement regarding how to analyze, balance, and resolve many, but not all, of the issues involved.

The point of departure for discussion was a review of the *Boumediene v. Bush* (No 06-1195) and *Al Odah v. United States* (No. 06-1196) cases pending before the United States Supreme Court at the time of workshop discussion and printing of this report. The discussion attempted to anticipate the Supreme Court rulings in these cases, including whether Guantanamo Bay is outside the sovereign territory of the United States, whether habeas corpus applies, and what, if any, due process standards may be imposed.

The participants examined the national security consequences of the anticipated Supreme Court rulings, noting that the detention matter would be of interest to Congress for legislative discussion.

There was general agreement that the traditional battlefield of World War II and past wars in United States history, and the contemporary battlefield in Iraq and Afghanistan, would change significantly in the future. Another area of general agreement is that the policy context of the “Global War on Terror” complicates legal analysis of due process and terrorism issues.

We are grateful to Professor Stephen I. Vladeck, Associate Professor of Law, Washington College of Law at American University, for preparation of this report.

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## II. OVERVIEW AND EXECUTIVE SUMMARY

On October 18, 2007, legal experts from the government, the private sector, and academia met in Washington, D.C. for a workshop titled “Due Process and Terrorism.” The workshop was sponsored by the McCormick Tribune Foundation and was organized by the American Bar Association Standing Committee on Law and National Security and the National Strategy Forum.

The meeting centered on the question of the appropriate process due to individuals detained as suspected terrorists, especially given *Boumediene v. Bush* and *Al Odah v. United States*, the lawsuits arising out of the detention of “enemy combatants” at Guantánamo Bay, Cuba, set to be argued before the U.S. Supreme Court in December 2007. The goal of the discussion was to attempt to move the agenda on this vital question by leaving the politics (if not the current policies) to the side. In wiping the proverbial slate clean, the workshop attempted to reach at least some agreement on the proper way forward with respect to the detention program and the broader question of the appropriate process due to terrorism suspects. To that end, the discussants/observers were asked to focus on a series of interrelated questions:

- Are there cases where the military detention paradigm is inappropriate? If so, do these cases turn on whether the detainee is a U.S. citizen and/or whether they are legally present within the territorial United States?
- In general, what role should detention play as an instrument of counterterrorism policy? Should the answer to the appropriate amount of process provided to detainees turn on the underlying purpose(s) of the detention program in the first place?
- Should the process due vary based upon whether the detainee is seized/captured up in an area of active combat operations (e.g., Afghanistan), or not (e.g., Kosovo)? Should it vary based upon where the detainee is held (e.g., Guantánamo) or not?
- Do the current “Combatant Status Review Tribunals” (CSRTs) provide the appropriate process for resolving whether detainees are properly classified as “enemy combatants” or not? Whether they are combatants in the first place or not? Should detainees have a meaningful opportunity to contest the findings of the CSRTs? Do they?
- Is there anything to be gained from the framework articulated by Justice O’Connor’s plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which outlined the appropriate process due to a U.S. citizen detained as an enemy combatant?
- Are there procedures that the government can adopt that will preempt most—if not all—of the current legal wrangling over the rights of the detainees? Does the government lose its ability to effectively interrogate or

incapacitate terrorism detainees if the detainees are provided a more searching opportunity to contest their detention?

- Are there means by which we can more effectively balance the government's undisputed interest in incapacitating terrorists with the equally compelling interest in not detaining the "wrong" people?
- What additional process issues are raised by the Court of Military Commission Review's September 24, 2007 decision in the *Khadr* case, authorizing military commission judges to determine whether or not a defendant is an "alien unlawful enemy combatant" within the meaning of the Military Commissions Act?
- What role, if any, should proposals for a hybrid "national security court" play in analysis of the underlying procedural question? Would such a court be able adequately to protect both the interests of the government and of the detainee? More adequately than the civilian judicial system today?

