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Eroding the Foundations of International Humanitarian Law: The United States Post-9/11

Col. Morris Davis

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ERODING THE FOUNDATIONS OF INTERNATIONAL HUMANITARIAN LAW: THE UNITED STATES POST-9/11

*Colonel (Retired) Morris Davis**

It is a real privilege to be back here at Case Western Reserve. As Professor Scharf mentioned, this is my third time standing here and talking to this audience. Some of you have been here for all three, and for some, this is the first, but it really is a privilege. I mean, for two counts:

Mainly, it is good to be out of Washington. The air just seems much fresher here in Cleveland than Washington. If you were up last night, as I was, watching to see if our government was going to pass a budget and get back to work, it just seems a lot fresher here than it does back in D.C. So I am glad to be here and not there.

Second—and probably most importantly—I told my wife before I left, I said, “God, I hope they give me another one of those Case Western pullover police jackets,” because I got a blue one when I was here the first time, and I got a tan or a beige one the second time,

* Colonel (retired) Morris Davis is Assistant Professor at Howard University School of Law and former Chief Prosecutor for the Military Commissions at Guantanamo Bay, Cuba. Morris Davis is an attorney and a national security, military and international humanitarian law commentator. He is a 2013 Hugh M. Hefner First Amendment Award winner. He served in the Air Force JAG from 1983 to 2008 and retired as a Colonel. He was Chief Prosecutor for the Military Commissions at Guantanamo Bay, Cuba, from 2005 to 2007 where he led a multi-agency prosecution task force of over 100 personnel from DOD, DOJ, CIA and FBI. He resigned in 2007 rather than use evidence obtained by torture or tolerate political meddling. His final military assignment was as Director of the Air Force Judiciary where he oversaw the criminal justice system and supervised 265 people at sites worldwide. He served as a Senior Specialist in National Security and Director of the Foreign Affairs, Defense, and Trade Division at the Congressional Research Service from 2008 to 2010. He was Executive Director of the Crimes of War Education Project from 2010 to 2011. He joined the faculty at the Howard University School of Law in July 2011. Colonel Davis earned a B.S. in criminal justice from Appalachian State University, a J.D. from North Carolina Central University School of Law, an L.L.M. in government procurement law from George Washington University School of Law, and an L.L.M. in military law from the U.S. Army JAG School. His military decorations include the Legion of Merit, six Meritorious Service Medals, the Global War on Terrorism Expeditionary Medal, and Global War on Terrorism Service Medal. He was included in the Center for Responsibility and Ethics in Washington report, “Those Who Dared: 30 Officials Who Stood Up for Our Country,” in July 2008 and he received the Justice Charles E. Whittaker Award from the Lawyers Association of Kansas City in November 2009.

and this time I got a gray one. And I have just about worn out the first two. So I have to come here at least every two years to get a new pullover because I wear those things constantly in the summer.

Apparently, there are a lot of Case alumni in the D.C. area because when I wear it, I get stopped quite often. “Hey, did you go to Case, too?” And this is my fourth trip because Henry King invited me back for the Niagara Moot Court competitions. So I think after four trips here, I at least qualify for a Masters or something.

So it really is a privilege, and thank you to Professor Scharf, Professor Cover, and to Ms. Pratt and all the others who have gone out of their way to make this possible. And also, thank you to Howard University for allowing me to be here.

As Professor Cover mentioned, I resigned during the Bush Administration, which didn’t endear me to the Republican side, and then I criticized President Obama for back peddling on Guantanamo, which didn’t endear me to the Democrats. And in Washington, when you aggravate both the Republicans and the Democrats, finding a job can be difficult. So I am very grateful to Howard University for giving me a home for the last three years and the freedom to go out and write and speak and do the kind of things that I think are important. And so it is a great privilege to be here.

At times I feel like Don Quixote, tilting at this windmill at Guantanamo that has been there now for eleven and a half years and this military commissions process that President Bush authorized on November 13, 2001. So almost a dozen years we have been attempting this process, and it has been a failure.

And it is discouraging at times, but to me, I am optimistic because of people like you; that you will take an hour out of your day and come and sit and listen, and you came before to hear General Martins. And I really appreciate that: that you are willing to take time to think and listen where, for the vast majority of the public, this is out of sight and out of mind, and they don’t really care. So I commend you for your commitment.

So what I want to talk about today is how I went from the guy on the top row (when I am standing on the steps of the courthouse in Washington or standing on the steps of the courthouse in Guantanamo) defending the process, as the leading advocate for Guantanamo, to the person on the bottom row who is speaking out in the media, who went from standing on the steps of the courthouse to standing on the steps of the White House leading a protest to close Guantanamo. It seems like a change of position that seems impossible to imagine, and I am often asked if—at the top row—if I was insincere in just toeing the company line, and what I hope to show you today is that I wasn’t. I believe we were committed to doing this right.

I told the first meeting I had with the prosecution team in 2005, I mean, this school has a close connection to Nuremberg and Henry

King. When I was here in 2006 and I spoke, there was a faculty luncheon, and I did a presentation for the faculty at the luncheon. And Henry King came up to me afterwards and stuck his finger out and said “It was important to Robert Jackson that we do it right at Nuremberg. Don’t you screw it up at Guantanamo.”

And I told the prosecution team in that first meeting that we are going to do this right. We are not going to use evidence used by the enhanced interrogation techniques that went too far, and I don’t want any of you to do anything you feel is illegal or immoral or unethical. I would like for our grandkids to be able to look back at Guantanamo the way that we look at Nuremberg. And so I believe that we were committed to doing that for a number of years, but by the summer of 2007, I became concerned that that wasn’t our commitment, and that’s when I chose to resign.

So I have kind of an aggressive agenda for today. There are really four segments to this talk, and I have done hour-long talks for each of those segments, and trying to take four hours and cram it into about thirty minutes is going to be a challenge. So hang on, and we will try to get through this because I think it is important.

President Obama has given a series of talks. Unfortunately, we don’t need a lecturer; we need a leader, and I think that’s where this Administration has failed in providing leadership on this issue on the War on Terror and how we choose to respond to it, because as the President said in the speech he gave at the National Archives back in May of 2009, it really is our values and our principles. When you talk about American exceptionalism, that’s what made us exceptional—our belief and the rule of law.¹

Unfortunately, since 9/11, rule of law are laws that are consistently well-known and consistently applied, but unfortunately, we have treated the rule of law as a slide rule, where it slides to fit whatever we find convenient at the moment, and I think it is in our interest to get back to being the champion of the rule of law and not just people that talk about it. And there have been a number of critics of the Administration and the U.S. in this post-9/11 policy that we have adopted. There are rules that apply to others. You know, we condemn others for doing things that we condone when we do it ourselves.

