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Remarks on the Military Commissions Act

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I. REMARKS

The Military Commissions Act was signed by the President a few weeks ago, and a lot of questions have been raised around the world in response. In fact, I just returned from London last night, where I was giving a talk at the London School of Economics explaining the legislation and its implications. Because I know that people are very interested in this topic right now, I jumped at Jack Goldsmith's invitation to speak to you about it. I have a few things to say to begin, after which I hope to move on to an open discussion.

Since 2005, when I became the Legal Adviser to the Secretary of State, detainee issues have arisen as one of the more troubling challenges facing Secretary Rice as she engages in diplomacy around the world. These issues have caused great controversy among friends, allies, and critics alike. And, the more involved Dr. Rice has become in the debate, the more opportunities I have had to take the lead in shaping the State Department's approach to the topic.

The legal complexity of detainee issues makes it difficult for embassies and ambassadors around the world to appraise and discuss the subject. Unfortunately, over the past three or four years, the State Department has not done its best to answer questions, clarify policies, or explain its actions to our allies. Dr. Rice has asked me to address this communications problem.

I am happy to answer as many questions as I can later on. Given that this is a legally educated audience, however, I would prefer first to go into more detail about the legal decisions that we have made with respect to the detention, holding, and trial of terrorists. As I cover these issues, I want you to ask yourself whether we are going about this correctly from a legal perspective. Do we have it legally wrong, and if so, how should we do it differently, in a way that would work better? To begin this

discussion, I am going to address six of the questions that I get asked most frequently as I travel the world.

First, what is our detention authority to hold these people to begin with? Second, were we required to release them all after the war in Afghanistan seemed to end in 2002? Third, can we and do we have the legal authority to hold these detainees indefinitely without trial? Fourth, why not simply try them in our criminal courts? Fifth, are these military commissions unfair? And lastly, do we finally have it right, now?

In the past year, there has certainly been enormous evolution in our policies and the laws in the area. That is one of the things I would emphasize, starting with the McCain Amendment in December of last year; the Supreme Court's *Hamdan* decision in June, which found that common Article 3 of the Geneva Conventions applies; the President's decision last September to bring all individuals held in classified locations to Guantánamo and give them access to the International Committee of the Red Cross ("ICRC"); the promulgation of new Defense Department interrogation and treatment directives, which cover everybody held by the Defense Department; and, ultimately, the signing of the Military Commissions Act last month.

So, our policies have evolved. The question is, have we gotten it right? Let me start with the first question: what is the legal authority for detaining the people we have? The vast majority of the people who are being held in Guantánamo, the most controversial detention area, were captured around the end of 2001 and the beginning of 2002, in or around Afghanistan and Pakistan. So what was our detention authority for holding those individuals? My first point is that this was not a police operation. We did not have police jurisdiction in Afghanistan. However, it was within our right under international law to defend ourselves against an armed attack by a group. Accordingly, we and our allies were acting in self-defense under international law. You will recall that, at the time, we gave the Taliban an ultimatum: either turn over the Al Qaeda people in your camps, because we suspect they are responsible, or we will take action against you.

This is something that happens periodically under international law, when a country has allowed a non-state actor to use its territory to launch attacks against someone else. If that country is unwilling or unable to do something about the aggressors, another country has a right under international law to take action to defend itself. The U.N. Security Council reaffirmed that right, saying that under Article 51 of the U.N. Charter, we were entitled to take action in self-defense. That is what our coalition forces were doing in Afghanistan. They were not there as policemen. They were not there to charge and arrest people or produce incriminating evidence, because we did not have criminal jurisdiction in Afghanistan. Yet, we had the legal authority to hold people as enemy combatants under international law. Under international law, articulated in the U.N. Charter and confirmed by the U.N. Security Council, we had the authority to use force, and part of using force is the authority to detain individuals.