While consensus was not the workshop objective, there were a series of issues that received differing degrees of agreement:

- **First**, some of the discussants generally agreed that the Guantánamo detainees *should* have access to the courts via the writ of habeas corpus, although there was no agreement regarding which courts.
- **Second**, some of the discussants further agreed that the *sui generis* nature of the questions raised vis-à-vis Guantánamo has largely distracted from harder questions about the process due to "battlefield" detainees.
- **Third**, there was agreement that far more nuance is necessary in distinguishing among different classes of detainees, including differentiation based upon citizenship, location and circumstances of capture, and location and circumstances of detention.
- **Fourth**, and perhaps most importantly, the discussants generally agreed that, irrespective of how the Supreme Court resolves the current cases, and, in the longer term, of who wins the 2008 Presidential election, the question of the appropriate process due to terrorism suspects will remain a vital issue in the near (and perhaps long-term) future.

This debate has implications for United States foreign policy and its moral leadership in the international community. Thus, the importance of identifying the appropriate jumping-off point for the way forward on U.S. detention policy is manifest.

### III. INTRODUCTION: FRAMING THE RIGHT ISSUES

At the heart of the ongoing debate over the U.S. government's detention of "enemy combatants" at Guantánamo Bay (and elsewhere) is one fundamental question: What is the process due to individuals detained as suspected terrorists under the control of the U.S.? Although this question is disarmingly simple in its formulation, the workshop participants reached general agreement that the only answer that has emerged in the six years since the terrorist attacks of September 11 is that there is no *one* answer.

Instead, the group agreed that the question of process necessarily varies with the circumstances. Moreover, not nearly enough has been done by the Administration, Congress, the courts, or the media to differentiate adequately among the relevant considerations in each class of cases. Some proffered that the same rules that apply to combatants captured and detained in Iraq and Afghanistan should not apply to individuals captured during active combat operations and subsequently held at Guantánamo.

Although the participants did not agree as to the legal or political significance that should be ascribed to differentiating facts ascribed to individual detainees, there was general agreement as to what the relevant characteristics are: the detainee's citizenship; the circumstances of the detainee's seizure or capture; and the location of the detainee's confinement.

It was noted that defining the "battlefield" has become increasingly difficult for a number of reasons, including the reach of technology that allows an individual sitting in the U.S. to deliver deadly force anywhere in the world via an unmanned aerial vehicle and the assertion that the "battlefield" is wherever a terrorist might be found. Nevertheless, for the purposes of this discussion, battlefield was used to mean a zone of active combat.

Assuming that the government would never transfer a detainee captured off the battlefield into the midst of active combat operations, such distinctions yield six categories of detainees:

- (1) U.S. citizens captured and held on the battlefield
- (2) U.S. citizens captured on the battlefield and held elsewhere
- (3) U.S. citizens seized and held elsewhere
- (4) Non-U.S. citizens captured and held on the battlefield
- (5) Non-U.S. citizens captured on the battlefield and held elsewhere
- (6) Non-U.S. citizens seized and held elsewhere

As the following summary suggests, the workshop discussion focused primarily on the last three categories (cases involving non-citizens). Although there was no clear agreement on the amount of process due to detainees within each subcategory, there was general agreement that there needs to be some amount of process.

Perhaps more importantly, the participants were largely in agreement that, to date, analysts and policymakers alike have been focusing on definitional (or jurisdictional) issues that ultimately do little more than obfuscate the more important bases for distinction along with the true underlying questions on the merits. Thus, the discussants generally agreed that there is a pressing need to rethink, from the ground up, the framework within which the process question is analyzed. With more appreciation for the subtleties and nuanced distinctions that should mark consideration of the process due to each class of terrorism detainees, the legal system will be far better positioned to meet the essential objectives of preserving fundamental human rights, effectively sorting between combatants and non-combatants, and ensuring that combatants are appropriately detained to ensure they do not return to the fight.

Some of the participants see the issues not as policy questions, but as legal issues which are already addressed by the law properly interpreted and applied. For example, some believed that the law of armed conflict properly applied and the existing domestic criminal laws of the U.S. and other countries provide answers to many of these questions.



## IV. THE DEBATE THUS FAR: PROBLEMS OF DEFINITION AND JURISDICTION

To understand the evolution of the debate from September 11 to today, much of the workshop discussion focused on threshold definitional questions that have dominated the discourse relating to terrorism detainees. Although these questions have been at the forefront, the discussants largely agreed that they have done little to illuminate the debate in any meaningful way.