And I think you have to question, you know, we have this incredible technology. We have the strongest fighting force in the world: this country with incredible capability, but are we accomplishing what we really want to accomplish when we are using this power in ways that I think may be tactically advantageous at the

1. See President Barack Obama, Remarks by the President on National Security at the National Archives (May 21, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

moment, but I think long-term, strategically, we are going to regret some of the decisions we have made?

So real quickly, if you think about it, it seems like an oxymoron: the law of war. You know, if you are angry enough to go to war, then it ought to be in some people's mind any means necessary to win, and this notion of having rules that apply just doesn't seem to fit for many. But if you think about conflict, if you go back to the early days (the original first days of man), if you want to kill someone, you had to actually have physical contact with them. You had to pick up a rock and hit them in the head or strangle them or something. You had to actually physically contact them. And then the sword came along, so you could stand three feet off and kill them. And then the bow and arrow—you could be twenty or thirty yards away—and then the musket, and then all the things that have evolved.

We have made it so much more convenient to kill each other. I mean, for example, currently, there is a debate about the drone policy, which I think is a bit of a misnomer. I will talk about drones more a little later, but you have got the drone operators at Creech Air Force base in Nevada. So picture base housing at Creech Air Force base: they get up in the morning, they have breakfast with the kids, go off to the office, sit in a comfortable chair in an air conditioned room, and then 7,650 miles away on the border of Afghanistan and Pakistan is where the drone strikes take place. And then at the end of the day, they go home, they attend their kids' soccer game and go to bed and get up the next morning and do it all over again without ever actually having to see or have contact with the people that are being impacted on the other end. So we have made it so convenient to kill one another that I think it is critically important that we have rules in place for how we use that power.

Now the evolution of international humanitarian law or the law of war is not something that just occurred. I mean, you can go back as far back as Moses—go back to Deuteronomy—and in there, it talks about the rules that apply when you are holding a city in siege. And then up to Hugo Grotius and the just war theory² or Henry Dunant in his book *A Memory of Solferino* and the battle that took place there that led to him leading the effort to create the International Committee of the Red Cross³ that to this day is still the leading organization in IHL. You know, Henry Dunant was the winner of the first Nobel Peace Prize, which President Obama went on to win later, and whom I think is the only Nobel Peace Prize winner with a kill list. And then on to Francis Lieber, who during the Civil War,

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2. See, e.g., Brian Orend, *War*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2008), <http://plato.stanford.edu/archives/fall2008/entries/war/>.
 3. See *History of the ICRC*, ICRC, <https://www.icrc.org/en/history> (last visited Dec. 30, 2014).

drafted—at Lincoln's request—the Lieber Code that Lincoln implemented, that were rules governing the conduct of Union forces during the Civil War.⁴ So we have had this long history of having rules on how we conduct conflict.

So I want to jump forward from that to a modern era, which I think really began with World War II. You know, one of the nice things about being the United States is we won. I mean, if you notice the people that are held accountable in war crimes tribunals, you don't see the winners showing up in those tribunals, because I think people could argue reasonably the use of the atomic nuclear weapons. We are the only country that has ever used nuclear weapons. And I think you can make an argument on proportionality, necessity and all those things. But fortunately we won, and we didn't have to answer those questions.

But we saw what happened during World War II, the atrocities that took place, and at the end of the war, we were pretty much left unscathed. You know, Europe was decimated, Russia was decimated, Japan was decimated, and we were largely left as the real super power in the world. And so after witnessing what we had seen in World War II, the United States became the leader of the effort to codify this body of international humanitarian law in order not to repeat the mistakes that we saw during World War II.

You know, one of the things we did—and as Henry King is certainly famous for—were the Nuremberg trials. Rather than, as some wanted to do, just taking the Nazis out and shooting them, we actually gave them trials, and some of the accused were acquitted, and some were ultimately executed, but we didn't just take them out and shoot them. We put together a process that by today's standards doesn't measure up, but by the standards that existed back in the 1940s, Nuremberg was an incredible accomplishment and one that we ought to be proud of.

And from that, in 1945, we brought the nations of the world together, and we created the United Nations. The last big conference was held in San Francisco in 1945, and later that year, most countries signed on to the U.N. Charter, which, again, is a body of law to try to regulate the use of force.

And hopefully, if we have time at the end, we will talk just a minute about one of my concerns, which was when we were about to bomb Syria, and whether that was permissible under this body of law that we created in the U.N. Charter, where it says you have the right to use force if you have been attacked or for imminent self-defense or

4. Francis Lieber, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field, *in* SERIES III-VOL. III, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 148–64 (1863), *available at* <http://digital.library.cornell.edu/m/moawar/waro.html>.

with the authorization of the international community, none of which in my view applied in Syria.

But we led the effort to create this organization to try to resolve conflict and avoid having wars and to regulate the behavior of countries. We also led the effort in the creation of the Geneva Conventions,⁵ again a body of law, the various conventions that govern the treatment of detainees and the protected status of personnel, of civilians, and medical personnel and others to try to contain the effect of armed conflict, to keep it to the battlefield and amongst the combatants, and to protect and mitigate the suffering of others, and we led the effort. So coming out of the World War II era, we were the champions of international humanitarian law—this body of law that we wanted to spread around the world.

The Senate held hearings in 1955 on ratifying the Geneva Conventions, and Deputy Under Secretary of State Robert Murphy testified at those hearings.⁶ And you can see what he said here about the Geneva Conventions and why the Senate should ratify them, saying that “They reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the conventions. Our own conduct has served to establish higher standards and we can only benefit by having them incorporated in a stronger body of conventional wartime law.”⁷

So you hear that talk about the United States being that shining city on a hill and a light into the world. Under Secretary Murphy was saying, in the conduct of war, we are the benchmark. We set the standard, and by adopting this body of law, we are bringing everybody up to our example and our standard.

Now, fast-forward a bit, and many of you in this room are too young to remember, but the first Gulf War in 1991. If you recall, when the ground war started, our troops went from the border of Kuwait and Iraq to the outskirts of Baghdad in about a hundred

5. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

6. See *Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F, and G Before the S. Comm. on Foreign Relations*, 84th Cong. 5 (1955) (statement of Robert Murphy, Under Sec’y of State).

7. *Id.*

hours. We had a total of about 120 casualties during the war.⁸ Some of those were accidents and heart attacks and other things. There were few that were actually combat fatalities.

