

SUPREME COURT PANEL: DISCUSSION & COMMENTARY*

Dr. Sekulow: I am going to lead you through a few questions. To keep it moving, I am going to set ground rules. On the first round of questions, I am going to ask that each panelist respond quickly. Then, we will expand out as the questions get more complex. Professor Rishikof, we will start with you. Was *Boumediene v. Bush* correctly decided?¹

Professor Rishikof: Yes.

Ms. Massimino: Yes.

Commander Sulmasy: Definitely no.

Professor Paust: Yes.

Dr. Sekulow: So three say that *Boumediene* was correctly decided, and one says it was not. In Justice Scalia's dissent in *Boumediene*, there is a line that reads, "Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."² Justice Scalia then says in Part I of his opinion, "America is at war with radical Islamists."³ Is America at war with radical Islamists?

Professor Rishikof: The answer is yes, but the problem with Justice Scalia's formulation is that when you look at *Johnson v. Eisentrager*, which is the case that turns the issue, twenty-one Germans captured in China were brought over to and held in Germany.⁴ This is the case that Scalia's dissent in *Boumediene* says should govern.⁵ The difference is those German prisoners were part of a state we were at war

* This panel discussion was presented as part of the Regent University Law Review 2008 National Security Symposium, September 27, 2008. The panelists included: Professor Harvey Rishikof, National War College; Professor Jordan Paust, University of Houston Law Center; Ms. Elisa Massimino, CEO & Executive Director, Human Rights First; Commander Glenn M. Sulmasy, U.S. Coast Guard Academy Fellow, Carr Center for Human Rights Policy, Harvard University; moderated by Dr. Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice.

¹ 128 S. Ct. 2229 (2008).

² *Id.* at 2293–94 (Scalia, J., dissenting).

³ *Id.* at 2294.

⁴ 339 U.S. 763, 765–66 (1950).

⁵ *Boumediene*, 128 S. Ct. at 2298–99 (Scalia, J., dissenting).

with.⁶ The prisoners fell under the classic prisoner of war doctrine. Regarding the people we are holding now—and I may be wrong about this—I am not aware that we are at war with either Algeria or Bosnia, which is where our friend Boumediene comes from.⁷ That is the distinction Justice Scalia does not get, but the majority does.

Dr. Sekulow: But the proposition that America is at war with radical Islamists, is that a correct proposition? Or do you think it is misapplied in context?

Professor Rishikof: The answer is yes and no.

Dr. Sekulow: Well, let us say you have to pick one. You would say yes and no?

Professor Rishikof: Yes, I would say yes and no.

Dr. Sekulow: Okay. Is America at war with radical Islamists?

Ms. Massimino: Well, clearly America is at war. That is the easy part. And there is no question that many, if not most, of the people we are fighting are radical Islamists. But I do not think that is really what you are asking. I think what you are asking is if we are in a state of armed conflict with an entity called al Qaeda.

Dr. Sekulow: I did not ask that actually. And that is the good thing about once in a while getting to ask the questions.

Ms. Massimino: Then I gave an easy answer, and that is my answer. We are at war and the laws of war apply in our actions at war. We have not really talked too much about the reason for this panel, *Boumediene* and *Munaf v. Geren*.⁸ From my perspective, these cases would never even have been brought had we applied the laws of war in this armed conflict that you are talking about.

Dr. Sekulow: We will get into the laws of war in a moment. Commander, is America at war with radical Islamists?

Commander Sulmasy: Yes. Obviously, I think we are. But I think there is a better way to focus the discussion. One of the problems is that

⁶ *Eisentrager*, 339 U.S. at 765–66.

⁷ *See Boumediene*, 128 S. Ct. at 2241.

⁸ 128 S. Ct. 2207 (2008).

words matter and calling it the “war on terror”—as Professor Paust alluded to as the “so-called ‘war’ on terror”⁹—has created a lot of the problems in the legal ambiguities associated with calling it that. Things like the cessation of hostilities, which would be a trigger under traditional armed conflict for release of prisoners, and what has been done on a variety of levels, has clouded whether we are actually at war or engaged in law enforcement.

Dr. Sekulow: Professor?

Professor Paust: I am in the minority on this panel, but perhaps some members of the audience would appreciate my situation. I am correct in stating we are not at war with al Qaeda. We simply cannot be, as a matter of international law, at war with a non-state actor who does not even have the status of an insurgent. There are several criteria for insurgent status.¹⁰ It is a no-brainer in terms of international law. Importantly, the Authorization for Use of Military Force (“AUMF”) was not a declaration of war.¹¹ Under international law, we know the difference between war and armed struggles and war and force. We know, for example, under Article 51 of the UN Charter that if you have a right, which you do, to target non-state actors who are attacking you, you are not simplistically at war with the non-state actors you target—even though you have a right to use lethal military force against them.¹² And certain things follow. Note in my Essay, I said that the laws of war do not apply to certain members of al Qaeda; for example, those picked up in Canada who have had no direct experience with the actual theaters of war.¹³ We are at war in Afghanistan with the Taliban, and we have been at war with Iraq since we first entered in 2003, even though it is dying down. I wanted to make this point because Commander Sulmasy referred to being at war. There are dangerous consequences, and Professor Rishikof mentioned three or so concerns.¹⁴ This would be a fourth concern: your self-interest, your foreign policy interest. What are the detrimental consequences of being at war with al Qaeda? Al Qaeda’s status could possibly enhance because it is now at war with a powerful

⁹ Jordan J. Paust, *Boumediene and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351, 351 (2009).