### A. The “War” . . .

The first issue addressed was whether the traditional Law of Armed Conflict (“LOAC”) paradigm is applicable to terrorism. One discussant suggested that the LOAC was not intended to apply to quasi-international conflicts with non-state actors (such as al Qaeda), although it does apply in Iraq and Afghanistan. Others noted the notion of a “war” where, on one side of the conflict, *every* enemy combatant was in violation of the laws of war simply by fighting. Still, others recognized that the U.S. is legitimately involved in an armed conflict with non-state actors and thereby must conduct detention operations as part of this ongoing armed conflict. As the discussion unfolded, it was noted that the definition of “hostilities” itself is changing, which only further complicates the question of which paradigm is appropriately invoked vis-à-vis terrorism detainees.

Several discussants also suggested that there might be cases where application of the armed conflict paradigm is inappropriate or difficult to apply during a conflict with a non-state actor. One discussant suggested, along the lines of the Supreme Court’s *Ex parte Milligan* decision<sup>1</sup>, that we might better think of military and civilian jurisdiction as mutually exclusive—where a terrorism detainee *could* be tried for his alleged misdeeds in a civilian criminal courtroom, the Constitution would otherwise preclude subjecting the detainee to military process. In summary, there was considerable disagreement on this point.

There was widespread agreement that the debate over whether terrorism is more properly handled under the law of armed conflict paradigm or the criminal law paradigm is largely counterproductive. The answer depends upon the circumstances. Discussants generally agreed that there are *some* cases appropriately (or at least *more* appropriately) managed through the armed conflict paradigm, and others that are less so or not at all so.

Following from that thought, several discussants looked favorably upon Justice O’Connor’s plurality opinion in *Hamdi v. Rumsfeld*.<sup>2</sup> There, the Supreme Court recognized that the Authorization for Use of Military Force

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<sup>1</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>2</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

(AUMF) passed one week after September 11<sup>3</sup> triggered the laws of war, at least with respect to the conventional combat operations undertaken against the Taliban government and members of al Qaeda who took up arms against U.S. forces in Afghanistan. The plurality opinion declined to go any further, concluding only that the AUMF authorized the detention of U.S. citizens as “enemy combatants” when captured, as *Hamdi* was, in a zone of active combat operations—e.g., Afghanistan. As Justice O’Connor wrote, “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the *narrow circumstances considered here*.”<sup>4</sup> Justice O’Connor also warned that this traditional understanding “may unravel” in an “unconventional war” that might not be “won for two generations.”<sup>5</sup> The implication of such analysis is that the armed conflict paradigm may be less applicable to non-U.S. citizen detainees captured or otherwise detained away from areas of active combat operations, and/or by other governments or by non-military personnel, particularly pursuant to the “Global War on Terror.”

One discussant further suggested that this precise distinction is embodied in Army Regulation 190-8 (“AR 190-8”), which generally governs the military’s treatment of those detained in the context of military operations and does not necessarily apply on its face in other contexts.<sup>6</sup> Some observers noted that comparative studies of other nation’s military detention due process standards showed that the prevailing practice provides minimum due process. Generally, there was at least some agreement that where individuals are (1) captured on the battlefield; or (2) detained as part of combat operations, application of the armed conflict paradigm is more appropriate, and AR 190-8 may well provide the process that is due under both domestic and international law. Absent both of those conditions, however, discussants were far more skeptical of the appropriateness of the traditional law of armed conflict model, or of military detention and process for detainees. However, several observers agreed that AR 190-8 satisfactorily provides for the process due to enemy combatants under LOAC.

## B. ...on “Terrorism”

There was general agreement that the propensity of the government and the media to refer to the conflict arising out of the September 11 attacks as the “war on terrorism” or the “Global War on Terror” is misleading and counterproductive. Several suggested that the unspecific phraseology only perpetuates the lack of clear distinction between different classes of detainees, and risks conflation of the two extant—but distinct—congressional statutes authorizing military force:

<sup>3</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>4</sup> *Hamdi*, 542 U.S. at 519 (emphasis added).

<sup>5</sup> *Id.* at 520–21.

