Guantanamo Bay: What Indefinite Detention Without Charge or Trial Looks Like

Alumni-Faculty Breakfast Series
April 24, 2008

Greg Hicks: Thank you so much for being out at this early hour. I hope we'll have a real treat for you. We have a wonderful panel here, Judge Richard Jones, Joshua Colangelo-Bryan and Professor Eric Schnapper who will be conducting the panel here on the detention of suspects at our base at Guantanamo. And we are very fortunate we have three of our own here: Judge Jones, a graduate of law school in the class of 1975; Josh, the class of 1999. And Eric Schnapper is the glorious and well-respected, and a highly, highly productive and active member of our faculty, best known for his work in the briefing of cases before the Supreme Court and the other federal courts of the United States.

And I'll just introduce our first speaker, Judge Jones and he will then introduce our other panelists. And this of course is one of a series of faculty alumni breakfasts that we're doing just to make clear that we are a community. We're a community of scholarship. We are a community of professionals. We just see it as so vital for us to have these events that bring us together and have a chance to restate just how important we are to each other, and how important the work of the law school is, and the links between scholarship and teaching and that wider world of advocacy and of standing for the public good.

Judge Richard Jones, at this stage, scarcely needs introduction. His career here in western Washington as a lawyer and jurist is really second to none. He has a wide variety of experience having served as a staff attorney at the Port Authority of Seattle, a lawyer at Bogle & Gates before having a very successful criminal practice, and then onto the Superior Court, and most recently named as U.S. District Judge for the western district of Washington. A pillar of our community, his volunteer service for the YMCA is especially notable, but in so many other areas, he's just been a public citizen of the first rank and a most effective jurist.

I was thinking a moment ago that he's getting all the tough cases now in the western district of Washington, and those of you who know him and know his history would expect nothing else. I remember hearing once this description of the great John W. Davis of Davis-Polk as being 'a lawyer for the situation,' and here we have a jurist for the situation - he gets the tough ones. So, Judge Jones, I'll turn the podium over to you. And once again, friends, thank you for being here. This is going to be a glorious occasion. It's great that everyone's come out.

Judge Richard Jones: Thank you.

[applause]

Judge Richard Jones: Thank you, Dean Hicks. I'd like to begin by making a formal statement and that is that the code of conduct for United States judges mandates that we are to uphold the
integrity and independence of the judiciary and to perform our duties of the office impartially. Please know that my purpose today is not to express any personal opinions or position on any of the issues today. Now that my formal disclaimer is out of the way, we can begin our program.

[laughter]

Judge Richard Jones: We do indeed have an outstanding and exceptional panel today. And look at the topic - Guantanamo Bay: What Indefinite Detention Without Charge or Trial Looks Like. Just the sheer title is compelling enough to be up this early in the morning and be here to spend this quality time with the panel that we do have.

Let me begin with an overview of the talent that is to my right and give you a brief description of our program. It's a conversation between Joshua Colangelo-Bryan who's represented six men who were detained for years at Guantanamo Bay without charge or trial, and Professor Eric Schnapper who has won three United States Supreme Court cases and is a recognized expert in areas of civil rights, discrimination, terrorism and the law.

Mr. Colangelo-Bryan will share his experience visiting his clients at Guantanamo, as well as the experiences of his clients in United States custody. A discussion will follow regarding the United States government's legal position with respect to the detainees, including the government's argument that the detainees can be held indefinitely, even if they're not accused of taking any action against the United States or it's allies.

Now, before we go any further, I'd like to provide just a little bit more detail of the true qualifications of these gentlemen.

Joshua Colangelo-Bryan: He is a senior attorney at Dorsey & Whitney's New York office, a trial group that practices commercial litigation with an emphasis on employment law and securities related matters. He also devotes a portion of his practice to matters involving human rights issues, including the representation of Guantanamo Bay detainees.

As a part of working for Dorsey, he served with the United States mission in Kosovo where he was involved in the prosecution of criminal cases involving war crimes and terrorism. Joshua has also done post-conflict humanitarian aid work in the Balkans. As indicated by Professor Hicks, he received his J.D. from the University of Washington Law School in 1999, and his B.A. from Oberlin in 1992. Give a warm round of applause to Dr. Bryan.

[applause]

Judge Richard Jones: Our other distinguished panelist, Professor Schnapper received a B.A. in 1962 and an M.S. in 1963 from John Hopkins University, a Bachelors in Philosophy in 1965 at Oxford University, and an LLB in 1968 at Yale University. He joined the University of Washington Law School faculty in 1995 where he teaches civil rights, civil procedure and employment discrimination law.

He served for 25 years as an assistant counsel to the NAACP Legal Defense and Educational
Fund, Inc., specializing in appellate litigation and legislative activities. He has won scores of United States Supreme Court cases since 1973 and has handled more than 70 Supreme Court cases. He's taught at Columbia Law School from 1979-1994 and at Yale Law School in 1990.

His articles on constitutional law and civil rights have appeared in law review articles published by Harvard, Columbia, Virginia, Stanford and other law schools. He served in 1981-1982 as administrative assistant to Representative Tom Lantos in California. He was the recipient of a Marshall Scholarship for study at Oxford University in 1963-1965, and served as articles editor of the Yale Law Journal and clerk for the California Supreme Court. A round of applause for our other distinguished panelist.

[applause]

**Judge Richard Jones:** That's just a brief glimpse of the resumes of these two gentlemen. Had we gone into more detail it would probably be 9:15 AM before we started the formal program, but let's get started. I'm quite certain and confident that when Joshua and the other lawyers from Dorsey & Whitney and Perkins-Coie took their oath for admission to the practice of law that they had no idea that as they raised their hands that afternoon, that oath would lead them to membership in an exclusive organization now known as the Guantanamo Bay Bar Association.

I'm equally confident that their definition of client did not include titles such as 'suspected terrorist' or 'enemy combatant,' nor did their vision of a client include an interview room with 15-foot high gates with surveillance cameras that observe every single act of communication between them and their clients, nor did they have a perception that their client would be shackled to the floor constantly contemplating suicide.

Aside from the notions of their expected practices, Joshua and the other lawyers who have volunteered to work abroad are to be praised and applauded for the work that they do. Regardless of one's position on the topics or regardless of one's position on their clients, what these lawyers bring to the table include issues of whether America, as a nation, is committed to the rule of law. Joshua and the lawyers committed to this struggle are truly committed and are to be credited to the bar, now a credit to the bar for raising these issues and taking on these enormous challenges, particularly in the face of tremendous pressure and unwanted criticism of their patriotism to this country.