In any war, a state can detain people. In our discussions throughout Europe over the last year we noticed a developing divide, with us tending to characterize this conflict as a war and the Europeans saying otherwise. But we have since narrowed

that divide by making it clear that we do not think we are at war with every terrorist group everywhere. Many Europeans, for their part, have agreed that from 2001 to 2002 at minimum there was, in fact, a war. There was a legal state of armed conflict in Afghanistan, where we were fighting the Taliban and Al Qaeda. As a result, we did have the legal right to pick these people up. We did not need evidence against them to pick them up, and we did not have to charge them beforehand to pick them up because we were not doing so under police jurisdiction. Our soldiers picked them up in a time of war. So that is the answer to question one: we had the original authority to take these people in.

This begs the next question: after holding these detainees, was there a period of time after which we had to release them? In any normal state of armed conflict, and under customary principles of international law, you have to release a prisoner when the hostilities are over. When the principal fighting in Afghanistan ended and the new Karzai government came into power in June of 2002, were we then obligated under law to turn everybody over at that point? The State Department thinks that it is very clear that the war with both the Taliban and Al Qaeda is not over. Certainly, the Taliban continues fighting in Afghanistan. If you talk to President Karzai and ask him if he thinks the conflict in Afghanistan with the Taliban is over, he would definitely tell you that it is not. In fact, Coalition forces continue to be killed in Afghanistan, as do hundreds of Taliban. So the war with the Taliban is not over.

Similarly, the conflict with Al Qaeda did not end in June 2002. Al Qaeda, while diminished, continues to attack us in different places around the world. Bin Laden, al-Zawahiri, and the other leaders of Al Qaeda have not run up the white flag and stated that it is over. So we conclude that we are still in a legal state of armed conflict with the Taliban and with Al Qaeda.

The next question is: can we now hold these detainees indefinitely without a trial? This is the most frequent charge that we receive. Critics basically say that it is illegal to do so. But you have to deconstruct the charge on a couple of different levels. One is the "indefinite" point, while the other is the "without trial" point. I will take the latter point first. The problem with the "without trial" charge is that it implies that the detainees are criminal suspects. Now, I will tell you candidly, I was not trained in the laws of war. I have had to learn a lot about the Geneva Conventions and customary principles of international law. But the ICRC, although they do not talk publicly about it, will say that we have a right to hold without trial people who were captured in an armed conflict. In fact, they will even say that the people who were captured in Afghanistan – the Taliban, Al Qaeda – are being held as combatants in an armed conflict and that there is no requirement to try them.

My point here is that we are confusing two bodies of law by suggesting that people captured in an armed conflict have to be tried. In any normal armed conflict – World War I, World War II – when you captured combatants there was no expectation that they would be tried. They were simply held until the end of the hostilities. Now, the problem is that the current situation is obviously different from any kind of normal armed conflict because we do not know how long this war will continue. That gets to the first point – the "indefinitely" charge. Of course, in any war, you don't know how long the war is going to go on. We have had wars that have

gone on for five years, ten years, thirty years, one hundred years. Nevertheless, under customary principles of international law, you may hold the people until the end of a conflict.

But again, that is very troubling in this context. Thus, the question is what to do about that. It seems to us that people should not be released simply because it is troubling that they might have to be held indefinitely. And it doesn't make sense to say that you can only hold people if there is a definite end in sight. Under that logic, we would immediately release all the people captured during an ongoing conflict, just because we could not predict an end to hostilities. What we have tried to do is come up with a middle ground. We have tried to come up with review mechanisms, for example, so that we periodically review the cases of the individuals who are being held to determine whether they continue to pose a threat. But we are struggling, because there is no definitive book on the shelf that tells us what to do.