<sup>6</sup> See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf).

the AUMF and the 2002 Use of Force Authorization for U.S. military operations in Iraq.<sup>7</sup> Whereas the former authorizes the use of force against those individuals and groups determined by the President to be responsible for the attacks of September 11, the latter applies far more narrowly, at least geographically, to the conflict in Iraq.

Further, although some scholars have compared the “war on terrorism” to “wars” on poverty, drugs, and other common nouns,<sup>8</sup> the sense among the participants was that the AUMF authorized a more specific—and more limited—military operation that was born out of an armed conflict as opposed to a police action. Thus, many participants believed that it is important to cast the scope of the AUMF somewhat narrowly, along the lines of the plurality opinion in *Hamdi*, lest the moniker “war on terrorism” continue to raise the suggestion that there are few geographical restrictions or other substantive limitations on the authority delegated to the President. Some agreed that the “battlefield,” for purposes of assessing the process that is due, should be understood as only those regions where active combat operations remain ongoing, while others agreed that the “battlefield” may be much broader, particularly where it is the enemy that may dictate the boundaries of the “battlefield.”

### C. “Enemy Combatants” vs. “Unprivileged Belligerents”

A third definitional problem is the Administration’s reliance, within the “war” paradigm, on the category of “enemy combatants.” Some discussants objected to the departure from the twin distinctions recognized by the laws of war since the aftermath of World War II, as between civilians and belligerents, and, with respect to belligerents, those who are “privileged” and those who are “unprivileged.” The term “enemy combatant,” in their view, may simultaneously obfuscate *both* status distinctions. Part of the argument for returning to this historical distinction is grounded in AR 190-8, which thoroughly distinguishes between the procedures to follow for lawful or privileged combatants as compared to those applicable to unlawful or unprivileged combatants. Several discussants noted the historical view of the third category- “unprivileged belligerents” - within the Geneva Conventions.

To that end, one discussant suggested that the United States would actually be *satisfying* international law if it treated battlefield detainees as “unprivileged belligerents,” because the procedures set up by AR 190-8 comply with both Common Article 3 of the Geneva Conventions<sup>9</sup> (which *Hamdan* held applicable to the conflict authorized by the AUMF)<sup>10</sup>, and Article 75 of Additional Proto-

<sup>7</sup> Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>8</sup> See, e.g., Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1871 (2004).

<sup>9</sup> See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318–20, 75 U.N.T.S. 135, 136–38.

<sup>10</sup> See generally *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794–96 (2006).

col I,<sup>11</sup> which the United States generally recognizes as customary international law.<sup>12</sup> Although some observers expressed concern about applying the lawful/unlawful combatants distinction in contexts where they argued the traditional law of armed conflict should not apply, there was general agreement that adherence to the distinction recognized by international law since the aftermath of World War II would be preferable, especially in contrast with the overbroad and unspecific Military Commissions Act of 2006 (“MCA”), which defines “Unlawful Enemy Combatant” as, *inter alia*: “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”<sup>13</sup>

Several discussants expressed skepticism with respect to the CSRTs, which were established by the U.S. government after and in light of the *Hamdi* and *Rasul* decisions in 2004. These discussants opined that the CSRTs determine only if a detainee is an “enemy combatant” under the prevailing definition, and do not provide a significant opportunity for the detainee to rebut the evidence proffered against him. They further proffered that the CSRT process is open to attack on several important grounds: **First**, some believe that at least some detainees in Guantánamo should not be subject to military proceedings because they were not seized on the battlefield. **Second**, the process may not comply with Article 5 of the Geneva Conventions, which requires a “competent tribunal” to resolve challenges when there is a doubt as to whether a detainee is entitled to POW status or not. As some noted, it is not clear that CSRTs make the determination (or afford the process) required under the treaty provision.<sup>14</sup> Several other discussants pointed out that the CSRT process complies with Article 5 of the Third Convention and provides procedures that exceed the process contemplated by Article 5. **Third**, the process may not satisfy the Due Process Clause of the Fifth Amendment, if the provision is held to apply to non-citizens outside the territorial United States. The Supreme Court, as several discussants noted, held in *Johnson v. Eisentrager* that “enemy aliens” detained overseas are not protected by the Due Process Clause.<sup>15</sup> Nevertheless, some discussants suggested that *Eisentrager* may be narrowed or distinguished from the present cases.