And if you recall, the bottom picture shows the Iraqi forces surrendered by the tens of thousands without firing a shot. Why did they do that? Anybody? Why did they surrender rather than fight? When they saw the U.S. forces, why did they put their guns down and put their hands up?

AUDIENCE MEMBER: They knew they were safe.

PROFESSOR DAVIS: Exactly. They knew who we were. We were the good guys that rather than fight, if they surrendered, the United States would give them shelter and food and medical care. They wouldn't be abused, and they chose to quit.

I can tell you as a guy who spent twenty-five years in uniform, I would prefer the enemy put down their guns and put up their hands and say, "I quit." I think it is in our national interest to regain that reputation, because I question today—I mean, if you look at the attitude in that region about the U.S., after things like Abu Ghraib and Guantanamo and water boarding and indefinite detention and drone strikes, those guys you see at the bottom, if they thought they were going to be held indefinitely, sexually humiliated, water boarded, would they put their guns down and quit, or would they fight? I think many would fight.

So I think it behooves us to get back to the day when the U.S. was viewed as the good guy that you could trust to treat you right and not to abuse you the way that we have done since 9/11. We used to be the land of the free and the home of the brave, and after 9/11, we became the constrained and the cowardly. We are what we stood for. Those principles that President Obama talked about became an inconvenience, and we were scared, and we told the government to do whatever you got to do to keep us safe.

I mean I tell my students at Howard, I remember—I am old enough to remember—going to the airport, if somebody felt you up, it was called a sexual assault, not pre-boarding. That's become the new normal. If you look at the American Red Cross, which did a survey on torture, the majority of the public had shifted during the Bush Administration, and the majority of the American public was opposed to torture. Now, the majority of the American public is okay with torture. And the younger the person asked, the more accepting they are because there is this whole post-9/11 new normal that many have grown up and come to accept.

8. See NESE F. DEBRUYNE & ANNE LELAND, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 3, 11 (2014).

So I hope we can get back to a day where we don't focus on 9/11; we focus on 9/10 and how we lived before we got scared, and I think we ought to go back to being the land of the free and the home of the brave and quit living in fear.

Remember in this body of law that we led the effort to create after 9/11, it became an impediment, and you can see the memo from Alberto Gonzales to the President saying that the Geneva Conventions—remember the thing we led the effort to create?—that many of the limitations on questioning enemy prisoners are rendered “quaint”⁹ and that his view is that some of the provisions are obsolete.

So this body of law that we led the effort to create, we now are discarding and setting aside as being quaint and obsolete because it is an impediment to what we want to do, which is to avoid the law. You had the memorandum from John Yoo, where again, he says that the Geneva Conventions and international humanitarian law don't apply to this conflict with Al-Qaeda and the Taliban.¹⁰

Now, there were some that pushed back: William Taft was a legal adviser to Colin Powell at the State Department. You can see this is John Yoo's memo on January 9, 2002. Taft wrote back to him on January 11, 2002.¹¹ Does anybody else know what happened on January 11, 2002?

AUDIENCE MEMBER: Guantanamo.

PROFESSOR DAVIS: The first detainees: the plane landed at Guantanamo that same day, January 11th.¹² Why did we choose Guantanamo to detain these guys? Why fly them halfway around the

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9. Memorandum from Alberto R. Gonzales, White House Counsel, on Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, to President George W. Bush 2 (Jan. 25, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.
 10. Memorandum from John Yoo, Deputy Assistant Att'y Gen., on Application of Treaties and Laws to al Qaeda and Taliban Detainees, to William J. Haynes, II, General Counsel, DEP'T OF DEFENSE (Jan. 9, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.
 11. Memorandum from William H. Taft, IV, Legal Adviser, on Draft Memorandum of January 9, to John C. Yoo, Deputy Assistant Att'y Gen. (Jan. 11, 2002), *available at* http://dspace.wrlc.org/doc/bitstream/2041/70949/00137_020111_001display.pdf.
 12. *Shackled Detainees Arrive in Guantanamo*, CNN WORLD (Jan. 11, 2002, 11:28 PM), <http://edition.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html>.

world? Why not detain them there? Why did we take them to Guantanamo?

AUDIENCE MEMBER: The legal argument was it is a U.S. military zone, but it is outside the contiguous United States.

PROFESSOR DAVIS: So no law applied. Remember, you know, what made us exceptional was our belief in the rule of law, and now we are doing everything possible to avoid the law: you know, saying the law doesn't apply and picking this site that we thought was a law-free zone that the U.S. courts couldn't touch and the international courts couldn't touch and the Cuban courts couldn't touch. It was the perfect place to exploit people for intelligence. So we chose Guantanamo.

And you see, we had people push back like William Taft did, saying, "Look, I agree we really want to see what the boundaries are of what we can do in this War on Terror." But you can see in this bottom paragraph saying, "Look, some of your conclusions you admit are questionable, and as this document will show, I expect that you will find they are actually incorrect as well as incomplete," and he ends it saying "we should talk." And of course they didn't.

Does anybody push back against what the Administration wanted to do, which included all of the judge advocate generals of the military services? People in uniform were uniformly opposed to Guantanamo and to the use of torture and to the use of military commissions, but like William Taft, they were marginalized because they weren't saying what the Administration wanted to hear.

And so we move forward. There is a memorandum by Jay Bybee, who at the time was the Assistant Attorney General.¹³ Does anybody know what Mr. Bybee does now? I mean, this is called the "Torture Memo" that he authored. Anybody know what he does now?

AUDIENCE MEMBER: Ninth Circuit Judge.

PROFESSOR DAVIS: He has a lifetime appointment to the United States Court of Appeals for the Ninth Circuit. It was his, I guess, punishment for having written the "Torture Memo."

In the memo, it says—now, again, remember we are the champion of the rule of law, the example, the shining city on a hill—and in this memo it says, Section 2340—that's out of our domestic torture statute—anything we do in questioning detainees that doesn't produce the level of pain that would be caused by "physical injury, such as organ failure, impairment of bodily function, or even death;"

13. Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, to Alberto R. Gonzales, White House Counsel (Aug. 1, 2002), *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>.

anything short of that is fine.¹⁴ I mean, stop and think about that for a minute. The United States is saying any pain that is less than being strangled to death or your heart stopping—anything short of that we are good to go, which to me is a pretty remarkable statement for the United States to be making if we are the example for the world to follow.

Probably even to me, even more incredible later in the memo it says even if you could make an argument that that level of pain is a violation of the torture statute, then it would be unconstitutional because, as it says, the President enjoys complete discretion in the exercise of his Commander-in-Chief authority in conducting operations against hostile forces.¹⁵

So what does that mean? It means that neither Congress nor the courts have any authority to tell the President “You can’t do that.” So whatever the president says is untouchable, whether it is torture or a kill list or indefinite detention. The President has the unilateral authority to act, and there is nothing that anyone can do to challenge it.