I now invite Joshua to share his experiences and describe what it is like to go to Guantanamo Bay as a lawyer visiting his clients.

**Joshua Colangelo-Bryan:** Thank you Judge Jones. Listening to the resumes of Judge Jones and Professor Schnapper, I flashed back to a realization I had on the flight out here yesterday, which is that I had voluntarily agreed to travel across the country to be grilled on one of the more controversial legal topics today. Not only by a law professor, but by a federal judge at the same time.

[laughter]
Joshua Colangelo-Bryan: A position I don't think I have ever been in before and depending on how things go today, may hope never to be in again. With that proviso, let me tell you a bit about what it's like to go to Guantanamo.

I made my first trip there in October 2004. At that point, only a couple of lawyers had been down to the base. They had met with clients from Western Europe. Whereas, our clients were from Bahrain, which is a tiny little island nation off the Arabian peninsula near Saudi Arabia. So, it certainly felt like we were in uncharted territory.

And as Judge Jones said, I probably had not contemplated representing enemy combatants at any time before that and beyond phrases like enemy combatant, I had heard the president say that these men were "the worst of the worst." I had heard Secretary Rumsfeld say that they "were the most vicious, best trained killers on the face of the planet."

I've heard the Chairman of the Joint Chiefs of Staff say that they would chew through hydraulic cables to bring airplanes down.

I don't necessarily buy political rhetoric wholesale. In that moment before I walked into my first meeting, it was hard not to wander whether I might be sitting down alone with a terrorist who would be just as happy to reach across the table and grab for my throat as he would to talk to me.

Despite those trepidations, I went into the room, which Judge Jones described and saw Juma Al Dosery. Juma looked up when I walked in and flashed one of the biggest smiles I have ever seen in my life. I thought, well that strikes me as a good sign.

I walked over and shook his hand. He couldn't get it up because he was shackled. I'm still feeling a little apprehensive. I gave him a quick look over, just to see what it seemed he was made of. Juma is about 5'6" and 140 pounds. Obviously size can be deceiving, but I admit that I was a little comforted by the fact that he didn't appear to be a muscled warrior.

In any event, we sat down, we started talking and we didn't stop for the next three hours. We talked about things that I never would have anticipated discussing with him. We talked about Egyptian cuisine. We talked about movies. Juma's favorite movie is "Jumanji," which I admit I had to go Google to find out that it's a Robin Williams film, based on a children's game or some sort.

We talked about the fact that he was divorced - and my parents had been divorced. And Juma just had a very welcoming and gentle manner that really put me at ease quite quickly. Any lingering anxiety I might have had dissipated when I went to take a break during that meeting.

As I was walking out the door, I looked back just to sort of give Juma a nod goodbye, and he said to me in English, "see you later, alligator."

[laughter]
Joshua Colangelo-Bryan: I don't want to sound nave, but I thought I can't imagine a hardened terrorist who really is plotting to reach across the table and kill me, would say, "see you later alligator." That's at least what I told myself in that moment.

Of course, we talked about many other things during that first meeting and in meetings that followed on several days after it, all during our first visit to Guantanamo. One of the things we talked about was experiences that Juma had in US custody. Being cynical by nature, being cynical by training, I'll admit that I was a little skeptical about some of the things that he talked about.

For example, he said that he had been short shackled in an interrogation room. That's where one's wrists and ankles are shackled to a bolt in the floor at the same time. He said that while he was short shackled, a female interrogator had wiped menstrual blood on his body and face.

I thought, I don't want to sound sexist, but I'm having a hard time imagining a woman, especially an American woman, doing something like that. It just sounded very far-fetched to me. He told me that he had been beaten unconscious by what's known as an Immediate Response Force. These are the squads of five or six guards who dress up in chest protectors and shin guards and the rest. They are supposed to quell disturbances among the detainees.

Now Abu Graib had already been disclosed so we had some sense that there was things happening to detainees that many of us would find objectionable. But, at the same time I thought, if beatings that severe were being handed out, surely we would have heard about people dying at Guantanamo or suffering serious injuries. And we hadn't heard about any thing like that.

He said that at one point life at Guantanamo had just got too much to bear, and that he had tried to kill himself by cutting open his arm with a razor and writing in blood on the wall, "I kill myself because the brutality of my oppressors," before fainting from blood loss.

Obviously, I'm not a doctor and I sat there wondering, is it possible to write a coherent sentence on the wall in your own blood when you are about to pass out. I didn't share any of those doubts with Juma at the time, but they were certainly in the back of my mind.

Several months later, the government released a raft of documents in the context of a foiled litigation. Some of those documents were emails and memos that had been written by FBI agents who had worked at Guantanamo. In one of the memos, an FBI agent wrote about interviewing a detainee who described a beating by an immediate response force in precisely the same terms that Juma had.

At the end of the memo, the FBI agent wrote that the detainee had what appeared to be a recent wound on the bridge of his nose. Reading that, I remembered that Juma had pointed to a scar on the bridge of his nose that he had told me was the result of that beating.

A few months after that, a book came out, written by a former US soldier named Eric Sar who had served at Guantanamo. In the book, he wrote about the beating of Juma and said that Juma's face was black and blue after the incident. He also wrote about serving as an interpreter, which
was his role at Guantanamo.

During an interrogation, when a female interrogator took red dye, pretended it was menstrual blood and wiped it on the face of the detainee. Apparently the notion was that by doing so, you would prevent detainees from feeling that they could pray and thus prevent them from taking strength from their religion that in theory they could use to resist interrogation. That tactic was later confirmed in a Pentagon report as well.

Eric Sar, in his book, also wrote about being called to the scene of an emergency. When he arrived he was asked by the officer in charge at the scene to go into a shower and read handwriting that had been put on a wall in Arabic script. He said that the handwriting said, "I kill myself because the brutality of my oppressors."

After he went and interpreted that writing, he went outside, as he describes in the book, and saw a detainee lying on a stretcher who had tried to kill himself.

Certainly seeing that kind of confirmation, corroboration of things that sounded outlandish to me, especially considering how closed to scrutiny Guantanamo is, gave me a new perspective. It certainly changed the way that I listened to Juma and our other clients at Guantanamo.

In some respects the thing that was troubling Juma the most, during those first meetings, was not the physical brutality that he had suffered before, it was his then current living conditions. He was being held in a place called Camp Five. In Camp Five, he was housed in a solid wall cell, that he couldn't see out of.