It basically comes down to this: you are not required to try people who are held during a conflict and you can normally hold them indefinitely. But in this case, it is obviously quite troubling that they are being held indefinitely. So why don't we simply try them in our criminal courts? Two points here. The first point, as I've tried to explain, is that people who have been captured as part of an armed conflict do not have to be tried in criminal courts. We are holding them under the laws of war, also known as international humanitarian law, and not because they are criminal suspects. There is an impression that the government is just being obstinate about refusing detainees trials in criminal courts, and that giving detainees "their day in court" would somehow resolve the indefiniteness of the conflict. However, my second point is one that I think you as a group will understand, but one which we have a difficult time explaining in Europe.

Our criminal courts simply do not have extraterritorial jurisdiction over the vast majority of these individuals or the vast majority of their activities. These people had never set foot in the United States or planned specific criminal acts in violation of our federal criminal statutes. If you were an Egyptian, Yemeni, or a Saudi, it was not a violation of our federal criminal laws to travel to Afghanistan, train in an Al Qaeda camp, or become a member of the Taliban. These were not violations of our federal criminal laws.

One thing that all of our countries have learned since September 11th is that we are facing a different kind of terrorism than we used to face. Now, the terrorists reside inside our countries, yet are linked to events that occur thousands of miles away. We have to expand the reach of our criminal laws now, and there has been a flurry of activity in the United States and other countries to do just that.

But the current effort to expand our criminal laws cannot be made retroactive. For instance, one of the principal criminal statutes that we use against terrorism is something called the Material Support for Terrorism Statute. Providing material support to a terrorist organization is a crime. Before September 11th, that statute only applied to conduct inside the United States. We have since extended it. But we cannot make that change retroactive. Therefore, even if we wanted to try our detainees in our criminal courts, our courts would not have had jurisdiction to take the majority of the

cases, since, in most instances, the defendants would not have violated our federal criminal statutes.

The people who we have tried previously in the familiar cases – the U.S.S. Cole bombing, the World Trade Center bombing – were people who had committed specific terrorist acts by blowing up our embassies, blowing up our warships, and things like that. But the majority of our Taliban and Al Qaeda detainees cannot be tied to a specific act, and so cannot, by jurisdictional rules, be tried in our criminal courts.

A further problem is the practical evidentiary difficulty of trying somebody in our criminal courts. For the most part, the detainees were picked up by our soldiers on the battlefield in the middle of a hot war in Afghanistan. Our federal courts require a chain of custody to any evidence presented. Thus, they would expect an American soldier having captured someone holding a hand grenade to have slipped the hand grenade into an evidence bag, marked it, and made clear the chain of custody, person to person, all the way back to the United States. Our federal courts would expect people all along the chain of custody, including the soldier from the battlefield, to testify. This, practically speaking, is extremely difficult.

Turning back to the lack of jurisdiction issue, I want you to imagine yourself a government lawyer. Let's posit for a moment that we really do have a bona fide Al Qaeda operative, and that he's been captured on a battlefield in Afghanistan. What do you do? How do you try that person? And if they violated a particular statute without benefit of a chain of custody, what do you do? That's one of the reasons why we decided that we do not want to just hold them all, but that we want to try those who have actually committed crimes before military commissions.

The above gives rise to a few issues. One, I think people choke on the "m" word – military. This can be attributed to the fact that virtually no one in this room has any experience with military justice. In our country, though, a country with one of the largest armies in the world, we have a system of military justice that parallels our civilian criminal justice system. It's a well-functioning system with well-trained judges. If anything, the judges in a military system are more independent and less political than federal judges. Federal judges are selected by a partisan President, while judges on military courts are individuals who have had ten, twenty, thirty years of training in military law and are, in essence, independent military lawyers. So, given our jurisdictional inability to use the federal criminal laws and courts, and given the fact that we were engaged in an armed conflict with the Taliban and Al Qaeda, it seemed as if military commissions were the only effective way to try any detainees.