<sup>11</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, June 8, 1977, 1125 U.N.T.S. 3 (specifying those protections that apply to all persons detained in the context of combat operations, even those who do not qualify for treatment as prisoners of war).

<sup>12</sup> See generally Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’LL.J. 367, 412–13 (2004) (discussing the relationship between Common Article 3 and Article 75).

<sup>13</sup> Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2601 (to be codified at 10 U.S.C. § 948a(1)(A)(i)).

<sup>14</sup> See, e.g., Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006).

<sup>15</sup> See generally *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

## D. The Guantánamo Issue

There was also broad agreement that Guantánamo has become too central in the current debate. Without diminishing the significance of the issues presented in the cases brought by the Guantánamo detainees, several discussants pointed to the *sui generis* nature of Guantánamo and the fact that the number of individuals still detained at the Naval Base (approximately 330) is small in comparison to the thousands of individuals in custody elsewhere outside the territorial United States. A large percentage of the latter figure are individuals detained in Iraq at the behest (or with the approval) of the Iraqi government and pursuant to resolutions issued by the United Nations Security Council; there are also serious process issues presented in at least some of those cases.

Guantánamo has become the focal point of both litigation in U.S. courts and international criticism. Several discussants suggested that because of its proximity to the United States, the unique nature of the jurisdiction and control the United States exercises over the base, the lack of process most of the detainees there received at the time of capture, and the comparatively small number of detainees at issue, there may well be stronger arguments supporting the rights of individuals detained at Guantánamo (including, for example, rights protected by the Due Process Clause) than would—or should—be true for detainees more recently captured and held in Iraq or Afghanistan. Given the extent to which several courts (and Justice Kennedy) have already embraced the notion that Guantánamo is “different,” resolution of the process question with respect to the Guantánamo detainees may have little impact on the question *vis-à-vis* other detainees.

Thus, although most of the discussants agreed that the questions raised in the Guantánamo cases have significant implications for detainees elsewhere, there was also agreement that it is likely that the cases presently before the Supreme Court will be limited to resolving the individualized process to which the Guantánamo detainees are entitled.

## E. The Jurisdictional Issue

There was significant belief that the Supreme Court might not even go that far, and might ultimately neither consider nor clarify these issues when it considers *Boumediene v. Bush* and *Al Odah v. United States* this Term—the third time in five Terms that Guantánamo has been before the Court in some fashion. Motivating this concern is the importance of the threshold question raised in the current cases, *i.e.*, whether the MCA is constitutional to the extent that it precludes the jurisdiction of the federal courts to entertain habeas petitions brought by non-citizens detained as “enemy combatants.”<sup>16</sup>

<sup>16</sup> See *id.* § 7, 120 Stat. at 2631–32. In addition, section 5 of the MCA precludes judicial consideration of claims based upon the Geneva Conventions, and might thereby also raise serious constitutional questions.

That question itself turns on the resolution of a host of equally complicated—and politically charged—issues ranging from the scope of review afforded by the Detainee Treatment Act of 2005<sup>17</sup> and the territorial limits, if any, enmeshed within the Constitution’s Suspension Clause<sup>18</sup>, to the enforceability of the Geneva Conventions and the scope of the detainees’ right of access to the courts. Thus, although the Court is once again presented with an opportunity to reach the merits of the detainees’ claims, it is unclear whether it will do so, especially given that the D.C. Circuit dismissed the suits after upholding the constitutionality of the MCA.<sup>19</sup> Indeed, in the five and one-half years since the first lawsuits arising out of Guantánamo were filed, only one abortive phase of the litigation concerned the merits of the detainees’ claims, and that phase produced two inconsistent opinions from the D.C. federal district court (one holding in favor of the detainees; one in favor of the government) that, because of the jurisdiction-stripping provision of the MCA, did not survive appeal.<sup>20</sup>

The upshot of the workshop’s discussion, then, was that the courts have, to date, done little to further illuminate the underlying issues, and that the cases presently before the Court will likely fare no better. Even if the Supreme Court does reach some aspect of the merits of the detainees’ claims, and holds that detainees have a right to habeas corpus that cannot be abridged by statute, there remains the question of what rights the detainees have on the merits, and what claims they will be able to press before Article III courts. As one discussant suggested, concluding that the Guantánamo detainees should have access to the federal courts via habeas petitions answers one important question, but only raises the all-important follow-on question of the process to which they are entitled and where the process will be given.