¹⁰ JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* (2007).

¹¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹² U.N. Charter art. 51.

¹³ Paust, *supra* note 9, at 358–60.

¹⁴ See generally Harvey Rishikof, *Powers, Distinctions, and the State in the Twenty-First Century: The New Paradigm of Force in Due Process*, 21 REGENT U. L. REV. 377 (2009).

state. I think that is quite interesting. It can have certain victories against a powerful state like the United States. There has been a blurring of the permissibility of certain targets and methods of conflict—like the attack on the USS *Cole*,¹⁵ which in a real war would be a lawful military target. The September 11, 2001, attack on the Pentagon in a real war would be an attack on a lawful military target.

There has also been a blurring of the status of individuals. For example, most members of al Qaeda, if they were not formal members of the armed forces of the Taliban when we went into Afghanistan in October 2001, would be called unprivileged fighters under international law, not enemy combatants.¹⁶ The President has turned this all on its head. A real prisoner of war is a combatant with combatant immunity for lawful targetings during a war. Al Qaeda is not a combatant, has no combatant status, and no combatant immunity unless its members are prisoners of war when captured. So a lot of things follow; importantly, you cannot be at war with a tactic. Terrorism is merely a tactic—state actors and non-state actors have used such a tactic.

Dr. Sekulow: Okay. Commander.

Commander Sulmasy: I agree that you cannot be at war against an entity like the war on poverty or the war on drugs. But that kind of reasoning diminishes if we really are at war. Regarding a war on al Qaeda, although there are other like-minded jihadists, if you refer to it as the war on al Qaeda, you can declare victory.¹⁷ You can actually disrupt the organization so, at least at the minimum, al Qaeda becomes *de minimis* in fact or not influential on the world stage. But one item—a red herring that is thrown out consistently—is that we cannot be at war because there was no declaration of war. That is a red herring, with all due respect to my learned colleague.

Professor Paust: I agree that you can be at war without a declaration. I just said the AUMF is not a declaration.

¹⁵ “On October 12, 2000, a small boat piloted by two suicide bombers and carrying between 400 and 700 pounds of explosives rammed the hull of the U.S. Navy’s guided missile destroyer, the USS *Cole*.” MARTIN C. LIBICKI ET AL., *EXPLORING TERRORIST TARGETING PREFERENCES* 37 (2007). Seventeen servicemen were killed and twenty-nine were injured in the attack, which Bin Laden denied responsibility for, while indicating support for the attackers. *Id.*

¹⁶ See PAUST, *supra* note 10, at 51–56.

¹⁷ See Glenn Sulmasy, Op-Ed., *Obama Administration Needs New Approach to Battling al Qaeda*, U.S. NEWS & WORLD REP., Nov. 12, 2008, available at <http://www.usnews.com/articles/opinion/2008/11/12/obama-administration-needs-new-approach-to-battling-al-qaeda/photos> (suggesting a change in the terminology from the “War on Terror” to the “War Against al Qaeda”).

Commander Sulmasy: The authorization is not, but it certainly is to use military force.

Dr. Sekulow: The next issue has been touched on by the panelists: applying the laws of war and the Geneva Conventions to this conflict. Which of our enemies, or potential enemies we may face in the future, do you think will be impressed by or will govern themselves according to the *Boumediene* decision to grant habeas, play by the Geneva Conventions, or abide by the rules of war? I will give for example al Qaeda, Hezbollah, Hamas, or for that matter, China or Russia.

Ms. Massimino: I want to jump in on this because I have spent a lot of time with retired generals and admirals who are thinking a great deal about this issue. I remember listening to Secretary Rumsfeld muse out loud as he wondered if we are creating more terrorists than we are killing.¹⁸ One of the things General Petraeus has done in Iraq, and I think it has helped diminish the violence, is that right before he went to Iraq he supervised the production of a new Counterinsurgency Field Manual that implemented the lessons from Afghanistan and Iraq.¹⁹ They are very important lessons. He is implementing them in Iraq, and hopefully will do so in Afghanistan now that he is in charge. Quoting the Manual, “Efforts to build a legitimate government though [sic] illegitimate actions”—including unjustified or excessive use of force, unlawful detention, torture, and punishment without trial—“are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law.”²⁰ What he basically says is that we are not going to win this war through kinetic means.

Those entities you just listed, Dr. Sekulow, are not our audience for these actions—for our adherence to the Geneva Conventions. There are a vast number of people, many of them in the Arab and Muslim world, who have not signed up to the ideals of al Qaeda. They are our audience. If we lose that battle, then we lose the whole thing.

Dr. Sekulow: So it is a question of world opinion and moral good.

¹⁸ See, e.g., Memorandum from Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def., to Gen. Dick Myers et al. (Oct. 16, 2003), available at <http://www.foxnews.com/story/0,2933,100917,00.html> (“Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?”).

¹⁹ U.S. DEP’T OF THE ARMY, COUNTERINSURGENCY, FM NO. 3-24 (2006).

²⁰ *Id.* ¶ 1-132.

Professor Rishikof: But to reinforce Ms. Massimino's position, one of the original codes for trying to figure out when an appropriate use of force was proportional and with appropriate discrimination is the Lieber Code from the Civil War.²¹ Lincoln began to realize that brothers were killing brothers and Americans were killing Americans. If the killings went too far, the Union would remain forever divided. Thus the Americans, in a Civil War context, started the generation of the Lieber Code. It eventually became the set of codes that we know as the international doctrine.