He could only communicate with other people from his cell by yelling through a small food tray slot in his door. But, that he couldn't even do most of the time because very large fans would be running the hallway.

He got out of his cell once or twice a week for half an hour of exercise and for interrogations, which were held or conducted about once a month. Other than that, he spent every minute of every day in his cell.

In the cell, the only things he had were a Koran, which he had memorized the year earlier, some censored letters from his family and letters from us. The isolation was, for him, almost unbearable. And at one meeting we had, which was in March 2005 after he was talking about these issues, he looked at me and he said, "What do I do to keep myself from going crazy?"

Naturally, I had no good answer to that question and I certainly couldn't give him any comfort in terms of our litigation efforts, which I'll talk about later and which we're going very, very slowly at the time. So, those issues of isolation were a major theme for us throughout our visits.

In October 2005, I was back at Guantanamo, meeting with Juma. At once point, he said, "I need to use the bathroom. Could you give me 10 minutes?" Of course, while going to the bathroom under some circumstances is a fairly simple operation. At Guantanamo, it's a little more involved.
I had to call guards into the room who would unshackle Juma, move him from our little meeting area and to a cell which was in the same room and separated from the meeting area by a steel mesh wall and the toilet was in the cell. So, the guards came in. I left. They moved Juma over to the cell. And then, they came out as well.

I spent a couple of minutes just making small talk with one of the guards. And I didn't want to go back in too early and disturb Juma, but I just started feeling a little anxious. And at one point, I decided, let me just open the door, stick my head and hear him say everything's OK and then I'll give him some more time.

I opened the door to the room and the first thing I saw was a pool of blood on the floor in front of me. I looked up and I saw Juma hanging by his neck from the top of that steel mesh wall on the cell side. I ran over to him and I yelled his name and I could see that he was unconscious, he wasn't bleeding and that he had a large gash in his arm.

Now, I was probably two inches away from him and I could see him perfectly clearly through this wall because it's mesh and you can see through it. But, at the same time, I had no way to get to him because the door to the cell was locked. I called guards. They came after fumbling around to find the right key. They finally got into the cell, cut Juma down and laid him on the floor.

At that point, they ordered me to leave the room, which I certainly didn't want to do, but I also knew that arguing about something like that wasn't going to help Juma at all. So, I left and went across the compound. About 20 minutes later, I saw them carry Juma out on a stretcher, which by that point was covered in blood.

Later that night, I got a call from a military lawyer saying that Juma had undergone surgery and was in stable condition, but that he was sedated and I wouldn't be able to see him during the rest of that visit.

Obviously, I knew that Juma's isolation was the primary cause of the desperation that led him to try to kill himself. So, we made some requests of the military. We asked that Juma be moved to a general population area where he could interact with other detainees. We asked that he be allowed to have a phone call home. He hadn't spoken to his family since arriving at Guantanamo.

We asked that he be allowed to have children's books in English and Arabic, which he once said he thought he could use to learn to speak English and occupy his mind. All those requests were denied. We then went to the court and moved for the same relief. In opposition to our motion, the government made arguments that I guess you could describe as novel.

They said, first of all, Juma wasn't isolated because he interacted with the guards who brought him food and because he was interrogated once a month. And during those interrogations, he did things like play checkers, eat pizza and watch movies.

So, our premise that he was isolated was incorrect and beyond that, he was receiving the best care that could be provided so there was nothing for the court to do.
Ultimately, the court declined to rule on our motion, dismissing it without prejudice because it found that there were doubts as to whether it retained jurisdiction over the case in light of a law called the "Detainee Treatment Act," which we'll talk about later.

Well, while all these was happening, Juma continued to attempt suicide. In fact, he tried three more times with a razor that he somehow was able to keep hidden. Naturally, as an attorney, without any litigation avenues to pursue, it was a helpless feeling at best.

The only thing that I could offer Juma as a reason to stay hopeful was the fact that clients of ours were being released, slowly but surely. And they were being released not because a court ordered them to be released, but because the government of Bahrain made diplomatic deals to bring them home.

When we got involved in the litigation, it became obvious early on that if you were a detainee from a western European country, you were going to go home. And it didn't matter how serious the accusations against you were.

What we found out was that people like Tony Blaire would come to the US and say, "Guantanamo is just a powder keg, politically, in my country. I need to bring my citizens home." And that's what happened.

So, we began to put pressure on Bahrain, which is a crucial US ally in the Middle East, to do the same. And slowly but surely, people came home.

It was with great relief that in June of last year, I got a phone call from Juma's brother, telling me that that morning, he had gone to Riyadh, Saudi Arabia, which was were the family was from, and had seen Juma.

Juma had come home through a diplomatic deal negotiated by the Saudis and the US of the very sort that we were pushing forth. I talked to Juma on the phone a couple of weeks after that. It was our first conversation when no one was shackled, when there were no guards around, when we could just talk, which was an absolute revelation.

He said to me, "You have to thank everyone who helped me and who was concerned about me throughout this experience." He said several times, "Please thank Whitney and Dorsey. Please thank Whitney and Dorsey." And I thought, "Uncle Whitney would be very pleased that Juma, if no one else, saw the proper ordering of those names." He said, "I'll never forget the people who helped me during this, but I will forget all of the bad things that happened to me. I need to move forward in my life."

We've been in touch ever since. We talk on the phone, we email. He gives me a hard time about not being married yet. It's a relationship of friends. And the timing of today's talk is somewhat interesting in that regard because in about two hours, Juma is actually going to be getting married himself. After which, I'm sure he'll give me even more grief about the subject.

There are, of course, hundreds of people still at Guantanamo. And with the court's permission, I'd
be happy to give a brief discussion of the litigation history, which has led those detainees who remain to being in a predicament that they are.

**Judge Richard Jones:** Permission granted, Counsel.

**Joshua Colangelo-Bryan:** Thank you. Thank you, your honor. The first detainees arrived in Guantanamo in January of 2002. A month later, habeas petitions were filed on behalf of a few of them by the Center for Constitutional Rights in New York, a couple of law professors and a few other firebrand public interest lawyers. They were filed in Federal District Court in Washington, D.C.

Government moved to dismiss the petitions, saying this court has no jurisdiction over claims brought by foreign nationals who are detained outside the sovereign territory of the US. Of course, Guantanamo was selected as the location so that that very argument could be made.

District Court granted the motion to dismiss. Court of Appeals affirmed. And then, to the surprise of some, the Supreme Court granted cert in a 6/3 decision issued in June 2004, which is the Rasul Opinion. The Supreme Court reversed. It said the US exercises exclusive control and jurisdiction over Guantanamo.