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<sup>17</sup> Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739–44.

<sup>18</sup> U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>19</sup> See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.) (holding that the Suspension Clause does not apply to the Guantánamo detainees), *cert. granted*, 127 S. Ct. 3078 (2007).

<sup>20</sup> Compare *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), with *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

## V. WIPING THE SLATE CLEAN: PROPOSALS FOR U.S. DETENTION POLICY GOING FORWARD

As noted above, the animating purpose of the workshop was to propose a fresh start for U.S. detention policy going forward. Although the workshop discussants did not reach an agreement on the proper way forward, there was agreement concerning a series of general recommendations. Irrespective of how the Supreme Court resolves the current cases, and, in the longer term, of who wins the 2008 presidential election, the question of the appropriate process due to individuals lawfully detained at Guantánamo will remain a vital issue in the near (and perhaps long-term) future. As several discussants noted, this debate has implications transcending American constitutional law, and any solution will necessarily have far-ranging implications with respect to foreign policy and the United States' moral leadership in the international community, and could impact upon the ability of the U.S. to prosecute future armed conflicts.

### First: Dealing With Guantánamo

A number of workshop discussants proffered that *all* of the Guantánamo detainees should have access to the federal courts or other adjudicative bodies via habeas corpus, owing to the unique status of Guantánamo, the current process to which the Guantánamo detainees have been subjected, and the relatively small number of detainees at issue.

It was also discussed that, with respect to the *merits* of the detainees claims via habeas, whether the courts can—and should—distinguish between those individuals detained in the context of active combat operations in Iraq and Afghanistan, and those captured elsewhere. Although some suggested that even those Guantánamo detainees captured “on the battlefield” have substantial claims on the merits that attached once they were moved to Guantánamo, there was far greater sentiment for the notion that those detainees seized outside the zone of combat operations should not be subjected to the military detention model; many of those who approved military detention supported rigorous—and potentially judicially enforceable—procedural safeguards. And while these safeguards would need to be specially crafted to reflect the unique nature of the problems posed in the current cases, there is much to borrow from prior practice.

Thus, the discussants effectively agreed that a clear distinction should be made between the two cases currently before the Supreme Court. In *Al Odah v. United States*, many of the petitioners are Kuwaiti nationals initially detained in Afghanistan. In *Boumediene v. Bush*, five of the six petitioners are Bosnian nationals<sup>21</sup> of Algerian descent initially detained in Bosnia, and removed from Bosnia

<sup>21</sup> The sixth petitioner is an Algerian citizen who is a lawful permanent resident of Bosnia.

in violation of a court order. To whatever extent the detention of the *Al Odah* petitioners may necessarily fall within the scope of law of war detention (for the reasons outlined in *Hamdi*), the detention of the *Boumediene* petitioners presents a much closer case.

Even if there is ultimately legal authority to detain the *Boumediene* petitioners pursuant to the law of armed conflict paradigm (a point about which the discussants disagreed), there were those in the group who offered the view that the detainees should be entitled to more appropriate adjudicative processes given the absence of a clear nexus to a zone of active combat operations. The rationale for this conclusion stems primarily from the notion that the farther an individual is from the zone of active combat, the greater the possibility that the government's determination that the individual is engaged in hostilities against the United States may be erroneous. Thus, that process should include access to counsel, the ability to rebut the facts adduced by the CSRTs (if not before the CSRT, then at least after the fact), the ability to press all legal claims—including any viable individualized claims predicated on treaties—and the opportunity to have a neutral decisionmaker rule based upon all of the evidence.