I think Dr. Sekulow's question is the wrong question. The relevant groups are not the groups composed of people who do not believe in human rights and the law of armed conflict. The relevant group is the rest of the world. We won the Cold War because of our values and our ideals in the face of what appeared to be a very different worldview. And we said as Americans we are willing to do that. The question is, is it a suicide pact, which is what you . . .

Dr. Sekulow: No, I asked the question for a reason. I wanted the members of our audience, who may not have studied these cases, to understand the general principles. I want them to understand what people are asking.

I, and probably most of the people here, understand the concept of moral good and of establishing our world standing. But some people ask a legitimate question, which I remember from a discussion group that I was in right after Danny Pearl was beheaded.²² I remember a government witness at one of the congressional hearings on the torture issue who said that we are sitting here debating waterboarding while they are cutting off the heads of American citizens. Now, I also understand the counterpoint—that we should not sink to their level. But let me ask another question. Go ahead, Professor Paust.

²¹ U.S. WAR DEP'T, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100 (1863), in *THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS* app. 410 (N.Y., Moore, Wilstach & Baldwin 1865).

²² Daniel Pearl, a *Wall Street Journal* reporter, was kidnapped by terrorists in January 2002, while he was on an assignment in Pakistan. *Daniel Pearl Is Dead, Abducted in Pakistan and Killed by Captors—Investigators Have Videotape Confirming the Murder of Journal Correspondent—A Career of Sparkling Stories*, WALL ST. J., Feb. 22, 2002, at A1. He was murdered and beheaded at some point over the next thirty days. Douglas Jehl, *A Nation Challenged: Journalists; U.S. in Talks on Handing over of Suspect in Reporter's Killing*, N.Y. TIMES, Feb. 26, 2002, at A1. It remains unclear exactly what caused his death. *Id.* But the video of his death has been the source of much controversy as it, and still-frames of it, have been released in various media formats. See Felicity Barringer, *Traces of Terror: The News Media; Paper Publishes Photo of Head of Reporter Who Was Killed*, N.Y. TIMES, June 7, 2002, at A24.

Professor Paust: This is not merely a question of our morality, although I think that is terribly important. Ms. Massimino mentioned value orientations that are at stake. This morning Admiral Clark talked about our national power.²³ If you are going to focus not on the law, but on our self-interest, power-interest, or foreign policy interest it is evident that we should be regaining a respect that we have lost because of illegal interrogation tactics, and the world knows about secret detentions, forced disappearance, and violations of international law.

We need to regain that strength we have lost even if one focuses merely on a self-interested point of view. More generally, I agree with Commander Sulmasy when he stressed that human rights values have been our values right from the beginning of this country. In 1788, in this Commonwealth of Virginia, Patrick Henry decried the attempt to create a Constitution of the United States because it did not adequately reflect “human rights.”²⁴ He was the first person I know to use that phrase, although we had had used the phrase “rights of man,” among others.

It is important that we realize that terrorism is just a tactic. But if we are talking about Osama bin Laden and al Qaeda, we are talking about an armed struggle in which values are important. Those values are important in winning that struggle and—as Ms. Massimino mentioned—maybe not in convincing Hamas or a similar organization, but in convincing neutral or generally pro-U.S. Arab groups to avoid contact with al Qaeda and its illegal tactics.

Ms. Massimino: This is another reason why it is important to consider trying these people in the criminal system. The Counterinsurgency Field Manual points to depriving the enemy of its “recuperative power.”²⁵ You want to cut them off from the societies from which they draw their recruits. Their recruits are fungible. An endless stream of people remain willing to sign up, so you want to marginalize them in their societies. If you read the transcripts of Khalid Sheikh Mohammed’s combatant status review tribunal hearing down at Guantanamo—they are redacted, but you get the picture—you see the problem with treating detainees like combatants instead of criminals.²⁶

²³ Admiral Vern Clark, *The Effect of U.S. Legislative Efforts to Enhance National Security*, 21 REGENT U. L. REV. 293 (2009).

²⁴ Patrick Henry, Against the Federal Constitution (June 5, 1788), in SELECT ORATIONS: ILLUSTRATING AMERICAN POLITICAL HISTORY 66, 68 (Samuel Bannister Harding ed., 1909).

²⁵ U.S. DEP’T OF THE ARMY, *supra* note 19, ¶ 1-129.

²⁶ Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10024 (CSRT Mar. 10, 2007), available at http://www.defenselink.mil/news/transcript_ISN10024.pdf.

This guy sits across from our uniformed Navy officers and says that, military-to-military, we all know war is hell and I hate that civilians get killed, but that is the way it goes in wartime.²⁷ That is not what we want. That plays totally into their narrative.

Commander Sulmasy: I think we all would agree that everyone wants to regain the initiative and have the United States once again be viewed as a shining city on a hill.²⁸ I do not think anyone would disagree with that—here or anywhere. However, to answer Dr. Sekulow’s question, what is the real issue? What would al Qaeda, Hezbollah, China, or Russia do? What is the benefit to us adhering to these provisions in the Geneva Conventions, or providing habeas relief? One of the goals of recognizing the Geneva Conventions was reciprocity—reciprocity so our soldiers are treated the same way we would expect our soldiers to be treated here.