So in this body of international humanitarian law, now again, I think many of you are too young to remember this, but there was a time when Congress did things on a bipartisan basis.

So back in 1994, we led the effort to create the Convention Against Torture.¹⁶ And after the Convention was passed, it came to Congress to be ratified in the Senate, and I forgot what the vote was. It was like 95 to 3.¹⁷ It was hugely popular on a bipartisan basis, and a lot of great speeches were given on the floor on why it was in our interest to sign on to the Convention Against Torture.

And it is interesting if you look because the discussion centered on the fear of Americans being the victims of torture, not the perpetrators of torture, but in the Torture Convention that we led the effort to enact, it says there are “[n]o exceptional circumstances whatsoever” for torture.¹⁸ It says that every party to the Convention has to provide a legal mechanism for alleged victims of torture to seek compensation for their mistreatment,¹⁹ and it says you can’t outsource torture. You can’t hand someone off to another country that has a

14. *Id.* at 1, 6.

15. *See id.* at 31.

16. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

17. *See* 136 CONG. REC. S17486 (1990).

18. Convention Against Torture, *supra* note 16, art. 2(2).

19. *Id.* art 14.

more morally casual attitude and let them do your dirty work. It is prohibited by the Convention.²⁰

Now, keep those provisions in mind: no exceptional circumstance whatsoever, a system, a legal system to provide compensation for alleged victims, and no outsourcing torture. All right. Did we torture, or did we not? I think it is clear that we did. John McCain has talked about it. Many others have talked about it. When I resigned as Chief Prosecutor for the Military Commissions, the person in charge of the Commissions was Susan Crawford, who is pictured here. She had been Dick Cheney's Inspector General when Dick Cheney was the Secretary of Defense, and I mean, you just don't get more Republican or more endeared to the Bush Administration than Susan Crawford, and Susan Crawford dismissed charges against Mohammed al-Qahtani. It was the one case I was personally handling myself.

He was the twentieth hijacker, the guy that when he landed in Orlando, an alert customs agent thought his story just didn't make sense, and put him back on the plane, and sent him home. And he never made it to where he wanted to rendezvous with the other nineteen. But we mistreated al-Qahtani. It was the dirtiest of the cases before the high value detainees arrived, and I was handling it personally.

In the spring of 2008, Ms. Crawford dismissed the charges against Mohammed al-Qahtani. In January of 2009, you can see on January 14th in this article by Bob Woodward in the Washington Post, Ms. Crawford said she made the decision to dismiss charges because, quote, "We tortured [al-]Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case."²¹

Mark Fallon was the Deputy Commander of CITF, the Criminal Investigation Task Force, the military organization that was responsible for trying to collect up all the bits and pieces of information on the detainees for us to be able to sit down with them and determine if there was a case that could be prosecuted. He was at Guantanamo in October of 2002. In this meeting with all the other agencies that were involved, and this is an e-mail he sent back to his boss saying, "What I am seeing down here are the 'kinds of stuff that Congressional hearings are made of' that someone from another organization, the CIA, said that if the detainee dies, then you are doing it wrong."²² And he goes on to say that in his view someone

20. See *id.* art. 3.

21. Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

22. See Mark Mazzetti & Scott Shane, *Notes Show Confusion on Interrogation Methods*, N.Y. TIMES (June 18, 2008),

ought to be paying attention to this because history is not going to look back favorably with what we were doing at Guantanamo.

So what happened to all the people that put us on this road to turn our back on the law, to engage in torture, and to do all the other things that we have done? They have all been handsomely rewarded for their conduct.

Jose Rodriguez was the head of Clandestine Operations for the CIA. You may recall there were tapes—videotapes of Abu Zubaydah and el-Masri being water boarded.²³ A judge had ordered that they be preserved, and Mr. Rodriguez ordered that they be destroyed because they thought that the risk of that information getting out in the public and the public seeing what our government was doing was more harmful than ignoring the order and destroying the evidence.²⁴ As you can see, the Obama Administration made the decision that Mr. Rodriguez should not be prosecuted for what he did. Instead, he wrote a book, and he is on the lecture circuit and making a lot of money off of having sanctioned torture.

In fact, if you look, the only person who has gone to jail for torture is not someone who sanctioned it or someone that conducted it. It is John Kiriakou, who is a CIA agent who talked about it, and John is doing thirty months in federal prison for having disclosed the name of the CIA agent who was involved in torture.²⁵

So, you know, we don't punish the people that put the policy in place; we punish the guy that had the audacity to tell the public that we engaged in torture. Now, again, I mention the torture statute. As part of the Torture Convention, every country had to sign on and have a domestic law that criminalized torture. We passed one with flying colors in both the House and Senate. We used it one time. We prosecuted "Chuckie" Taylor—you know, Charles Taylor, the former President of Liberia that was convicted at the Hague not too long ago—we prosecuted his son in federal court.²⁶ So we know how to use the statute. We prosecuted him for the atrocities he committed in

http://www.nytimes.com/2008/06/18/washington/18detain.html?_r=1&.

23. Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, WASH. POST (Dec. 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/12/06/AR2007120601828_pf.html.
24. *Id.*
25. John Kiriakou, Op-Ed., *I Got 30 Months in Prison. Why Does Leon Panetta Get a Pass?*, L.A. TIMES (Mar. 9, 2014), <http://articles.latimes.com/2014/mar/09/opinion/la-oe-kiriakou-panetta-whistleblower-20140309>
26. *Ex-Liberian Dictator Charles Taylor's Son Sentenced to 97 Years in US Jail*, THE TELEGRAPH (Jan. 9, 2009), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/4210623/Ex-Liberian-dictator-Charles-Taylors-son-sentenced-to-97-years-in-US-jail.html>.

Liberia, and he was sentenced to ninety-seven years in prison, in federal court.²⁷ So we know how to use the testimony, but we have never used it.

Maher Arar was a Canadian who flew to Tunisia with his family, and on the way back at JFK, he was taken off the plane, held for two weeks in the U.S., and then we put him on a plane, flew him to Jordan, and from Jordan, he was driven to Syria.²⁸ Now, remember Syria? You know, Bashar al-Assad that we were planning on bombing not too long ago? We turned over Maher Arar to that same government, where he was tortured for about a year until they realized he was a nobody.²⁹

The Canadians, who had given us the information that led us to believe he might be a somebody, have apologized and paid him \$10.5 million for their part and us sending him off to be tortured.³⁰ When he sued here—remember, this Convention says there has to be a means for people that are alleged victims of torture to seek compensation—the Obama Administration asserted the state secrets privilege, and the case was dismissed,³¹ and we never even apologized to Maher Arar for the year he spent in prison in Syria being abused thanks to us. He is an incredible guy.