As an alternative, people have asked why we couldn't use the existing court martial system, which is what we use to try our soldiers. The court martial system, though, is basically designed to try our soldiers who are inside the United States. It is where we can easily deal with them, with both speedy trial rights and normal evidentiary rules attached. It was just not the place for a new category of trials. Furthermore, we did not have a broad framework of violations under the laws of war. As a result, we decided on military commissions, which, as shown in a historical analysis in the *Hamdan* decision, is a concept that dates back at least 100–150 years. Thus, we wanted to use military commissions to try these people.

This leads me to my last couple of points. The way military commissions were set up by the President, by executive order, was obviously problematic, but military commissions themselves are not unconstitutional. The Supreme Court ruling in the *Hamdan* decision was not that military commissions are unconstitutional, which critics frequently get wrong. Instead, the Court just noted that the President had not followed the proper procedure in setting them up. In response to this, Executive Branch lawyers have since engaged in setting up the military commissions "properly." In my mind, we have now addressed all of the concerns raised by the Supreme Court and our allies with respect to the President's original order.

I recently had an opportunity to look back at a list of concerns regarding the way military commissions were originally set up. British Attorney General Peter Goldsmith, an individual with whom I had negotiated the return of British detainees, raised these concerns to me. Looking at his list, I realized that, with the Military Commissions Act we just passed, we have now addressed all of his concerns.

One concern was that the accused originally did not have a right to be present at all times to hear evidence presented against him. The reason for this original set-up was protection of sensitive evidence. One can imagine a situation where a member of Al Qaeda is on trial, and a key piece of evidence came from a human penetration of Al Qaeda or a sensitive communications intercept. In that situation, the government would be faced with the difficult choice between forgoing prosecution of a known terrorist and giving up a communication source that would be critical to prevent future attacks. As a result, the original plan was a compromise which allowed the evidence to be introduced, so that the accused's lawyer, but not the accused, could hear it in its entirety and argue against it. That was troubling to people for obvious reasons. In the recent Military Commissions Act, we reversed course. The accused now has the right to be present at all times to hear all of the evidence against him. If that means we have to reveal intelligence information, then we will just have to do that.

The other main concern among the multiple that have been addressed was the lack of independent appeal into Article III courts. Our international partners were particularly concerned because they didn't have a lot of experience with our military system. Military courts, to be candid, struck them as a third-world concept. They did not understand how the United States could possibly be engaged in something like this. In military commissions, however, a direct appeal is available, first to the D.C. Circuit and then ultimately up to the Supreme Court. Thus, there's a complete, independent review through Article III courts.

The above amounts to a quick summary of some of the questions I field most frequently. There are many, many others out there. Have we gotten this right? I can tell you with certainty that our international partners don't think we have. I travel throughout Europe attempting to address their concerns, listening to what they have to say about these matters. But there has been significant evolution in our policies, with heightened legal standards. It's difficult to say, at this point, that military commissions are not fair.

The main thing I will leave you with is that, while people are uncomfortable with where we are, there are no easy answers, and there are no easy alternatives. I cannot

tell you that we have clearly gotten the law right – the law is very hazy concerning how you hold or detain members of a terrorist group who attacked one's country without setting a foot inside. This is a question that I think all societies are going to have to deal with moving forward. And again I ask, how would you do each of these things differently? Certainly we have learned a lot as we have moved along, but how would you do it differently in a way that would actually work? So let me stop there. I'm happy to engage in a dialog and field questions.

II. QUESTION AND ANSWER SESSION

QUESTION: Thank you very much for coming to speak to us. My question is about the end of a conflict. What is your position on what constitutes the end of a conflict like the one we're in now? You mentioned the white flag, and I believe, like you, that it is not likely. But what *would* constitute the end and who would decide that?

BELLINGER: This is a really good question. We've grappled with this in the government and there is not an easy answer. There's a theoretical answer and then there's what we have been trying to do. You know, it could reach the point where we have so decimated Al Qaeda that there may be so few operatives left that we don't think they are actually engaged in a major war with us. For instance, Bin Laden could be killed. In that case, it's hard to imagine that the group could do what some other terrorist groups have done, which is to become exhausted and transition into the political realm. It is possible that if the leadership is utterly decimated, Al Qaeda will be in such disarray that we can say that we are no longer in a legal state of armed conflict.