We have to remove ourselves from emotion, hyperbole, and politics. Factually, to answer the question, al Qaeda will not abide by the Geneva Conventions. We know that because they do things like cut off our soldiers’ heads when they are captured and indiscriminately target civilians. Hezbollah will not abide by it: they indiscriminately attack civilians. I would suggest, unfortunately, China and Russia will not abide by it either, in a conventional armed conflict. That is just a fact; we have to get that out there. Some people are mentioning reasons—I think nobly and correctly—why we have to find a way to become that shining city on the hill once again, but . . .

Professor Rishikof: Think of Algeria and the French. The French became an occupying power and fought the Algerians.²⁹ They used very, very dirty tactics and those tactics lost.³⁰ Now the issue is: when we are in Iraq, is Iraq an independent country? Or can America exercise power over it by extension? That is the problem.

One of my students helped set up the Iraqi criminal court. The Iraqis should be doing this in Iraq. The Afghanis should be doing this in Afghanistan. But the criminal court justice system would not be appropriate for the third category of individuals, individuals who are not on a traditionally defined battlefield, and from a country not a war with the United States. If we pick them up what are the resulting legal

²⁷ See *id.* at 23–24.

²⁸ See John Winthrop, *A Modell of Christian Charity* (1630), in *POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY* 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988) (providing the origin of the phrase designating the United States as a “city on a hill”).

²⁹ WILLIAM R. POLK, *VIOLENT POLITICS* 124 (2007).

³⁰ See *id.* at 129, 137–38, 141–42.

consequences? Thus, you have to think of the individuals analytically. What is their status? Where are they being picked up? Why are they being picked up? Who has the right to control them?

The last point is the United States did not ratify Protocol I or II of the Geneva Conventions.³¹ And why? Speculate upon this. If an American citizen jihadist commits an act of terrorism inside the United States, what is the due process? One of the only circumstances that Justice Stevens and Justice Scalia agree on is that this person would be a traitor, and if that person is a traitor, we should be using the criminal court system.³² That reasoning, however, was rejected by several of the members of the Supreme Court.³³ That is the problem.

Ms. Massimino: I want to return to the core of your question, which really gets to the issue that Commander Sulmasy raised about reciprocity and the reasons behind the Geneva Conventions. Of course al Qaeda will not conform its behavior to the law simply because we do. But we often lose sight of the sad fact that this is not the last war we will fight. In the future, undoubtedly we will be engaged in a war with another state actor. If we destroy the integrity of these standards now, or put them aside, then we are not going to be in a position to rely on them to protect our own people in future armed conflicts.

Commander Sulmasy: I think that as American men and women in the armed forces, we do abide by the Geneva Conventions. We try to do so completely. Al Qaeda does not. The jihadists do not. The jihadists did not sign the Geneva Conventions—they did not even exist when the conventions were drafted. We need to keep that as a guidepost for everyone in the audience.

Dr. Sekulow: Ms. Massimino, you mentioned in your presentation that one of the concerns you have is that the United States needs to get

³¹ International Committee of the Red Cross, Protocol I Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S> (last visited Apr. 10, 2009) (showing that the United States signed but did not ratify Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391); International Committee of the Red Cross, Protocol II Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=S> (last visited Apr. 10, 2009) (showing that the United States signed but did not ratify Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442).

³² *Hamdi v. Rumsfeld*, 542 U.S. 507, 558–59 (2004) (Scalia & Stevens, J.J., dissenting).

³³ *Id.* at 522–23 (2004) (plurality opinion).

its house in order on human rights issues because we are generally the best example.³⁴ Can you think of another country that on the human rights issues, especially in a war context or when that country has been attacked, has a better human rights record than the United States? Under the Bush Administration and even right now today? In light of everything that has happened, including Abu Ghraib, can you think of another country that has a better record than the United States?

Ms. Massimino: One of the reasons Human Rights First does not publish reports ranking countries is because this is a pretty complex question with many different parts. It is hard to say who has the best record overall. The most important point is that in my view—and this may be parochial because I am an American—the United States is the indispensable nation in leading the world in human rights.

Dr. Sekulow: Do you think we still carry that role?

Ms. Massimino: I think people look to us.

Dr. Sekulow: But do you think we possess that role right now?

Ms. Massimino: It has been damaged. Our ability to lead has been damaged.

Dr. Sekulow: Okay, so some say it is tarnished. Here is my follow-up question: if you were a terrorist caught on the battlefield, would you rather be taken to Guantanamo Bay or to a facility in Germany or Jordan? Panel, answer with regard to the human rights issue.

Commander Sulmasy: No question, Guantanamo Bay.

Dr. Sekulow: Versus Jordan even?

Commander Sulmasy: Yes, no question.

Dr. Sekulow: Another Arab country?

Commander Sulmasy: Nope, no question. If you read Kyndra Rotunda's new book about Guantanamo Bay, you may get a different

³⁴ Elisa Massimino, *A Human Rights Perspective*, 21 REGENT U. L. REV. 371, 371 (2009).

perspective than what the media reports.³⁵ I think some in this room who have been to Guantanamo would agree that it is not the horrendous place that it is portrayed to be. It is certainly not the gulag of our times—certainly not a place where we flush the Qurans down the toilet.

Ms. Massimino: Why are we asking ourselves whether we are better than Jordan? Is that our touchstone now? We are Americans; we hold ourselves to a higher standard.