I teach a class in national security law, and he spoke to my class by Skype because he is barred from coming to the U.S., but he is a remarkable guy. He has completed his Ph.D. and is just a really interesting person. If we can't apologize to Maher Arar for sending him to Syria, what does it say about us?

And so, again, not a single person of this alleged—that had been tortured—has been able to hold the government accountable, either criminally or civilly, rather than be victims of the torture. So people tried. If you can't sue the government, let's sue the contractors, the businesses that profited by helping the government send us off to be tortured.

27. *Id.*

28. *The Story of Maher Arar: Rendition to Torture*, CTR. FOR CONSTITUTIONAL RIGHTS 2–4 (Dec. 2008), <http://ccrjustice.org/files/FINAL%20updated%20rendition%20to%20torture%20report%20dec%2008.pdf>.

29. *Id.* at 4.

30. *Id.* at 8.

31. Jerome Tuccille, *Maher Arar Can't Sue U.S. for Sending Him to Syria to Be Tortured, Says Court*, EXAMINER (Nov. 3, 2009), <http://www.examiner.com/article/maher-arar-can-t-sue-u-s-for-sending-him-to-syria-to-be-tortured-says-court>.

So they filed suit against Jeppesen, this company that does aeronautical planning.³² And what did the Administration do? They asserted the state secrets privilege saying, in order for this company to defend itself, we would have to give them classified information, and therefore, the case should be dismissed. And it was.³³

And now you can't sue the government, and you can't sue the companies that profited by helping the government when they outsourced torture. In fact, the latest company that was sued was CACI. The case was dismissed on jurisdictional grounds,³⁴ and the victims, the alleged victims of torture, were then sued by CACI for the alleged facilitator of torture to recover their attorney fees.³⁵ And the court said, well, we do have jurisdiction to hear that one, and they have ordered the alleged victims now to pay the company that they had sued.³⁶

Any of you see *Zero Dark Thirty*? I didn't. If it comes in Red Box, I would spend 99 cents to see it, but I was not going to help support it. You guys are probably too young to remember, but I remember when *Jaws* first came out. I had never seen a shark. But after seeing *Jaws*, I had some pretty firm opinions that the only good one was a dead one.

My fear was that *Zero Dark Thirty* was going to do for torture what *Jaws* did for sharks, and people that had no experience with torture were going to sit down, and watch a movie, and come away with the conclusion that thirty minutes of torture leads to Osama bin Laden. Therefore, it is a good thing, and that was not the case.

Actually, it is five years now I did an article in *The New York Times* criticizing our relaxing of the standards and using torture.³⁷ If you all want to know about torture, there are two books I would recommend: one by Matthew Alexander, which is actually a pseudonym. He is actually a former Air Force officer named Tony

32. Mohamed v. Jeppesen Dataplan Inc., 614 F.3d 1070, 1092 (9th Cir. 2010) (holding that the state secrets doctrine protects Jeppesen, the company who assisted the United States in the aeronautical planning for the transport of citizens such as plaintiff Maher).

33. *Id.* at 1086, 1093.

34. Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 857, 874 (E.D. Va. 2013).

35. Bill of Costs at 1, Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013) (No. 1:08-cv-00827).

36. *Id.* (providing an updated and correct bill of attorney's fees that the court ordered the victims to pay).

37. Morris Davis, Op-Ed., *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES (Feb. 17, 2008) http://www.nytimes.com/2008/02/17/opinion/17davis.html?pagewanted=all&_r=0.

Camarino, who had to write using a pseudonym at the time,³⁸ and one by Ali Soufan, who was an FBI interrogator, who actually was the first to interrogate Abu Zubaydah and others.³⁹

So these guys: they are not like Dick Cheney, who has never interrogated a person in his life. They are people that spent their careers doing interrogations, and they both tell you torture doesn't work. I mean, it is great for making somebody talk, but it is not good for making them tell you the truth, and the purpose of an interrogation is to get useful information, and they say it doesn't work.

Now, some other countries have not been as casual in their attitude as we have. The Italians have convicted twenty-three Americans for the abduction of Abu Omar, and then he was sent off to Egypt, where he was tortured.⁴⁰ So there are people that aren't quite as cavalier about it as we are.

Now Guantanamo: again, we picked Guantanamo because it was viewed to be outside the reach of the law. There is an article recently: *The Miami Herald* is suing under FOIA.⁴¹ Camp Seven is where the high value detainees are held, and as you can see over the time that Guantanamo has been open, about eleven-and-a-half years, by the September of this fiscal year and by September 30th of next year, we will have spent \$5.25 billion to detain people at Guantanamo, or \$2.7 million a year per person.⁴²

Now, there are 162 men at Guantanamo.⁴³ There are 779 that were ever held there.⁴⁴ There are 162 that are left.⁴⁵ Eighty-two of the

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38. MATTHEW ALEXANDER & JOHN R. BRUNING, HOW TO BREAK A TERRORIST: THE U.S. INTERROGATORS WHO USED BRAINS, NOT BRUTALITY, TO TAKE DOWN THE DEADLIEST MAN IN IRAQ (2008).
 39. ALI H. SOUFAN & DANIEL FREEDMAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA (2011).
 40. Ian Shapira, *Italy's High Court Upholds Convictions of 23 Americans in Abu Omar Rendition*, WASH. POST (Sept. 19, 2012), http://www.washingtonpost.com/local/italys-high-court-upholds-convictions-of-23-americans-in-abu-omar-rendition/2012/09/19/af06022c-0286-11e2-91e7-2962c74e7738_story.html.
 41. See Carol Rosenberg, *FOIA Suit Reveals Guantánamo's 'Indefinite Detainees'*, MIAMI HERALD (June 17, 2013), <http://www.miamiherald.com/2013/06/17/3456267/foia-suit-reveals-guantanamos.html>.
 42. Carol Rosenberg, *Total U.S. Tab Tops \$5B for Guantánamo Prison*, MIAMI HERALD (July 30, 2013), <http://www.miamiherald.com/news/nation-world/article1953705.html>.
 43. *General Who Opened Guantanamo Prison Urges for Shut-Down in 2014*, RT NEWS (Dec. 13, 2013, 4:11 PM), <http://rt.com/usa/general-guantanamo-urges-shut-down-162/>.
 44. *Id.*
 45. *Id.*

162 are men that the CIA, the FBI, the Department of Justice, and the Department of Defense unanimously agree didn't commit a crime.⁴⁶ We are not going to charge them. They are not an imminent threat, and we don't need to keep them. They published their report in January of 2010, saying these are men we don't need to keep.⁴⁷ They are still there at a cost of \$2.7 million a year each. So for the fiscal conservatives in the crowd, economically, Guantanamo doesn't make sense in addition to the costs we pay, as far as our reputation.