As I said with respect to the people we are holding in Guantánamo, you normally don't release people until the end of a conflict. We held Germans or Japanese until the white flag went up because, when the war was over, they just went back to their normal professions. In this situation though, we have added an annual administrative review process in addition to the combatant status review tribunals that the Supreme Court has ordered for every person. We review every person's case every year to determine if he or she continues to pose a threat personally. We ask if the war is over with respect to that person. Even if Al Qaeda continues to be fighting us, if an individual can say, "I want to stop fighting, I want to just go back and join my tribe," and in fact the tribe will say, "We will take responsibility for this person, and make sure that he doesn't go back to fighting," then we will release people. We have released or agreed to release, subject to their countries taking them back, more than one hundred people pursuant to that process.

QUESTION: Just on the same subject, you seem to be defining this as a war on Al Qaeda, but the administration rhetoric has been that it's a war on terror. First, is this a war on Al Qaeda or a war on terror? Because if it's a war on terror, it never ends. Second, is everyone in Guantánamo related to the war on Al Qaeda? Or are

there other detainees there related to other wars and are they under different deadlines?

BELLINGER: Both good questions. And this goes back my earlier point, that people have good and fair questions on these things. We did not do a good job of engaging our allies to talk about these questions, and that's why the Secretary has asked me to go out and to try to do so. Your first question strikes at the heart of a lot of the differences. The answer is that the "global war on terror" is not a legal term. It's essentially a political term. When the President says we are in a global war on terror it means all of our countries need to stand up and fight terrorism everywhere in all of its forms. When terrorism has gotten so bad that 3,000 people can be killed in a matter of six hours, all countries need to stand up against it. But, it's not a legal term, because if you are in a legal state of armed conflict with all terrorists, that would mean you are always attacking every terrorist group everywhere, and we aren't. We are in a legal state of armed conflict with Al Qaeda.

And no, the people in Guantánamo are not people who are from various terrorist groups around the world. They are either Taliban who were fighting us on the battlefield in Afghanistan in what I think almost everybody will agree was a legal state of armed conflict, or they are from Al Qaeda and related groups.

QUESTION: I think you've done a nice job trying to de-link passion and law and politics and law, but I don't think it can be done and I'm not convinced. I think that the legal regime that's been put together essentially tries to legalize the passionate use of force against people to whom you are opposed either because they are from a certain tribe or because they are from a group that you have designated Al Qaeda. And I don't think law here can be de-linked from politics in-as-much as the new regime that was put in place with the Military Commissions Act was political. It was the run-up to an election. And it was put through in that context, and it's going to stick with us, and it creates a regime in which someone like the President, or you, or Rumsfeld, or Cheney can designate someone an enemy combatant and put them in a parallel track. I agree with you when you said that there is a parallel track of justice. I don't know whether it's justice or not, but, based on that single designation, as I understand it, you can be put in a confinement where you may never receive trial, and I was wondering if you think that is a difficult constitutional question.

BELLINGER: When you're talking about indefinite detention, when you're talking about people's lives, there's passion on both sides and so these are fair points. What I do think, though, is that there has been sloppy legal analysis on both sides. I can line ten people up in Europe who will tell me ten different things as to what law applies. If the law were crystal clear, and if we were clearly violating the law, then I wouldn't have half the people telling me that we have to apply the Geneva Conventions because we're in armed conflict, and the other half of the people saying, "What is all this stuff about war? You need to be trying them or letting them go."