And for anyone who ever goes to the base, you could not find a more American place than Guantanamo, complete with a high school, supermarkets and a go cart court and batting cages and a drive in movie theatre and a little Starbucks and everything else. I think, it was Justice Souter who pointed out at oral argument that U.S. environmental laws protect iguanas at the base. And in fact, there's a heavy fine if you hit an iguana in a car, which maybe why people drive so slowly there. He noted that it would be something of an anomaly if reptiles were protected by U.S. law, but people weren't.

So, the Supreme Court said that Guantanamo prisoners could bring habeas actions. At that stage, Dorsey and a few other firms got involved and there were about 13 petitions for 60 detainees pending in the district court in Washington, D.C., by the end of the summer of 2004.

The government moved to dismiss all of our petitions. It said while the Supreme Court may be ruled on jurisdiction, but there's still a separate question of rights and these foreign nationals detained outside sovereign U.S. territory have no rights, so these petitions must be dismissed. In essence, the Supreme Court decision of Rasul was just an empty exercise.

The judges down there, I think, got a little anxious about handling this hot potato issue and they got a retired colleague of theirs to come back and hear the cases in a consolidated manner. Judge Joyce Hens Green, who I think, was in her 70's at that point, came back and dealt with a number of things including the government's motion to dismiss.

She held an oral argument and at one point said to the government's lawyer a phrase that sort of tickled me when I heard it. 'Counselor, I want to ask you a few hypothetical questions. Let's say there's a little old lady in Switzerland who hears about orphans in Afghanistan, feels bad and donates $10 to what she believe is an orphanage there, but in fact, it turns out to be an Al-Qaeda
front. Is the little old lady from Switzerland an enemy combatant?'

Now obviously, the government's lawyer didn't want to say yes. Unfortunately, under the government's definition of enemy combatant, he had to, 'Yes, your Honor.' She said, 'Well, that means I presume she could be held at Guantanamo Bay.' 'Yes.' 'For how long?' 'Well, until the war on terror is over.' 'When will the war on terrorism be over?' 'Well Judge, it's whenever the President says that it's over.' 'OK, but can you give me a ballpark sense of what we're talking about?' 'Well it's whenever the President says it's over.'

Judge Green ultimately decided that the detainees had a 5th Amendment right to due process. She also found that that right was not satisfied by hearings that had been instituted at Guantanamo immediately after the Supreme Court's decision. We'll talk about those hearings - they were called the Combatant Status Review Tribunals. A few of their features were that all the evidence was secret; the detainees couldn't see it; they had no counsel; evidence obtained through torture was admissible; there was a presumption in favor of the government's evidence; there was a presumption that the detainees were enemy combatants; and some other issues that certainly made the hearings a tough road to hoe for detainees.

That decision was appealed to the Court of Appeals. Before the Court of Appeals could issue a decision, the Detainee Treatment Act was passed, which purported to strip Guantanamo detainees of their habeas rights, although not retroactively. When the Supreme Court in the Hamdan case, which some of the Perkins lawyers have worked on, said that in fact, there was no retroactive strip, Congress then went ahead and passed the Military Commissions Act, which explicitly stripped jurisdiction retroactively.

At this point, the Supreme Court has before it the question of whether that habeas strip is constitutional or not; and we are expecting an opinion some time in the next couple of months.

The bottom line from my perspective is that six and a half years into Guantanamo, no court has heard the merits of a single detainee's claims, and we're still in fact debating the fundamental question of whether the detainees have any enforceable rights at all. I apologize if I took more time than I was allotted, your Honor.

**Judge Richard Jones:** Fine. Professor, would you like to ask the first question?

**Eric Schnapper:** Sure. Let me just start by lending my commendation to Josh and Whitney & Dorsey, and Perkins.

**Joshua Colangelo-Bryan:** That has a ring to it, doesn't it?

**Eric Schnapper:** It does. I think, as lawyers, we like to think that one of the great traditions of the bar in the United States is that lawyers will take on unpopular causes. But, I think that for most of us that makes us like 'armchair' generals. Most of us never do it and probably never met anyone who did it, but when people ask us why it's a good thing to be a lawyer, we talk about that.
This was surely one of the most extraordinary periods in the history of the bar. It was Joshua, Dorsey & Whitney and Perkins finest hours. It is hard to think of a time in our history when it took such uncommon courage for lawyers to take a case like this. There have been other times and I think, we all think back - not all of us remember it of course - to John Adams representing the Redcoats after the Boston Massacre.

But, most unpopular causes haven't involved defendants who were being attacked by the President and the Secretary of Defense, back when being attacked by the President and the Secretary of Defense meant more. It was not foreseeable when lawyers like Joshua started this that this wasn't going to be the end of their careers. I think, we're all proud of our profession because of what men and women like he and his colleagues have done here.

That said it seems to me that like any number of things the problem is to figure out where we go from here. A lot of mistakes have been made, but the mere fact that an administration has fouled something up doesn't mean the answers are easy or obvious. So, perhaps I could start with a general question to Joshua, which is what does he think at this point our policy ought to be in dealing with detainees? It's easy to think of any number of things that we've done in the past that were mistakes, but what do you think this process ought to look like?

Joshua Colangelo-Bryan: Professor, may I limit my answer to the Guantanamo detainees?

Eric Schnapper: Sure.

Joshua Colangelo-Bryan: There are 20,000 detainees in Iraq, people in Afghanistan and they all raise different issues. The process for Guantanamo detainees at this point should be a habeas hearing in front of a federal judge in a district court in Washington, D.C. Habeas, as we all know, is a flexible remedy. It can be fashioned in any number of ways.

We're not talking about full-blown criminal trials. We're talking about - as the Supreme Court described in a companion case to Rasul - notice of the accusations against you and opportunity to rebut them and a decision by a neutral fact finder. The specifics may vary in terms of the proceedings in any given case, but those are the essential elements that need to be implemented.

I would note that all of this could have been avoided if the military had been allowed to do what it has done for the last 50 years, which is hold what are known as Article five hearings at or around the time that people were captured. Article five is found in the 3rd Geneva Convention, which relates to prisoners of war, and it says, 'if the military grabs someone and it's not clear that the person is a prisoner of war, it has to expeditiously hold a hearing to determine the status of the person.'