Professor Rishikof: Why is the person not being held in Iraq? If he is on the battlefield in Iraq, he should be held in Iraq. If he fought in the battlefield in Afghanistan, he should be held in Afghanistan.

Dr. Sekulow: But is that not a decision the military has to make—where is it best to hold him? It may not be a secure facility.

Professor Rishikof: No, because if it is a sovereign state, Iraq should make the decision. If it is a sovereign state, Afghanistan should make the decision. Unless you are saying that they are not sovereign states.

Dr. Sekulow: No. They are sovereign states who may not have a functioning system, like how Iraq did not have one after the toppling of Saddam Hussein.

Professor Rishikof: But at this point in time, there is a sovereign Iraq and a sovereign Afghanistan.

Dr. Sekulow: The question I am asking, though, is on the human rights front. I think everybody would probably agree that world opinion of the United States being held to this high standard, which we traditionally have hoped to exalt ourselves to, has been tarnished. Having said that, look at other countries' systems of interrogation. I still think that at our lowest point, we are probably better than anybody else at their current point. That does not solve the problem. I am just trying to put a balance as to where we are.

Professor Paust: This is really sort of a silly question. I would rather be held in Canada . . .

³⁵ KYNDRA MILLER ROTUNDA, *HONOR BOUND: INSIDE THE GUANTANAMO TRIALS* (2008).

Dr. Sekulow: Why do you say that? Why would you rather be held in Canada?

Professor Paust: Because our former Secretary of Defense issued two authorizations to use clear violations of the laws of war—to use snarling dogs at the feet of naked, hooded detainees for interrogation.³⁶ I believe history will judge us harshly for that. I do not want to be subjected to that harsh fear that threatens people with death and threatens their family members with death. I do not want to be subjected to a United States Government that is doing that to me—no matter where they are doing it. The Lieber Code was very important to identify customary laws of war that we, the United States, would apply regardless of the situation.³⁷ The fact is the Canadians might apply the law of war more adequately. And that is my main point.

The United States must live up to a higher standard. In any event, the law requires that human rights laws are a minimum set of laws in any social circumstances. It does not matter if you are at war, a war paradigm, or a fear paradigm. Human rights laws are a minimum set of standards, and you simply cannot engage in inhumane treatment of another human being. I am a Christian and my God requires that I treat all human beings equally and with dignity. You probably remember in *Matthew*, for example, one of the rules that He talked about. I am paraphrasing, but He said as you have mistreated your fellow human beings in this way, you have done this “unto me.”³⁸ That is a powerful statement if we think about it. That is what drives not only my moral being, but my legal being as well, as a matter of law.

Dr. Sekulow: It actually says as you treat “the least of these,”³⁹ which is a completely different context, but go ahead.

Commander Sulmasy: I think Professor Paust is right in many ways, but we should recognize that some concerns are not occurring now.

³⁶ *E.g.*, Action Memorandum from William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def., to Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def. (Nov. 27, 2002) (approving, on December 2, 2002, an interrogation plan for detainees located at Guantanamo Bay, Cuba that included removal of clothing and fear of dogs). *But see* Memorandum from Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def., to Commander, U.S. S. Command (Jan. 15, 2003) (rescinding approval for the December 2, 2002 interrogation plan); Memorandum from Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def., to Commander, U.S. S. Command (Apr. 16, 2003) (approving a new interrogation plan that did not include the use of dogs or removal of clothing).

³⁷ U.S. WAR DEP’T, *supra* note 21.

³⁸ *See Matthew* 25:40 (King James) (“Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.”).

³⁹ *Id.*

To clarify, mistakes have been made, and they have been rectified. Dogs are not being used with people in Guantanamo right now.

The question asks where you would rather be held. I would always want to be held, being a proud member of the armed forces, under military control by the U.S. armed forces because we act with dignity. We act with respect. We did when problems occurred in Abu Ghraib—we court-martialed the people involved. I think we should be proud of our men and women in the armed forces. I would be very comfortable being held under their jurisdiction and control.

Ms. Massimino: I agree with that. I think that is a good example of how we learned from our experiences. Because frankly, that was not the case immediately afterwards. We know that the military lacked clarity about what standards applied. To its great credit, the military has—in part due to the McCain Amendment, which restored the Army Field Manual as the interrogation standard for the military and said that all agencies must refrain from cruel and inhuman treatment of prisoners—largely corrected itself.⁴⁰ That is a great virtue of our military. But this morning we heard from Professor Radsan that the CIA needs to operate in the shadows, do things differently, and have a different standard.⁴¹ We tend to beat up on Congress and say it has failed us. Congress is an easy target. But in fact, Congress has spoken twice very clearly on this issue. The McCain Amendment in 2005 forbids “cruel, inhuman, or degrading treatment” of any detainee in U.S. custody—period.⁴² That is not who we are. We do not do that stuff. The President signed that law. Then, the President issued an executive order reauthorizing the CIA program to hold people in secret and use the techniques that our military thinks violate the laws of war.⁴³ So Congress passed another law because it was not convinced that the first one had accomplished its objective.⁴⁴ The President vetoed it—the law that told the CIA that Congress really meant to abide by the Army Field Manual rules and the golden rule standard within it.⁴⁵

⁴⁰ Detainee Treatment Act of 2005, Pub L. No. 109-148, div. A, tit. X, §§ 1002–1003, 119 Stat. 2739, 2739–44 (codified as amended at 10 U.S.C. § 801 note (2006) and 42 U.S.C. § 2000dd (Supp. V 2006)) (introduced by Sen. John McCain).