I was with the finest lawyers doing international humanitarian law in London yesterday. But after two hours, they couldn't agree with each other, much less with me. So it's just hard. Of course, there is a political overlay to a lot of this. The United States is a political place. But I will tell you, with respect to the Military Commissions Act, that it wasn't rammed through because of politics. It was pushed through at that point because of the Supreme Court. People had been telling us for a long time that we needed to try the detainees. I've told you why we couldn't try them in our criminal courts. So, we'd been trying to try people, and when the Supreme Court said we couldn't do it the way we had it set up, we faced the choice of either trying to get it done in September or waiting another four or five more months. So this was not an election year issue. We just really wanted to get moving on it.

QUESTION: You didn't answer the last question that I asked, which was whether you think that the president's authority to designate someone an enemy combatant and put them in a parallel system of justice will be deemed constitutional. You strip detainees of habeas corpus, and you frame it as the lack of independent appeal to our Article III courts.

BELLINGER: I don't want to duck the question, but I do want to allow others to talk. I'll take ten seconds to address the idea that we are stripping detainees of the right of habeas corpus. Aliens captured outside the United States never had a constitutional right to habeas corpus. For someone to stand up and say people have been stripped of their most basic right of habeas corpus sounds like a great criticism, but it's not accurate. It's a little bit like saying people have been stripped of their right to settle in the United States.

QUESTION: Coming back to when the conflict would end, I can imagine a situation where we would be able to say that Al Qaeda or the Taliban has been beaten, and that we are not really in a war with them anymore, but that the ideology of terrorism that we're dealing with now is still out there and a concern. Then the people in Guantánamo, who were formerly Al Qaeda, would still be national security concerns because this ideology would still appeal to them. So you would have a situation where the initial legal basis for holding them is undercut, but there's still a continuing armed conflict potentially against new and emerging groups. How would you deal with that and do you think that raises serious concerns about applying international laws of war to individuals rather than groups?

BELLINGER: It's difficult. We wanted to address the concern about indefinite detention, and to avoid classifying people overall as a group, because we had heard criticism about classification as a group. So we wanted to release individuals who were willing to say that they'd stop fighting. But about ten percent of the people who we have released have gone right back to fighting again.

And let me say before I go to the next question, I would like to challenge you on the issue that I raised: how would you have done it differently each step of the way? In Afghanistan, should we not have defended against Al Qaeda to begin with? And if that was all right, when we were there should we have used force but not detained anyone? Should we have simply cleared out the Taliban and members of Al Qaeda from training camps, but just left them? Should we have just left around members of the Taliban and people from thirty different countries? And if not, then at what point should we have let them go? Did we just not do a good enough job of screening them? Or if we were justified in detaining them, is the problem that we've not tried them? I've explained to you why we couldn't try them in our criminal courts, and we've tried to try the ones we can in our military commissions, but that's proved to be difficult. And so again, I would like to at least have one or two of you say where did we go wrong at some step along the way and how would you have done it differently? I'm happy to hear those thoughts.

QUESTION: I have a few questions about clearing up what the exact provisions are in the Military Commission Act, in terms of judicial review. As you pointed out, there is still some kind of review through the D.C. Circuit. Does this apply only to people who have received military combatant status? Does that mean only the people who have gone through a combatant status review tribunal – those held in Guantánamo? Does it apply to people held in Afghanistan, or Iraq, or some of the various secret detention centers that the President has announced exist throughout the world? And is this really a review mechanism in the Military Commissions Act, or are military commissions just a way for the President to arbitrarily try someone through some kind of mechanism based on his own bankroll?

BELLINGER: Let me be clear. There are two types of formal review mechanisms for all of the people in Guantánamo. First, everyone has to have a combatant status review tribunal, to ensure that everyone we are holding at Guantánamo is an enemy combatant.

Our military thinks, after multiple screening processes, that the people who are being held were combatants. The combatant status review tribunal is the first screening process that determines whether each person was actually fighting. That tribunal is a review panel of military officials who hear all of the information about a person. During the tribunal, the detainee is assisted by another military official who can present his case. When that is done, if the individual is determined to in fact have been a combatant, he can appeal that determination into our federal courts, where it will be reviewed.