By past experience, these appear to be very effective hearings. In the First Gulf War, about 75% of them found that the detainee in question was not a combatant of any sort. It was just someone who had been swept up. It would have been particularly important to use that kind of process in this context because according to the government itself, the U.S. only picked up 5% of the detainees held at Guantanamo. The rest were picked up by Pakistani security forces, Pakistani civilians and Afghan warlords, and turned over to the U.S. for bounties. Donald Rumsfeld, who
could always turn a phrase, said that the leaflets promising bounties were falling on Pakistan and Afghanistan like snowflakes in Chicago in December.

We were paying money to individuals of the sort I described to turn people over. There was no screening mechanism because the administration decided that Geneva Conventions had no application at all. Article five hearings wouldn't be held, and as described by the head interrogator at Kandahar Air Base, which is where many of these people came through, if you were an Arab and you came into US custody, that was a one-way ticket to Guantanamo.

Had the Article five hearings been held, I don't think we'd be sitting here having this discussion, and most of this litigation probably wouldn't have happened. It's obviously far too late to do that kind of thing now, so that's why we need habeas.

**Eric Schnapper:** Just to ask you a question, one of the concepts and terms that frequently comes up criticizing the United States government is the issue regarding secret evidence. First could you describe to us what secret evidence is and how it's used in this process, and how does a government balance its interests against national security and the interest of investigative proceedings, against the interests that you've identified?

**Joshua Colangelo-Bryan:** All of the evidence, to the extent that you can call it that, used at the Combatant Status Review Tribunals was classified, and therefore, could not be viewed by the detainees. I think, there are some thorny underlying questions about how to deal with that, but there are also some practical issues that would narrow the scope of the problem.

When you think about the kind of information that was deemed classified, just to give you a couple of examples, one detainee was accused of associating with a known Al Qaeda operative. When the detainee said to his tribunal, "What's the operative's name?" they said, "We can't tell you. That's classified." This is the name of a person that the detainee supposedly knew, yet he could not know that name for national security reasons. Obviously, it's pretty hard to mount a defense against a claim that you knew someone when you don't know who that person is.

In another instance a detainee was told that his alias had appeared on a computer in a safe house somewhere. He said, "I don't think I have an alias. What's the alias?" That was classified also. In another instance, there was a document written by government investigators saying that a particular detainee appeared to have no connection what-so-ever to Al Qaeda, the Taliban, or any other terrorist organization. It was mistakenly declassified a couple of years after the Combatant Status Review Tribunal, but that document was deemed classified.

This is the sort of information that is not rightfully treated as secret or top secret. There has been GAO reports about over-classification. I think, if there were a more realistic approach taken to that, many of these issues would be limited.

It's important to remember that we have convicted in federal court, open court, people who are involved in the 1993 World Trade Center bombing, the 1998 embassy bombings, the millennium plot, the day of terror plot in New York. Very serious characters. And classified information was dealt with under the Classified Information Procedures Act in those cases.
Obviously, there are challenges at times. It's not an easy thing to do. But, when you think about that, and then think about the fact that more than half the detainees at Guantanamo weren't actually accused of taking any action at all against the US, I think, there must be a middle ground so that detainees can see at least some of the evidence against them, especially of the sort that I discussed.

The other important thing to remember is that the US controls completely information coming out of Guantanamo. Everything that a client says to an attorney at Guantanamo is presumptively classified. In order to disclose that information outside of a secure facility, which is near Washington DC, the information has to be submitted to a government review team, which decides whether it's classified or not.

So, there is no information flowing out of Guantanamo beyond our control. In that sense, I think that some of the concerns about disclosure of classified information are, as a practical matter, very much overblown.

Judge Richard Jones: I think that the problem is greater that it needs to be, but it seems to me it is real. One of the problems with the process, I think, it was apparent when any number of us first looked at it, was that the Combatant Status Review Tribunals don't have any authority to inquire whether material they're told is classified really needs to be classified.

Whoever is making that decision is external to the whole process, and it seems to me that it would seem a perfectly sensible reform of this processes that whether material classified could be scrutinized more carefully than it has been. I think, that would reduce the problem.

But the problem, it seems to me, is real. That we are going to, at times, apprehend individuals on the basis of evidence that involves sensitive intelligence and methods, and it's going to be contrary to the national security interests of the United States to have it made public.

If we're tapping a phone in Pakistan, if we have an informant - it doesn't seem we have very many, but if we have an informant within the Taliban, we certainly don't want people knowing about that. I think, it would be unrealistic to assume that you could tell an Al Qaeda leader who had been apprehended who the mole was within Al Qaeda, and somehow that would never get out.

So, it seems to me that we can reduce the problem, but at the end of the day, it's still going to be there in some cases, and it will pose difficult issues because it may, in some instances, be critical probate evidence, and yet there will be situations where releasing that information to the detainee poses serious risks to the country. So, I think, it's easy to agree that we need to cut this back, but at the end of the day, I'm not sure we can eliminate it.

Joshua Colangelo-Bryan: That may well be true, and it's probably something I would have thought about more if there was even the slightest hint of that kind of dynamic with any of my clients. But, if you look at the accusations against our clients, you would have to know that disclosing whatever evidence underlay them wouldn't be even of interest to people, let alone
potentially damaging.

You know, if you've got a client who's accused of announcing to some unspecified person in some unspecified place, "I want to fight Jihad." Period. Nothing else. That's the accusation against him. It's hard to figure out how the national security interests would be damaged in that case.

Certainly I agree that there are instances where there would be issues. As a practical matter, it's very limited number of cases. And as I said, we have dealt with it in cases of people who were convicted of inflicting death and destruction through terrorist act.

**Judge Richard Jones:** But, in those instances, we deal with it by disclosing it. It seems to me, we don't have a point where the jury hears evidence that the defendant doesn't. To take your hypothetical, it may be we have a spike mike in a wall somewhere in Waziristan, and we're listening into conversations, and we heard this particular detainee say to someone, "I can't wait to wage Jihad against the Americans." We don't want to tell him where that mike is.

Essentially, it's just different. I don't know that I know the answer, but it seems to me it's not sufficient to say, "We've dealt with things in the criminal justice system." There are problems. The question here is whether the problems related to national security are so serious that we can't, because the kind of things...

If we were to try someone in a criminal court, the evidence against them would all be put out in the open where they could see it. And I think, the position of the administration, which occasionally gets it right, occasionally, is that there are going to be situations where we just can't do that.

And I think, I agree with you completely that we could narrow this down to a far smaller group of situations than it's coming up in, and the use of classification has been overly exuberant and no one and very few people involved in this process have said anything that they want to be talking about very much when this is all over.

But, I don't think that we can be confident that we can do away with the problem of secret evidence.