⁴¹ A. John Radsan, *Change Versus Continuity at Obama’s CIA*, 21 REGENT U. L. REV. 299, 301–04 (2009).

⁴² Detainee Treatment Act of 2005 § 1003(a), 119 Stat. at 2739 (codified at 42 U.S.C. § 2000dd(a)).

⁴³ Exec. Order No. 13,440, 3 C.F.R. 229–31 (2007).

⁴⁴ Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. (2008).

⁴⁵ 154 CONG. REC. H1419 (daily ed. Mar. 10, 2008) (veto of H.R. 2082 by the President of the United States).

We need clarity about this. The lack of clarity is one of the reasons we got off track early on. No matter whether we are in uniform or out of uniform, a civilian agency or the military, we need to have a standard for what it means as Americans to treat people humanely.

Professor Rishikof: The distinction remains important because if you are out of uniform, you are a spy. If you are a spy, you do not get the traditional law of armed conflict protections.

Ms. Massimino: You get Common Article 3.⁴⁶

Professor Rishikof: You get Common Article 3, which is humane.

Ms. Massimino: That is all I am talking about.

Professor Rishikof: But then you can be hung, which can never be done to a prisoner of war. Without question that is what we do to spies.

Ms. Massimino: I do not dispute that at all.

Professor Rishikof: But see, to me, that issue is the darker side. The easy case is one with people in uniform in which the laws of armed conflict apply.⁴⁷ A harder case is how far we are willing to go vis-à-vis using out-of-uniform covert actions and special forces.

Dr. Sekulow: Let me open it up to the students and guests to ask questions. As you have questions, please raise your hand to participate. Yes sir.

Question 1: My question involves international law and national security, specifically regarding post-*Boumediene* and the prisoners in Guantanamo who are due for acquittal or release. What should we do with those prisoners? According to international law, many of them cannot go back to their home countries because they will be subject to torture or death. But at the same time, are we to release them into the United States? I am asking all four panelists what they would do.

Dr. Sekulow: That is a good question.

⁴⁶ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁴⁷ *Id.* art. 4.A(2).

Professor Paust: In my Essay, I said the United States has the power to detain certain persons as security detainees when reasonably necessary under human rights law if the detention is not arbitrary in any context—law of war context or not.⁴⁸ Such detainees do not receive much protection against detention, but they have a right to judicial review of the propriety of their detention. If the laws of war apply, the Geneva Conventions provide a relevant status for every person. There are no gaps. At a minimum, you have Common Article 3—the Supreme Court recognized that in *Hamdan v. Rumsfeld*.⁴⁹ In particular, you cannot mistreat them, but you can try them for any domestic or international crimes they committed within your jurisdiction. You can continue to detain them as prisoners of war and non-prisoners of war as long as the laws of war remain applicable and it is reasonably needed to detain the security detainee. I do not think *Boumediene* addressed any of those issues directly.

Commander Sulmasy: The national security court proposal might be the best way to move forward on this issue because you will have adjudication, rather than simply preventative detention.⁵⁰ Try them in a statutorily created court that satisfies issues of due process as well as the laws of war—that might be the best answer.

Ms. Massimino: We produced a short blueprint on how to close down Guantanamo.⁵¹ It breaks down the categories of prisoners and makes specific recommendations for the next administration, which will have to deal with this. Everyone says they want to close Guantanamo, but doing so involves very difficult choices. I think, in contrast to some of my colleagues here, that we have a greater substantive legal basis for trying people who have committed crimes against the United States in the regular federal criminal system that we do under military commissions. I believe these cases ought to be moved there. Khalid Sheikh Mohammed is already under indictment in federal court.⁵² We probably knew enough about him before we even picked him up—before

⁴⁸ Paust, *supra* note 9, at 358.

⁴⁹ 548 U.S. 557, 629–30 (2006).

⁵⁰ See GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (forthcoming June 2009).

⁵¹ HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION (2008), available at <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf>.

⁵² Press Release, U.S. Dep't of Justice, Virginia Man Returned to the United States to Face Charges of Providing Material Support to Al Qaeda (Feb. 22, 2005), available at http://www.usdoj.gov/opa/pr/2005/February/05_crm_072.htm.

he was ever waterboarded—to convict him and put him away for the rest of his life. I think that is what should happen.

Professor Rishikof: I think your case is the Uighurs.⁵³ What do we do with them? We were detaining them and then a civilian court of appeals finally said there was not enough evidence to detain them.⁵⁴ We have them. China does not want them back, and we have created yet another facility for that group.

Ms. Massimino: China wants them back,⁵⁵ but they are at risk of torture there.

Professor Rishikof: Yes, but China wants them back for the wrong reasons, so we will not do that.⁵⁶ I believe that when you do the capture, you have to think long and hard about what to do with the detainee—keep them in place or not in place? Where Ms. Massimino and I disagree is that I think there may be many reasons why we actually should not use the criminal courts. My recent law review article details why the Human Rights First report on prosecuting terrorism cases fails to address a set of caveats.⁵⁷ Its report makes it clear it has already thought through this international issue and a set category of cases that they do not think are going to be appropriate. That is why people like Commander Sulmasy and I say we need a national security court. But the real issues with detainees involve where you seize them, where you are going to place them, what is the appropriate due process, and how quickly you determine the evidence is insufficient to keep them.