The military commissions, like I said, next year it will be twelve years since they were authorized. There have been a grand total of seven trials completed.⁴⁸ Five of those seven men aren't at Guantanamo anymore.⁴⁹ They have gone home. So one of the jokes we used to make at Guantanamo was you got to lose to win because if you got charged with a war crime and convicted as a war criminal, you got a five in seven chance you are not at Guantanamo anymore; you are back home. But if you are never charged with a war crime, you could spend the rest of your life sitting there.

In the picture is Abu Hamza al-Masri, who was extradited from the U.K. to the U.S.,⁵⁰ and you got Abu Anas Al-Libi in the upper right-hand corner of the recent capture in the raid in Libya.⁵¹ You have got bin Laden's son-in-law, whose name is escaping me, I can't think of his name, and you have got Ahmed Ghailani depicted in the bottom corner.⁵²

What is unique about those four? What do they have in common? They either have been, or are being, prosecuted in federal court, not

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46. See Craig Whitlock, *82 Inmates Cleared But Still Held at Guantanamo*, WASH. POST (Apr. 29, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/28/AR2007042801145.html>.
47. U.S. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 10 (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.
48. *Facts and Figures: Military Commissions v. Federal Courts*, HUMAN RIGHTS WATCH, <http://www.hrw.org/features/guantanamo-facts-figures> (last visited Dec. 30, 2014).
49. See *The Guantanamo Trials*, HUMAN RIGHTS WATCH, <http://www.hrw.org/features/guantanamo> (last visited Dec. 30, 2014).
50. Adam Brookes, *Abu Hamza Arrives at RAF Mildenhall for US Extradition*, BBC (Oct. 5, 2012), <http://www.bbc.com/news/uk-19852506>.
51. Mark Hosenball & Phil Stewart, *Abu Anas Al-Libi, Senior Al Qaeda Figure Captured in Libya, Questioned on U.S. Ship*, REUTERS (Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/2013/10/07/abu-anas-al-libi-ship_n_4058559.html.
52. See *The Guantanamo Trials*, *supra* note 49.

in a military commission at Guantanamo.⁵³ So I think it is a pretty powerful statement. Like in Abu Hamza al-Masri, we had to promise the U.K.—our closest friend and ally—we had to promise we wouldn't take him to Guantanamo.⁵⁴ We wouldn't prosecute him in a military commission, which is a pretty strong statement from our closest friend on what they think about Guantanamo and the military commission.

And the President has chosen Ahmed Ghailani. When I was the Chief Prosecutor in September 2006, a plane landed at Guantanamo, and fourteen men got off. Only one has been convicted and sentenced, and it was Ahmed Ghailani in federal court, not at the military commission at Guantanamo.⁵⁵

So I started a petition in May of this year to close Guantanamo, and mainly because of my own procrastination, it happened to go up the morning that the President talked about Guantanamo at a press conference. So it looked like it was this coordinated process, but it was entirely a fluke that it happened on the same day. But 23,000 people signed my petition to tell the President to close Guantanamo, and he invited me to his speech he gave in May, where he said we are going to close Guantanamo. It is a blight on the country, and here we are in October, and there are still 162 men there, the majority of whom have been cleared for transfer but are still at Guantanamo.

Let me end up with drones. Here is a list: nobody has an exact figure on how many people have been killed in drone strikes around the world. I think this is probably as good a data as you are going to get. So I know the Administration likes to portray it as this precision weapon—you know, we can mitigate the risk to the civilian population—but it is not error-free, and there is no doubt that a lot of people have died as a result of drone strikes.

I am not opposed to drones as a weapon system. It is like an F-16, but instead of sitting in the cockpit, you sit in an air-conditioned room at Creech Air Force Base and fly it. It is our policy for how we use it that causes me concern. Mainly it's this policy of

53. Aki Peritz & Mieke Eoyang, *Even al Qaeda Operatives Deserve Their Day in Court – and Justice*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/aki-peritz/even-al-qaeda-operatives-_b_4109812.html?view=print&comm_ref=false 2/2; *Abu Hamza Terror Trial Begins with Jury Selection in US*, BBC (Apr. 14, 2014), <http://www.bbc.com/news/world-us-canada-27015350?print=true>; Benjamin Weiser, *Jurors Convict Abu Ghaith, Bin Laden Son-in-Law, in Terror Case*, N.Y. TIMES (Mar. 26, 2014), http://www.nytimes.com/2014/03/27/nyregion/bin-ladens-son-in-law-is-convicted-in-terror-trial.html?_r=0; Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html>.

54. See Brookes, *supra* note 50.

55. See *The Guantanamo Trials*, *supra* note 49.

having a separate agency. The military drone program comes under IHL and the law of war. We have another drone program run by the CIA, a civilian agency, that's not part of the military and not covered by IHL, carrying out lethal, offensive, military operations, and I don't know any legal basis for the President to tell a civilian agency to go kill someone in another country.

So I am concerned about the policy that we have used. You know, the majority of Americans are opposed to drone strikes on Americans, like we did with Anwar al-Awlaki and his son.⁵⁶ Did you see, they were opposed to using them on us, but they were okay with using them on other people, but other people aren't happy about being on the receiving end. You know, we want to win hearts and minds in this War on Terror.

In Pakistan, three quarters of the Pakistani public have spent billions of dollars. Three quarters of the Pakistani people consider us to be the enemy. The U.N. sent Ben Emmerson to Pakistan. He concluded that our use of drones there has been an invasion of their sovereignty and that we certainly wouldn't condone it if someone were doing the same here.⁵⁷ And more recently, you had Malala, who last week told the President "Hey, stop droning us because you are making enemies of innocent victims in Pakistan."⁵⁸ Yet, the program continues.

So I just want to wrap up real quickly. This is my concern on where we are headed, so bear with me: just a short three-minute clip that I think this is what you ought to be thinking about going forward and the precedent that we are setting in this effort.