**Eric Schnapper:** We've talked about the concept of presumptions because Josh, you made allusions to presumptions and different references and throughout our litigation system in the United States, there are a host of presumptions that take place in our day to day trials, criminal and civil. Does it really matter if the military is offering this evidence anyway, despite the fact there may be presumptions in existence?

**Joshua Colangelo-Bryan:** I guess, I've always wondered about presumptions generally in the law and what effects they really have. I do know that there were some instances where members of Combatant Status Review Tribunals wrote things like, "The evidence against this detainee is incredibly weak. But, given the presumptions and the very low evidentiary threshold, we really have no choice but to find him to be an enemy combatant."
So, I think that there were instances in which that had an effect. Maybe, more significant than the presumptions that were written into the Combatant Status Review Tribunal Procedures, was the fact that you're asking military officers to review the detention of people who had been labeled the worst of the worst, the most vicious best trained killers, people dedicated to killing Americans, by the highest officials in our government for several years.

And, in fact, the Combatant Status Review Tribunal Procedures said the detainees have already been determined on multiple occasions to be enemy combatants. I think, it's very difficult under those circumstances to make a truly independent assessment that contradicts the people at the very top of your chain of command.

That problem was made even worse by the fact that in a number of instances, a panel would find that a detainee was not an enemy combatant, that decision would be communicated to the authorities in Washington, who then order a second panel be convened, which would then find that the detainee was an enemy combatant. And in one instance, three panels had to be convened before a detainee was found to be an enemy combatant.

So, I think, those atmospherics, maybe even more than the presumptions written into the procedures, had a serious effect.

Judge Richard Jones: But I think, that's the world that we're in. And earlier, you said that you thought the better solution here was to have Article five panels. But, at the end of the day, the President has made those remarks, the Secretary of Defense has made those remarks, it can't be that the answer is, "This is like pretrial publicity and we have to set everybody free."

We need an adjudicatory process that is sufficiently independent that it isn't going to be swayed by that. But, the problems, I think, we can't foresee on assumption, the problems are simply so enormous that it can't work. Certainly, JAG officers, any number of them, have illustrated exemplary independence. And there is a considerable tradition of that kind of independence within the military.

Changing panels because you don't like the results seems to be just indefensible. And I think, we may need to do more to guarantee the independence of these panels and staffing the JAG officers or others may be a better solution to it. But, it seems to me that the argument that the President has denounced these folks means that the process is incurably corrupted. I mean, it just goes too far. It would lead us to the conclusion that we have to set everybody free. I don't think anyone thinks that makes sense.

Joshua Colangelo-Bryan: And we have never even remotely argued that. What we have argued is that with respect to this group of detainees, which has been labeled with the worst pejoratives you could think of for six and a half years, we need Article three judges. That's who we need.

I agree that there have been some JAG lawyers, in defense counsel capacity, who have done incredible work. Those people are not serving from the Combatant Status Review Tribunals. And at this point, the Combatant Status Review Tribunals for the majority of detainees, it's done, it's
finished, it's not going to happen again. What we need to ensure that these sorts of verbiage we've heard doesn't corrupt the process is the federal judges hearing the cases for this group of men.

**Judge Richard Jones:** If I respond to that, that's not habeas corpus as we know it. Habeas corpus as we know it is a process that reviews... Ordinarily, it's reviewing determinations by other courts or other adjudicators. And a number of the criticisms of the limited federal appellate review of what goes on at Guantanamo, to be frank, could be made with equal force about ordinary habeas corpus.

If someone is convicted of a crime by the state of Washington, it goes through a personal restraint petition and then ends up in federal court. A couple of things transpire. First of all, you don't just run to federal court. You've got to go through that process and then ask to have it reviewed. And the federal judge just doesn't say whether you did or didn't commit the crime. The federal judge rules on the fairness of the process, whether the way the trial was conducted is constitutional.

It seems to me one could criticize some of the details of how this would work under the Detainee Treatment Act. But, the notion that habeas corpus normally means you go before the habeas corpus judge and he decides whether you committed the crime, that is not how habeas works.

**Joshua Colangelo-Bryan:** That's only because we don't have cases where people are being held indefinitely without charge and who've never undergone trial. I mean, absolutely, day-to-day habeas would look different from what we're talking about here. But, it's very clear that at common law... And the Supreme Court has said that common law habeas would be available to the detainees. If you did not have any sort of underlying adjudicatory process, there is a plenary review.

It's not a trial, but it's a factual review. And that is, at essence, what we're seeking here.

**Judge Richard Jones:** But it seems to me that what you're really arguing is that the proceeding wasn't a good proceeding. I mean, there was a proceeding. It may have been a kangaroo court, but if it's a kangaroo court, what the habeas court does is not to replace it, but to say the CSRT proceeding is defective. It's defective because you didn't have a lawyer or it's defective because the evidence was secret or it's defective because of command influence. Go back and do it right.

That's the way habeas corpus normally functions. And it's not clear to me why that isn't the appropriate response here. Even if you had habeas corpus, it seems to me a federal judge would normally deal with it the way a federal judge would do with any challenge to a proceeding, however unfair, and say, "Let's look at the defects. If the defects are there, go back and get it right."

Now, if the federal government would say, "No, that's the only hearing we're going to have." Then, the federal judge would have to intervene more. But, I assume, if at some point the federal court say the secret evidence is no good the way it's done, the defense department will go, "Oopppss! Sorry, never mind" and they all tweak the system and address that.
Joshua Colangelo-Bryan: Well, certainly, the government does argue for a perpetual loop of judicial review to new Combatant Status Review Tribunal. Six-and-a-half years into the detention of these people, who have yet to have what really anyone could legitimately call a fair hearing, that's not an adequate answer. That's not what you would get as a matter of habeas under the statute or common law.

I mean, there is a temporal element here that should not be overlooked. We have not done this before, so normal experience with habeas just doesn't apply. And we never have problems getting a Micas brief from the best English legal historians about what habeas corpus would look like at common law if you were an accused prisoner of war and the kind of review that you would get.

Judge Richard Jones: And the CSRT, as I understand, convene periodically. It is not just a one time thing. Is that the case?

Joshua Colangelo-Bryan: No, it's always been a one-time thing.

Judge Richard Jones: I mean, suppose a new administration comes in and it fixes the CSRT process to some degree. We get lawyers, we get JAG officers on the panels. We largely do away with secret evidence. And then everyone who is at Guantanamo is going to go back through that process.

Is it your view that those people could, nonetheless, run to federal court and say, the heck with that process, let's just do the whole thing de novo here in federal court?