The other issue is our parole system in the United States. Mistakes will be made. We have had many years with parole systems. We let people go and they turn around and commit illegal acts. There will be some mistakes, but you are creating a structure that the world will have confidence in because there will be accountability and transparency.

⁵³ “The Uighurs are from the far-western Chinese province of Xinjiang, which the Uighurs call East Turkistan.” Parhat v. Gates, 532 F.3d 834, 837 (D.C. Cir. 2008).

⁵⁴ *Id.* at 836, 854.

⁵⁵ Peter Spiegel & Barbara Demick, *Uighur Detainees at Guantanamo Pose a Problem for Obama*, L.A. TIMES, Feb. 18, 2009, at A5, available at <http://articles.latimes.com/2009/feb/18/world/fg-uighurs-gitmo18>.

⁵⁶ *Id.*

⁵⁷ Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT’L L.J. 87, 125–27 (2008) (discussing RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>).

Dr. Sekulow: Next question. Yes sir.

Question 2: We have talked about the dichotomy between criminal courts and enemy combatants in military courts. It seems our enemy is more and more a non-state actor—with Hezbollah, Hamas, and al Qaeda—yet we are using our military force to fight them instead of law enforcement. My impression is that this series of recent cases has given more rights to enemy combatants in Guantanamo than our military members sitting here today, who waived some rights when they joined the military and fell under the Uniform Code of Military Justice.⁵⁸ How do we reconcile, and please correct me if I am wrong, this issue of criminal courts using a military force to enforce law? Anybody on the panel can please answer.

Commander Sulmasy: Two quick things. I think that is a great question, first of all. But I think we are not at war with Hamas or Hezbollah. We may be in a state of disagreement. We may condemn their actions, but we are actually only at war with al Qaeda. This distinction is important. In terms of your specific question, obviously I am concerned about giving nontraditional warriors rights greater than if they were prisoners of war right now. Again, I think that is something that would go to the national security court system to strike the constitutional balance between national security and human rights.

Professor Rishikof: Dr. Sekulow elegantly has created the confusion by grouping together these types of groups—Hezbollah is actually more of a problem for Israel than the United States. Let me ask you this question: how do terrorist organizations end? How does a terrorist group end using a tactic? The large number of historical cases involving occupation ended in one of two ways: either the occupiers withdrew or successfully took over the country.

Right now we have a problem in Colombia with the Revolutionary Armed Forces of Colombia⁵⁹ (“FARC”). How is the FARC as a terrorist group going to end? Either Colombia will be able to crush them with a variety of mechanisms, or the FARC will be able to take over power in Bogota. Right now the smart money is on President Uribe and Colombia. How it ends often turns on whether you are an occupying or non-occupying force. What do they want? That becomes the issue. By collapsing the different groups all together the way Dr. Sekulow did helps create the confusion. When you start to disaggregate each

⁵⁸ Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2006).

⁵⁹ U.S. DEPT OF STATE, COUNTRY REPORTS ON TERRORISM 2007, at 154–57 (2008), available at <http://www.state.gov/documents/organization/105904.pdf>.

organization, you get leverage on how to resolve the problem. That is the issue.

Commander Sulmasy: Can I go a step further on that, Dr. Sekulow? Look at organizations like the FARC, Hezbollah, or Hamas. I would suggest most of us detest and condemn their tactics, but we are not at war with them. I think we also have to recognize that al Qaeda has declared war on us. Those folks have not. In fact, they have rejected the support of al Qaeda on numerous occasions.

Dr. Sekulow: Next question.

Question 3: Some of us who have grown up in the 9/11 world are not used to thinking about war as against a country. I want to ask about the situation here. We have Russia selling weapons and technology to Iran, who then gives them to Hezbollah in Iran, who transfers them across the border to Iraq, who then kills our troops. Which laws apply and to whom? Can we bomb Russia and Iran under a military law, and kill the guys while they are driving in Iran? What happens when they cross the border, and what happens when the bomb goes off? I think it applies to everyone now as we look at the world. We see Venezuela who then gives technology to Tehran, who uses it against us, but through other actors. So do we use the Geneva Conventions or . . .

Professor Paust: You are bringing up a basic international law issue concerning state responsibility. A state should not intervene and try to overthrow certain types of governments in certain circumstances through proxies. It should not finance or foment armed groups for armed violence. It should not support terrorism. From the United Nations, a number of General Assembly and Security Council resolutions touch on this. There is a state duty not to support these type of groups, and violations can lead to economic, political, diplomatic, and juridic sanctions—but a mere violation of this duty does not authorize the use of military force against a state that is financing, training, or equipping such groups. The International Court of Justice has recognized this.⁶⁰ You cannot use military force against a state that merely supports terrorism, unless that state is in control of these proxy-type groups, but

⁶⁰ See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 115, 195, 228, 230 (June 27); Jordan J. Paust, *Use of Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 540-43 (2002).

you or your troops are subject to an armed attack in Iraq, in which case you could act under Article 51 self-defense.⁶¹

We must note an important distinction. Some people are talking about Iran, for example, financing Hezbollah. That is an important current question. I would find Iranian responsibility under international law if the facts fit and if it is financing or fomenting terrorist groups to attack Israel, for example. But that does not justify either an Israeli or a United States raid on Iran until there is an armed attack on our troops by Iran or Iran takes direct control of Hezbollah.