In addition, the discussants were largely in agreement with the view that closing Guantánamo should be a priority for the next Administration, regardless of which party prevails in the 2008 Presidential election. Although there was no clear agreement on what to do with all of the remaining detainees (including whether to release some of them outright; to repatriate them to their home countries; or to transfer them stateside), some of the discussants agreed that Guantánamo has turned into a waste of resources, effort, and energy, and has distracted from the increasingly important questions with respect to individuals detained elsewhere.

## Second: Detainees in Iraq and Afghanistan

With respect to non-citizens<sup>22</sup> captured in the context of active combat operations and detained on or close to the battlefields in Iraq and Afghanistan, the participants were largely of the view that the appropriate process is that set out in AR 190-8. Moreover, many agreed that AR 190-8, if properly adhered to, would effectuate whatever rights the detainees have under international and/or domestic federal law. The more the government adheres to the traditional law of armed conflict in its detention and treatment of individuals captured and held in Iraq and Afghanistan, the less there would be a need for independent judicial oversight, and determination. Thus, notwithstanding the differing legal bases for detention,

<sup>22</sup> Although the discussants recognized that there are a handful of U.S. citizens detained in Iraq and Afghanistan (including one case—*Geran v. Omar*, No. 07-394—in which the government is currently petitioning for certiorari in the Supreme Court), the general agreement was that these cases present a wholly separate set of issues.



most discussants believed that, at least for *non*-citizens captured and detained in Iraq and/or Afghanistan, the AR 190-8 process is sufficient.

### **Third: Detainees Outside the Zone of Combat and Access to the Courts**

A much harder issue, and one that divided the workshop participants, was the question of detainees from outside an active zone of combat. First, the discussion noted (with several discussants disapproving) the distinction made by the Administration between those in the custody of the Department of Defense and those in custody of other government agencies, including the Central Intelligence Agency. Second, in both cases, a majority favored some form of access to the courts, along similar lines to the arguments made in the Guantánamo context. Where there is a more attenuated nexus between active combat and the detainee, these discussants generally favored more searching judicial review. And some discussants suggested that, where the custodian is not the U.S. military (and is either some other federal government entity or a foreign government acting at the behest of the U.S. government), the case for review was the strongest.

### **Fourth: Article III Courts vs. Military Commissions**

In relation to the question of what to do with Guantánamo, the discussants also considered the feasibility of trying at least some of those detained at Guantánamo in Article III civilian criminal courts or in military commissions.

Some suggested that certain subclasses of detainees may not properly be subjected to the military detention process and it would be no solution to *try* those detainees by a military commission.

With respect to Article III courts, the objections raised largely fell into two categories: *First*, several discussants suggested that Article III courts were poorly suited to handle the secrecy issues that would arise in the context of these types of prosecutions, and would unduly burden the military, which would have to produce witnesses, account for the chain of evidence, and so on. *Second*, some discussants also emphasized that *trying* the detainees defeats the perceived justification for holding most of them—pursuant to the LOAC to prevent them from returning to the battlefield. From the government's perspective, the need to gather intelligence on future terrorist acts in order to save lives, is a higher priority than developing criminal cases against enemy combatants.

Currently, Article III jurisdiction is preempted by military commission trials pursuant to the MCA, and several discussants noted that the MCA is not without its own flaws, including the question of whether military commissions may constitutionally try offenses or offenders that would not be subject to such proceedings under the laws of war. Moreover, several discussants argued that certain subclasses of detainees should not properly be subjected to the military detention process in the first place, and consequently, these detainees should not be subject

to military commissions.

The question was raised whether detainees subjected to the military commission process, would be entitled to post-conviction review via habeas corpus, and, if so, what claims, if any, they would be allowed to press in such proceedings. In short, the discussants generally agreed that the military commission process is not the global solution to the question of what to do with detainees going forward, but is instead a process to account for the illegal and criminal acts of specific individuals. The military commissions are a means to try a small class of particularly important detainees for war crimes, but they provide sparse guidance in solving the dilemma—or, as one discussant put it, the “multi-lemma”—posed by the remaining detainees.

### **Fifth: The Increasing Calls for National Security Courts**

With that in mind, the discussion turned to the so-called “national security courts”—courts established by Congress to try terrorism suspects that would borrow from both the civilian criminal justice and the military justice models.<sup>23</sup> Several discussants expressed significant support for such a proposal, suggesting that such a hybrid might be the best way going forward to balance the rights of the detainees with the government’s compelling interests implicated in terrorism cases.