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56. See Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted=all&_r=0 ("Within just two weeks, the American government had killed three of its own citizens in Yemen."); see also Bruce Drake, *Obama and Drone Strikes: Support but Questions at Home, Opposition Abroad*, PEW RESEARCH CTR. (May 24, 2013), <http://www.pewresearch.org/fact-tank/2013/05/24/obama-and-drone-strikes-support-but-questions-at-home-opposition-abroad/> (stating that "[a] Gallup poll, conducted in March found, that while 65% of Americans supported the use of drone strikes to kill suspected terrorists in other countries, 52% opposed such strikes if the targets were U.S. citizens").
57. See *Statement of the Special Rapporteur Following Meetings in Pakistan*, U.N. HUMAN RIGHTS (Mar. 14, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13146&LangID=E>.
58. See Philip Rucker, *Malala Yousafzai Meets with the Obamas in the Oval Office*, WASH. POST (Oct. 11, 2013, 8:40 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/11/malala-yousafzai-meets-with-the-obamas-in-the-oval-office/>.

(The following discussion is from a video clip):

VOICE: The use of drones is just one way that the U.S. military has approached unmanned combat. The Pentagon is also exploring another way. For more, TV's Jim Spellman joins us from the newsroom with more.

VOICE OF MR. SPELLMAN: Elaine, they look like something from a science fiction movie, but they are very real, and some fear these robots could become the drones of the future.

He looks like a soldier, moves like a soldier, and marches like a soldier, but underneath that camouflaged uniform, Pet Man is something very different. Pet Man is a robot designed to test uniforms built by an American company called Boston Dynamics with funds from the U.S. Department of Defense.

In the near future, robots like Pet Man and other less human looking machines could be used to keep first responders out of harm's way during disasters like wild fires or the Fukushima nuclear disaster, but experts say it is inevitable that machines like these will one day be used in battle. It will be a substitute for what in the past would have been a human being in a cockpit or a human being in a tank or a foot soldier.

For now, most of these robots are controlled by operators, but research is focusing on creating fully autonomous robots, who will make their own decisions when performing their missions. Enter Atlas, standing nearly two meters high and weighing 150 kilograms, Atlas is being provided to eight universities and research labs for further development, including greater levels of autonomy.

There is no indication that any of these robots are meant to go to the battlefield, but fears that fully autonomous robots could be the next major evolution in weaponry concerns groups like the Campaign to Stop Killer Robots and the United Nations, which released a report last year calling for a moratorium on lethal autonomous robots until a legal framework for their use can be established.

VOICE: We are headed in that direction where machines are going to be autonomous and can make their own decisions, but who is going to be held accountable?

VOICE OF MR. SPELLMAN: Like the drone currently in use, the drones have the potential to greatly reduce the loss of life. For the country that has robot superiority, some day they may make conflicts easy to start and hard to finish.

VOICE: Americans aren't coming home in body bags because of drones, and it makes it palatable to the public.

VOICE OF MR. SPELLMAN: Someone is coming home in a body bag but not us.

Ultimately, what is at risk may be our humanity as the line between weapon and warrior continues to blur.

So how far off is it until we may see fully autonomous robots? The U.S. Department of Defense won't say how far along they are, but the fed systems looking at varying degrees into autonomy are already in place in Israel and the demilitarized zone in Korea and on some U.S. naval vessels. And right now, the U.K. is testing a semiautonomous stealth drone called Taranis, which can find and choose its own targets. At the moment, it is said the operator will make the final decision to engage a target so still a few steps away from full autonomy lane.

VOICE: All right. Jeff Spellman in our Washington newsroom. Thanks.

PROFESSOR DAVIS: So let me just end up with—I mean, it is not so far off. You know, there is a really good book I would recommend called *Wired for War* by Peter Singer,⁵⁹ where he talks about drone technology. He says it's like comparing the Model T to the Tesla. He says we are at the Model T stage with drones. In these autonomous machines, to carry out warfare is like the Tesla, and that's where we are headed.⁶⁰ Thirty-seven countries are now calling for a ban on autonomous lethal weapons.⁶¹ Because if a weapon—a machine—can make the decision, who is accountable? Because at the center of international humanitarian law is accountability. Someone has to be accountable for the decisions, so I recommend to you *Wired for War*.

And again, back to President Obama, when the bodies of Ambassador Stevens and the others came back to Andrews Air Force Base, the President gave a talk there on the tarmac, and he talked about their sacrifice and the sacrifice of men and women serving the country, and he said, “[T]his country that we love will always shine as a light onto the world.”⁶² I think we do, but I think for the last twelve years we haven't been a guiding light; we have been a warning light, and we need to return to our principles and our values and that body of law that we champion and stand up for, international humanitarian law, and those principles because, again, as I said, it became

59. PETER W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY* (2009).

60. *Id.* at 46–47, 110.

61. Noel Sharkey, *Computing Experts from 37 Countries Call for Ban on Killer Robots*, INT'L COMM. FOR ROBOT ARMS CONTROL (Oct. 16, 2013), <http://icrac.net/2013/10/computing-experts-from-37-countries-call-for-ban-on-killer-robots/>.

62. Melanie Hunter, *Obama: 'Even in Our Grief We Will Be Resolute,'* CNS NEWS (Sept. 14, 2012), <http://cnsnews.com/news/article/obama-even-our-grief-we-will-be-resolute>.

important, I think, with Syria, where we were about to launch an attack on Syria when we hadn't been threatened or attacked. I think we can certainly debate that.

AUDIENCE MEMBER: I am Richard Wanerman. I am a second-year student here at Case.

Getting back a little bit to the detentions and prosecutions, I believe there were some initial rumblings back in 2009 of closing Guantanamo and possibly moving all of them to the federal courts or, at least, moving them onto U.S. contiguous territory, but the political pressure obviously must be very high. Then there was the move to Michigan, to the abandoned prison, and that was problematic because, at least, there is a sizeable enough quantity of Congress that was vehemently opposed to this. So even if tomorrow the National Security Council and the President all say yes, let's move them up here and do Article III prosecutions, you would still have a lot of Congressional opposition.

What sort of arguments do you have non-politically as the former prosecutor, from a legal perspective, or even a military perspective, to say it is perfectly all right to move them up into the United States out of Guantanamo Bay and into a detention facility that is more in line with what the world expects?

PROFESSOR DAVIS: Right. I think General Martins said there are about twenty that we either intend to prosecute or have been prosecuted.⁶³ So it is a pretty small group.

Remember we were told they were the worst of the worst. So out of 779, there are about twenty that we want to prosecute and hold accountable. I think the military commissions—like I said—we have had seven trials in twelve years. Five of those, the D.C. Circuit (the civilian court) said the offense they were convicted of was not a legitimate law of war offense, so they haven't been a huge success.