Ms. Massimino: I think this question is so important because it underscores the complexity of the problem that we are facing. We will continue to face these problems if we look at this as a one-dimensional or binary choice between criminal law, war, or something else. I think the answer to your question was given this morning by Admiral Clark.⁶² The question “Can we under the law bomb Russia?” or “Can we do this?” only gets you so far. It does not tell you how we achieve the United States’ interests in this complex world. We must use a whole range of tools of our national power to deal with the complex problem that you set out there. I know this is a law school and we are all lawyers. We are talking about the importance of international law and the laws of war, but at our peril, we focus only on that slice of the problem. We have to look across the whole spectrum.

Professor Rishikof: The issue partly concerns the notion of preemption and prevention in the international regime system. I submit that the Bush Administration completely confused and absolutely abused the notion of preemption and prevention. The idea that you can use it as a tool has caused extraordinary disturbance inside the system. So the idea “when I see an act ‘X’ now I have the right to respond” is actually outside of our international law understanding. The prevention doctrine is disagreed upon in a dramatic way. Notice that we recently had Israel bombing Syria. We have never had a system in which everyone denied such an event. We have never had an international system in which everyone says, like a Monty Python script, “We bombed. No you did not. Yes we—no you did not.” And why? Because it strikes at the heart of sovereignty. The Syrian leadership must look at its people and say we have no capacity to protect each other, to protect you.

⁶¹ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security.”).

⁶² See generally Clark, *supra* note 23.

Dr. Sekulow: Which was the real problem.

Professor Rishikof: Which is the sovereignty issue. What is the collective responsibility and response of Russia, as opposed to our unilateral decision as to what America is going to do?

Commander Sulmasy: I just want to go back, if I could, to the question, which was great because the answer is so difficult. I think we have to be careful about completely discrediting preventative attacks or anticipatory self-defense. General Ashcroft and Admiral Clark talked about fourth generation warfare and how things proceed.⁶³ At what point do we say it is not preventative war or anticipatory self-defense when someone is actually attacking a nuclear plant? If someone is putting the missiles on a silo to be launched or on a launching pad to be launched? At what point do we wait for ourselves to be attacked before we respond in kind? I would be careful or hesitant, with all due respect to Professor Rishikof, about disregarding anticipatory self-defense altogether. In this new world order, I think it is important to have it as a tool.

Dr. Sekulow: The red stop is up, but I want to give each panelist one minute to sum it up and reiterate a point.

Professor Paust: In my discussion I jumped into my Essay, so I did not have a chance to thank everyone for inviting me here. That is the way I would like to end my presentation. Thank you very much.

Commander Sulmasy: I think *Boumediene* was wrongly decided. Even though we did not really have a chance to get into it much, I think we should ask when people raise issues of executive power, "Who is really at fault?" Is the institution of Congress or is the Executive really at fault in creating the catalyst for the Supreme Court to intervene in these affairs?

Ms. Massimino: The last thing I would like to say is that we need to keep our heads in this and not overreact. I think many of our problems resulted from our panicking and losing our way. I believe we have a serious challenge, but I do not believe that we are facing an existential threat as a nation. Terrorists hit us hard and we need to fight back. We need to be smart. But we have to use the tools that we know

⁶³ See generally John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285 (2009); Clark, *supra* note 23.

work. We have to have confidence as a nation in our own values and our own system. Because that is—in the end—what this battle is all about.

Professor Rishikof: First, I would like to thank Dr. Sekulow for being such an agent provocateur in the questions. Second, on Commander Sulmasy's notion of preemption and prevention, I think one will only use the doctrine when general consensus believes the state is clearly acting in pariah-like way—then you would feel very comfortable making the case to world opinion vis-à-vis the issue. For example if the Security Council agreed, then the action would have international law approval. And third, I think Ms. Massimino has said we have reacted to empire baiting. When you bait the empire and the empire overreacts, it diminishes the true values that America has understood and why we won the Cold War—for a variety of reasons that also involved covert actions, which is why I protect covert actions.

But really, the test for your generation is how you see these issues and how you participate in the debate to make sure that the best, most rational, and most appropriate answers take place. That is why I thank Regent Law School for having the foresight to bring us all together. I thank all of you for participating and supporting us to come and be here.

Dr. Sekulow: I want to thank first the Law School and the Law Review, as well as the Federalist Society for sponsoring this tremendous debate. One of the things we pride ourselves on at Regent is this diversity of views and dialogue. As the agent provocateur, you want to bring out the most difficult aspects—some might even say silly—but issues on the minds of every American in the country.

I view the threat a little more on the existential side of things. But I think what we have seen today is that if we continue to discuss these issues, write about them, publish articles about them, and debate them in public fora like this, we do something that most other countries do not do at this level—certainly not the enemies who we are fighting or who are fighting us. The United States allows this free thought, free speech, and free exchange of ideas.

I will leave with one comment, which is one question to ponder. What would you do if you were the Commander-in-Chief of a country—it does not matter what country—and you were faced with a decision to authorize an act that would clearly be illegal torture under the Articles of War, the rules of war, and the Geneva Conventions, if you knew that that person had information about an act of terror that would surely happen, and there was a way to get that information that would prevent mass casualties? With that, and no answer, ponder it. I want to thank the panel for an engaging discussion. Thank you very much.