At the same time, several other discussants emphasized that the devil would be in the details. On the one hand, the more that “national security courts” look like Article III courts, the less it seems there is a need for them. On the other, the less that “national security courts” look like Article III courts, the more it would mean that there are two sets of process—the process due terrorism suspects, and the process due everyone else. One discussant noted that they are likely to be viewed unfavorably by the international community. Moreover, one discussant noted that the same issues raised today would be raised at the threshold of any case before a “national security court,” since some body or judge would have to decide the process to which each detainee should be subjected.

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<sup>23</sup> For two of the more prominent recent examples, see Jack L. Goldsmith & Neal Katyal, Editorial, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19; Matthew Waxman, Editorial, *The Smart Way To Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4. See also Andrew C. McCarthy, *Abu Ghraib and Enemy Combatants: An Opportunity To Draw Good out of Evil*, NAT’L REV., May 11, 2004, available at <http://article.nationalreview.com/?q=NTZjNWFjNmEzYzA5ZDlhZWlwMDU2MTc0YmEwODFjY2U=>.

## VI. CONCLUSION

As the discussion made clear, while there is not a general common ground with respect to the appropriate process due to individuals detained at Guantánamo, the disagreements are smaller than might appear publicly. The discussion revealed broad agreement among many participants for habeas corpus for the Guantánamo detainees (and then an expeditious resolution of the Guantánamo issue). However, some discussants and observers concurred with the current detention processes. Additionally, the group recognized that distinctions may exist between different classes of detainees going forward. In addition, there was widespread—but not universal—support for the use of the process prescribed by AR 190-8 for non-citizens captured and detained in Iraq or Afghanistan, and for the possibility of a more adjudicative process with respect to those detainees captured away from a zone of active combat, whether detained at Guantánamo or elsewhere. Although the discussants disagreed as to whether the law of armed conflict paradigm should even apply in those cases, those who argued in its favor nevertheless agreed that more review was warranted in such cases.

Finally, it bears emphasizing that there was clear agreement with respect to what, exactly, is at stake in the current debate. The discussants noted the government's responsibility to defend the country from future acts of terrorism. However, some discussants contended that at least some aspects of the United States' detention policy have been unnecessarily overbroad, have been in tension with both domestic law and international treaty obligations, and have thereby undermined the long-term counterterrorism imperative of winning hearts and minds.

Concerning a way forward on U.S. detention policy, while not agreed to by all, it was suggested by many that it should begin with a thorough and careful delineation of the relevant considerations in each class of cases, distinguishing between detainees who are citizens and those who are not; detainees captured by the U.S. military in the context of active combat operations and those who were not; detainees held on or near the battlefield and those who are not; and detainees held as lawful combatants and those who are not. Casting the debate in these terms will assist the courts, Congress, and the Administration in addressing the legal, ethical, and political questions surrounding those individuals detained at Guantánamo.

# APPENDIX I.

## **2001 Authorization for Use of Military Force (AUMF)**

Section 2(a):

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

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### **Common Article 3 of the 1949 Geneva Conventions**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat ‘ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

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### **Article 75 to the (First) Protocol Additional to the Geneva Conventions**

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
  
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
  - a. Violence to the life, health, or physical or mental well-being of persons, in particular:
    - i. Murder;
    - ii. Torture of all kinds, whether physical or mental;
    - iii. Corporal punishment; and
    - iv. Mutilation;
  - b. Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
  - c. The taking of hostages;
  - d. Collective punishments; and
  - e. Threats to commit any of the foregoing acts.
  
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- a. The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- b. No one shall be convicted of an offence except on the basis of individual penal responsibility;
- c. No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- d. Anyone charged with an offence is presumed innocent until proved guilty according to law;
- e. Anyone charged with an offence shall have the right to be tried in his presence;
- f. No one shall be compelled to testify against himself or to confess guilt;
- g. Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- h. No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
- i. Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
- j. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

a. Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

b. Any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

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### **Army Regulation 190-8**

*See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997).*

*Available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf).*

## APPENDIX II.

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