Joshua Colangelo-Bryan: The Supreme Court has said we can bring habeas claims; and I'll certainly credit their opinion more than my own. The idea that a new administration will come in and will somehow reform the process and maybe in year eight of the detention of these people, they'll get a proceeding that is in some way a little bit better than the one they got before.

That's not what habeas contemplates and...

Judge Richard Jones: It seems to me that there are two kinds of responses to the argument about the passage of time and it certainly what happened, shouldn't have happened. But, in terms of time, anyone familiar with capital punishment litigation would look at a six and half year delay as speed. These processes...

Well, you don't like the trial. I don't like the trial. But, it doesn't mean it doesn't a precedent. And it doesn't mean, if Joshua Colangelo-Bryan is now the General Counsel of the Defense Department and you are fixing the process. It seems to me normal habeas corpus... I mean, it wouldn't be unconstitutional for congress to then say, you don't get into federal court and habeas corpus until you've gone through this process. That's normal.

Joshua Colangelo-Bryan: That's what congress has said and now we'll find out if the Supreme Court agrees that the substitute procedure that the Detainee Treatment Act provides is an
adequate substitute for the habeas proceedings that the Supreme Court earlier said the detainees were entitled to. That is the heart of the issue before the court now.

**Eric Schnapper:** One of the responsibilities that we have as judges, is something we learn at baby judges school and that is to test the practicalities of what the lawyers tell us. Now, Josh, my understanding is, is it practical to call a hearing at Guantanamo with witnesses, because it sounds that's the direction you are going.

If so, wouldn't we force the government to be in the situation of having a hearing where witnesses would have to come in from Afghanistan to essentially testify to some of the issues now before the proceeding? Is that really practical?

**Joshua Colangelo-Bryan:** Well, it may be complicated in some instances, but Paul Wolfowitz, who apparently wrote the Combatant Status Review Tribunal Procedures, said that if a witness is reasonably available that witness can testify at such a proceeding.

Interestingly, not a single witness requested by any detainee was deemed reasonably available and brought to Guantanamo. And that included people that government said they just couldn't find even though a reporter from the "Boston Globe," for example, was able to pick up the phone and track down some of these witnesses within a couple of days.

So, there may be well be some logistical issues with that. Those issues, of course, we would not have had to face if we had held the Article five hearings at or around the time of capture in Pakistan or Afghanistan. Those hearings didn't happen. We ended up with the Combatants Status Review Tribunal rules and I suppose, from my perspective, it's not too much to hold the government to the rules that it wrote.

**Eric Schnapper:** If the proceedings did take place in the Middle East, under what rules of government law would apply?

**Joshua Colangelo-Bryan:** Well, if they had taken place at or around the time of capture, the military would have used a series of regulations that it has developed over the last 50 years or so for these Article five proceedings. They are pretty down and dirty. There's not a lot of bells and whistles in terms of procedures.

But, as a statistical matter, looking at prior determinations made by those kinds of tribunals, it appears that they are fair. Of course, the military has a great interest in determining whether or not some one is worth detaining, because it takes a lot of resources to hold people.

If you've got a chicken farmer, well, you don't want to have to carry that chicken farmer around with you wherever you go and feed him and house him and the rest of it. So, those proceedings by all accounts are quit...

**Judge Richard Jones:** If Islamabad calls up and says, we got him. He's in the basement. What do you think we should do then? Are we supposed to hold an Article five hearing in Islamabad, or are we supposed to take him off to Bagram and do it? Where is this supposed to happen?
Joshua Colangelo-Bryan: If we're asserting that we are holding him pursuant to the laws of war, and we have some question as to what his status is, yeah. Then we hold an Article five hearing as we obligated ourselves to do when we wrote and signed the Geneva Conventions. And that Article five hearing could be held in Islamabad or at Kandahar Air Base or at Bagram or wherever else the person was held.

What we have done is said that we are acting pursuant to the law of armed conflict, yet said that none of the restrictions on a state's power, under those laws, apply to us.

Judge Richard Jones: Could we bring them to... I mean, I think, probably we couldn't hold an Article five hearing in Islamabad. The political problems with that would be pretty serious. Could we just bring him to Guantanamo and do it there?

Joshua Colangelo-Bryan: Sure. I mean, we have to remember that in Italy, there is now a prosecution of CIA agents for kidnapping, in connection with the abduction of a terror suspect. So, there are number of bodies of law that can overlap here, including the domestic law of the place where we grab people.

But, we are now, although not often, bringing people to Guantanamo from the horn of Africa, from places around the world. So, I don't anticipate that that will change, even if it's a less frequent practice.

Greg Hicks: OK, we've been going around the table for a few minutes and we certainly don't want to cut off discussion. We could go on until... deep into the hours of the day. But, I want to give all of you, some of the brightest legal minds in our community in this room, the opportunity to ask any question that you may have.

So, I'd like, if you do have any questions, just to stand, identify yourself and let's hear your question. We do have a microphone so all of us can hear what your question is.

Good morning. I have to defer to the person who reads my opinions first. Judge Fletcher.

Judge Fletcher: I grade your papers. We haven't talked this morning about the evidence obtained by torture. Now, do you want to comment on that?

Joshua Colangelo-Bryan: Sure. And thank you for the question, your honor. As I mentioned, the Combatant Status Review Tribunals have no prohibition against the use of evidence obtained through torture. In fact, in an oral argument, the government said that there would be no legal reason why you couldn't justify someone's detention on the basis of such evidence.

This isn't just philosophical concern. There was a detainee named Mohammed al Katani who was subjected to several months of very intense interrogation. Interrogation techniques were meticulously logged and those logs were obtained by "Time Magazine" or now are public information.

He had sleep deprivation and was threatened with dogs, extreme temperatures, short shackling
and was given intravenous fluids and then not allowed to use the bathroom. Some very extreme things.

We know from public information that during that process, he identified about 30 other detainees as having in some way been involved with bad things. The CSRTs, the Combatant Status Review Tribunal panels that heard the cases of those other detainees, would have been perfectly free and certainly may well have relied on those statements and nothing else to find that the detainees in question were enemy combatants.

So, it's a very real, practical concern. The Detainee Treatment Act and the Military Commission Act put some limitations on the sort of evidence that can be used, but don't address evidence that was gathered before the passage of those acts, the first of which was in 2005.

So, obviously, I can't discuss classified evidence, but there can really be no legitimate question that there are people at Guantanamo that were found to be enemy combatants on the basis of evidence that was the product of what we could call coercion.

Greg Hicks: There's a question in the back to your right. No.