Second, if we try any of these individuals for a war crime in a military commission and the individual is convicted, there are three levels of review. First, there is an intermediate level of review in the military system – a military commission review panel very similar to the court martial review panel. In fact, it's exactly parallel, except we call it a military commission review. The next level of appeal is to the D.C. Circuit, and then to the Supreme Court. And again I would ask: if one is not comfortable with

these procedures, what is the alternative? These military commission judges, who are trained military judges, will be constantly looking over their shoulders to the D.C. Circuit, knowing that they will be reversed if they make a wrong decision.

QUESTION: A detainee, even under the new rules, is not necessarily given notice of the information on which he was detained. Whether he is obtained on the basis of unreliable statements by a warlord or good information – he does not know. All of that looks like a very sloppy detention process. It appears especially sloppy when compared to detention of prisoners of war, who are in uniform and easily identifiable as combatants. I wonder if we are not holding too many of the wrong people.

BELLINGER: Let me tell you the way it would normally work. In a normal war, you're right, it is easy to identify combatants because they wear uniforms and dog tags. But this is not a normal war. So, in this unusual war, are the soldiers to simply not to detain anyone in Afghanistan, because no one is in a uniform? Are they simply to push through the Al Qaeda training camps and fight with the Taliban, and pick up no one?

In a normal conflict, if there's a question as to whether someone is entitled to prisoner of war status or not – and usually there isn't even a question because you can tell whether someone is part of a normal army – then you have what's called an Article 5 tribunal. Article 5 of the Geneva Conventions says that in cases where there is a doubt about whether someone qualifies for prisoner of war status, the issue should be decided by a "competent tribunal." Some people have read enormous things into that – that a "competent tribunal" requires a civil court with evidence, lawyers, and so forth. That's completely made up. Those requirements have never existed in the history of the Geneva Conventions. Ever since the Geneva Conventions were created in 1949, Article 5 tribunals have worked in the following manner: if there is a question about whether a person is a prisoner of war, U.S. forces have the person come in and explain their circumstances to three soldiers. There's no lawyer, there's no assistant, there's no transcript, and they just make a decision on the spot.

The Canadians do it with one single officer. The suspected prisoner of war is simply brought before the Canadian official and asked, "What were you doing here?" So, the administration's new procedures actually add a lot of process. Again, because this is different from a normal conflict, maybe we need the added process. But there isn't a clear law that says which way we should be doing these things. When one is fighting in a different situation like the current one, one has to try to develop new rules as one goes along.

QUESTION: A lot of these policies seem very reactionary. Should there be a way to look proactively? It would be silly to say that it's not going to happen again, in a

similar conflict. Do we need to create a better framework that makes these questions clearer? What could we change so that we have a clearer framework in the future?

BELLINGER: You're stealing my basic speech. This is the basic point that I make, that if the existing set of rules doesn't fit these people very well, if we can't try them under our criminal statutes because of jurisdictional and evidentiary issues, but they don't fit under the traditional laws of war because they're not combatants of a national army or they're not prisoners of war, then what can we do with them? What should we do going forward?

I'm not saying that I want to change the law or break any rules. If the rules fit, then we apply the rules. But there are places where the rules do not apply well. It doesn't make sense to just jam everybody into a category that does not fit. For instance, we *could* just say that we're going to treat everybody as prisoners of war as a matter of policy even though it's extremely clear under the law that Al Qaeda are not entitled to prisoner of war status.

But, being named prisoners of war wouldn't really help these people. If you're a prisoner of war, you do not get a trial and you are not released until the end of hostilities. So what good does being a prisoner of war do you? We need to think hard about the old rules – rules that were developed to fit domestic crimes, or laws of war that were created to apply to national armies. I don't think that these rules fit the types of conflicts that we will have in the 21st century. Do I have an answer as to what the rules ought to be? No. But I do think that we ought to keep working on it.

QUESTION: Who decides which of the people being held in Guantánamo will be tried before a military commission, and what will happen to the rest of the detainees?

BELLINGER: A combination of Defense Department and Justice Department prosecutors are reviewing all of the information we have on the detainees to determine whether there is sufficient evidence of a particular criminal offense that can be tried under the laws of war. Thus, there are two issues: (1) Is there introducible evidence?; and (2) Was there a violation of the laws of war? According to figures I have heard, there are between forty and eighty detainees that meet these tests. As for the others, we are not anxious to continue holding them for very long. The President is serious when he says he does not want to keep Guantánamo open. He understands that the detainee issue causes us problems around the world. I can certainly tell you that my boss, the Secretary of State, understands that it causes problems for us around the world. The question, then, is what do we do with the people there?

It seems that people who argue that Guantánamo should be closed assume that one can snap one's fingers and people will just get on airplanes and fly back to their thirty countries. But most of these countries do not want the detainees back. Many of them deny that the detainees are their nationals altogether. We have been working with a lot of countries to take these people back.

Thus, if you really want Guantánamo to be closed, you have to figure out a way to do it. Some people say that if we cannot send them back to their home countries, we need to let them enter the United States. Is it a good suggestion to let four or five hundred people onto the streets of the United States?

QUESTION: You've been talking about the current situation as if it's something dramatically different from anything that anyone's ever seen before and necessitates the invention of the third category of detainee. I'm wondering where that comes from, considering that terrorism has been around for a long time – the Viet Cong did not wear uniforms and dog tags. Since 1949, everyone else has been able to apply the Geneva Conventions. So, what is different now?

BELLINGER: Well, I do think that what we're facing now is different from what was faced in the past. Certainly, terrorism has been around for a long time, but most terrorists were groups that were inside our countries where we could deal with them. When in Europe, I frequently hear, "We have been able to deal with terrorism in the confines of our criminal system, without resorting to these excesses. What is America's problem?" But all of those European groups were domestic groups: they were located within those countries, the evidence was in those countries, the witnesses were in those countries, and the existing criminal statutes covered those activities. Our situation is different. Here, we face a non-state actor acting very much like a nation did historically, exerting force and power with the magnitude that only a nation could. If a nation had done to us on September 11th what Al Qaeda did, we would clearly consider ourselves to be in an armed conflict with that nation. The problem is that now it is not a single nation. Thus, the magnitude of the threat, in comparison to our experience of guerilla activity, is much different.

QUESTION: Why act through military commissions rather than the court martial system? The court martial manual applies to war crimes of non-soldiers, so you would have had the incredibly clean position of saying that we are treating suspects from foreign nations the same way we treat our soldiers. I agree with you that we have a very decent system of military justice now. Why, except for some kind of vanity in the White House, would we be creating new military commissions with new rules after we have developed a very successful court martial jurisdiction?

BELLINGER: That is a fair question. The problem is that if you have a public policy problem you have to figure out a solution to it, even if the solution is not ideal. In November 2001, we had the choice of federal criminal courts, courts martial, or military commissions. I've explained why the federal criminal courts don't work in those cases. We then looked at the courts martial and the problems there were the rules of the Speedy Trial Act, evidence collection, and the use of intelligence information.

The administration has now reversed its course on some of these issues, such as use of intelligence information, which was a critical reason for the setting up of the military commissions. But there are still some issues that a court martial system would not address. Frankly, the rules that Congress passed last month are not that different from the courts martial. The majority of the rules are a combination of the court martial rules and the Supreme Court's ruling in *Hamdan*. But, even following as many of the court martial rules as we can, we simply cannot have speedy trials. Unlike trying soldiers, where the witnesses and the evidence are easily available, trying detainees involves collection of witnesses and evidence from halfway across the world. As I mentioned, however, the current system is not that different from the court martial system. It's probably a good deal closer to the court martial system than it is to the President's military orders as originally set up.

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