Henry Aaronson: Hi. Good morning.

Joshua Colangelo-Bryan: Good morning.

Henry Aaronson: My name's Henry Aaronson. As a kid lawyer I spent my first three years out of law school in Mississippi in the 60s. Slightly older, I spent a year defending antiwar guys in Vietnam, living in Vietnam. One of the things that occurred to me through that period of time... As we were dealing with breathtakingly stupid acts by the Mississippi government and similarly by the Army in Vietnam, we were wondering, "Why are they being so dumb? They could achieve the same results by just being swifter."

I wonder if the cynical side of you often wonders... It strikes me that much of what the administration is trying to accomplish could avoid many of the legal problems or charades if they would just be much swifter on their face. Is there anything to that observation?

One comment to Judge Jones about the baby judges course and practicality. It strikes me if the military chooses to create the problem, they've got to overcome it. If you have these hearings at the base camp of Mt. Everest, it would fall on purely deaf ears to say that it's impractical to bring people there. They chose to put them there. I think, they've got to deal with issue.

But, the larger question, Jone, is that I wonder if you have any thought... It just seems really dumb the way they're going about quite beyond how you feel about the underlying lines.

Joshua Colangelo-Bryan: People far more politically savvy than I am have talked about the fact that the administration probably could have gotten a congressional sign-off. A lot of this, had it gone to Congress in the months after September 11th, if it had been more collaborate in that way... Obviously, that was not the approach that was taken. Instead what we see are memos
saying that Congress cannot impede the President's authority to order torture as Commander in Chief. Just a limitless expression of executive authority.

It has been the administration's position that a US citizen arrested in the United States can be held indefinitely, potentially forever, as an enemy combatant without the right to any legal proceedings at all. It's hard to imagine a broader position than that. It's in fact now statutory law that any non-US citizen arrested called an enemy combatant, or merely arrested and awaiting a determination as to whether or not he's an enemy combatant, is precluded from being any legal proceeding at all to contest his detention.

That is statutory law in the Military Commissions Act, which in some respects maybe underscores the point that a more politically collaborative approach could have shielded the administration from some of the problems and flack that it's facing now, because there probably would have been a buy-off on some of the new authority that the executive asserts that it has.

**Judge Richard Jones:** I had a comment on that. I think, there's a related problem and one that is potentially more far-reaching. I think that the way the government has handled any number of these issues has undercut its credibility, not just with the public but with the courts. When this started, if the government got up and said, "Look your Honor, I can't really get into details, but trust me, we need to do this for national security." There was a time when I think a lot of judges would have accepted that.

There's been this pattern of practices and representations about things being essential to national security that just turned out not to be so. In a number of these cases, the courts were told, "If this particular individual..." I forgot the name of the fellow who was in the Navy Brig in South Carolina.

**Joshua Colangelo-Bryan:** Padi?

**Judge Richard Jones:** No, not Padia. The other one. The one that's in Saudi Arabia now.

**Joshua Colangelo-Bryan:** Oh, Hamdi.

**Judge Richard Jones:** Hamdi. The government's position was that Hamdi was so dangerous and he knew such incredibly sensitive material that it was too dangerous even to let him talk to an American lawyer from the Brig in South Carolina. Within about two years of saying that, we had set him free and he was walking in the streets of Saudi Arabia.

**Joshua Colangelo-Bryan:** After this the Supreme Court said he was entitled to a hearing.

**Judge Richard Jones:** Right, but...

**Joshua Colangelo-Bryan:** That was the triggering event.

**Judge Richard Jones:** No, I understand that. I didn't mean to suggest that the government just had a change of heart.
Judge Richard Jones: But, the underlying concern is that government lawyers have been getting up and making representations like that, which turned out not to be true. It seems to me it was exceptionally short-sighted because to be an effective advocate for the government, you have to have the confidence of the judiciary that when you say something is true, it is true.

That simply has been departed from too often and it impairs the ability of the government to represent the interest of the United States when you let that happen.

Joshua Colangelo-Bryan: The Padia case is another example of a US citizen detained as an enemy combatant, deemed too dangerous, couldn't be charged, and as his case was potentially going to be heard by the Supreme Court, the government said, "Actually, now we're going to charge him." The government managed to take off the Fourth Circuit Court of Appeals, which is probably...

Judge Richard Jones: Not easy.

[laughter]

Joshua Colangelo-Bryan: ...the most sympathetic ear anywhere in the world. But, the Fourth Circuit was troubled by what it saw as a bait-and-switch, so I think, that underscores Professor Schnapper's point.

Greg Hicks: One of things that I think, you'll find fascinating is if you go to read some of the briefing that's been done on some of these issues. I have some of the briefs. I won't read the names because they're too long, but before the Supreme Court 061195 and 061196, these are arguments specifically by the government that identifies many of the issues that have been discussed this morning.

When I received the briefing I was just going to spin through it. I found myself late in the morning hours just reading through the different arguments that had been advanced, the history behind the arguments, and the suspension clause in different components of habeas corpus.

You probably think I'm crazy for reading something like this, but trust me. Once you get into it, it's tough to put down and not be deeply involved in some of these issues that impact us as members of our society and Americans in the United States. There's another gentleman. I'll take one question and then we have to close these proceedings.

Robert Friedman: My name's Robert Friedman. I wanted to ask if you would briefly explain the proposal by Neil Katyal and Jack Goldsmith, which I understand the ACLU is against, and tell us what you think of it.

Greg Hicks: I don't want to misstate what it is. my best understanding is that they're proposing sort of preventive detention court, where Article three judges would hear cases of detainees who,
for whatever reason, can't be charged but are too dangerous to be released. We keep waiting to find out who this mythical detainee is, who can't be charged, but is too dangerous to release. We have a long history of prosecuting terrorists who were involved in very serious, very heinous crimes. I'm just not sure who falls into that category.

Having worked in Kosovo and seen what it takes to create a new court, and also having watched the process of military commissions in Guantanamo, which were created out of whole cloth and years later have yet to hold an evidentiary hearing, it's a very hard thing to do, to whip up a new court system.

That's one reason why I'm a little skeptical, in addition to the fact that I'm just not sure who exactly it is that we need to detain preventively.

We've tried preventive detention in the past. We tried it during World War II. We tried it after 9/11 where we held thousands of people on an immigration violations, none of whom were ever charged with crimes.

I'm sure Neil Katyal has a much more narrowly-tailored process in mind but preventive detention, I think, is a hard thing to pull off in a way where you'll look back on and say, "That was a good idea."