In the meantime, we have prosecuted hundreds and hundreds of similar cases in federal court successfully, securely, and have gotten what I think most people would consider good results.

You know, the President—I get on Twitter quite a bit when I comment on this: “You know, Congress has made it impossible. It is not the President's fault.” The most common response I get on Twitter is “You suck.”

Which is not a particularly helpful comment, but Congress has made it difficult. When President Obama took office—remember John McCain and Barack Obama both said, “I want to close Guantanamo.”

63. Jane Sutton, *United States Scales Back Plans for Guantanamo Prosecutions*, REUTERS (June 11, 2013), <http://www.reuters.com/article/2013/06/11/uk-usa-guantanamo-idUKBRE95A0P320130611>.

So I am curious, I wonder what would happen if McCain had won. Would Guantanamo still be open?

But it became the other side. Anything Obama was for, they were against. So you had this backlash, and I don't think he was prepared for the backlash. I think he thought, "Look, we both agree we ought to close Guantanamo." So I think when he signed that order on January 22, 2009, it was kind of like over and done, and he was not prepared for the backlash, and healthcare reform was number one, and the economy was crashing. I just don't think he had the backbone to get it done.

But for the first two years, he had a majority of Democrats in both the House and Senate until the Tea Party swept in, and that's when the legislation began. The 2011 National Defense Authorization Act that President Obama promised he would veto⁶⁴ if it included the NDAA, he included those provisions, but two years in a row, he did that. On New Years Eve, it has become: which is going to drop first—Obama's veto threat or the Big Ball at Times Square?

And the veto threat has dropped twice, and he signed the NDAA that limits his authority to transfer detainees to the U.S. But my view is: look, if you have the unilateral authority to send a civilian agency to kill an American in another country, I think you have got the unilateral authority to bring detainees to the U.S. for prosecution in federal court.

Now, there will be complaining for sure, but you got to man up and get in there and keep your word. You promised you were going to do it and do it because this has just been a blight on our reputation with our friends and our enemies alike. And we tried and failed, and we need to give up on this effort and use the courts that have the respect of the world.

AUDIENCE MEMBER: Could I ask you to look into your crystal ball twenty, thirty years from now the way things are going? Will the Fourth Amendment be as dead as the Tenth Amendment by then?

PROFESSOR DAVIS: Well it certainly seems, again, if you are my age, and you look back at the TSA pat downs at the airport or the whole NSA spying program, the surveillance program, which they denied doing, and now it is pretty clear, and yes, there is an interesting debate with people like Edward Snowden. You know, is he a hero or villain or somewhere in between?

But we have certainly gotten more comfortable, and like I said, I think it has become the new normal. We have a generation that grew

64. See Josh Gerstein, *On National Defense Authorization Act, Obama Pulls Veto Threat*, POLITICO (Dec. 14, 2011, 4:19 PM), <http://www.politico.com/blogs/under-the-radar/2011/12/obama-pulls-veto-threat-on-defense-bill-107514.html>.

up in the post-9/11 environment, where that is just the way it is, and so I am hoping people will pay attention. I mean, if you really believe in the Constitution and liberty, and what it meant to be an American, you ought to be offended at what our country has done for the last twelve years. So I am hoping—I remember when I was your age, thirty years ago when I was in law school—I remember thinking, my generation, because I grew up in the post-Watergate Vietnam era, and I saw how my father's generation had screwed up the country, that my generation was going to go out and change the world. Well, we haven't done such a good job.

So I am hoping your generation will do what my generation has failed to do and to make us that shining city on a hill that we ought to be and we can be if we just had the guts to do it.

PROFESSOR COVER: So when General Martins was here last month, he understandably gave quite a defense of the commission he is now presiding over as Chief Prosecutor, and he acknowledged many of the problems and inadequacies that weren't part of the commissions passed by Congress. But he would maintain now that pretty much they are fixed and makes the argument that really the commissions are needed, however, for two primary reasons: one, some instances, some level of hearsay must come up which is accepted in other tribunals outside the United States.

And secondly, for some reason, security and classifications—that they couldn't be prosecuted in federal courts. I just wonder what you say to both his praise of the current commissions and the need for them still.

PROFESSOR DAVIS: Well, a couple things: one is, I think the current iteration of military commissions are vastly improved over the original. I mean, the original concept was you had some civilian political appointees that looked back at the trial of the Nazi saboteurs in 1942, which, if you are familiar with the case, you had the eight Nazi saboteurs dropped off by submarine come into the U.S.⁶⁵ One guy decided he was going to go to the FBI and be a hero and turn everybody in. So between June of '42 and August of '42, he went from capture to prosecution in a military commission to Supreme Court review and execution and burial by the Anacostia River in Washington in a hundred days.⁶⁶

So it was swift, it was severe, and it was secret, and people saw that and said, "Hey, this worked really well in 1942. Let's do it

65. *Nazi Saboteurs Trial*, LIBRARY OF CONGRESS (Aug. 15, 2014), http://www.loc.gov/rr/frd/Military_Law/nazi-saboteurs-trial.html.

66. *Six Nazi Saboteurs Executed in Washington*, GHOSTS OF DC (Feb. 9, 2012), <http://ghostsofdc.org/2012/02/09/six-nazi-saboteurs-executed-in-washington/>.

again.” And so here we are in 2013, and we have completed seven cases, five of which the appellate court has said were convicted of offenses that aren’t really law of war offenses.⁶⁷ So it has been a colossal failure.

And in 2007, when I stood right here, under the original Bush order, I said “This is good stuff. You know, this will work.” And then the Supreme Court said, “No, it is not.”

And then we passed the Military Commissions Act in 2009,⁶⁸ and I went out and said, “Hey, this is even better. It was good before, but this is even better now,” and then President Obama shut that down, and then they have the Military Commissions Act of 2009 and we’re saying “Okay. This time it is really justice.”

I think we had the opportunity to do this and do it right, and I think—to me, it is no longer a question of could we do it? It is: Should we do it?

Because you could give KSM the most perfect trial in the history of jurisprudence, and 90 percent of the world is not going to believe it because we have screwed this up for so long and told the world over and over and over, “This time we got it right. This time we got it right. This time we got it right.”

And if you look at the failures they have had at Guantanamo, where the sound went out—the judge thought he was in control of the courtroom—and the sound goes out. It turns out there is a secret CIA monitor somewhere that controlled the courtroom, and they spent two days arguing over whether Khalid Sheikh Mohammed can wear a camouflaged vest to court and all the things that aren’t issues in federal court because we are making it up as we go at Guantanamo.

So I think they are vastly improved over what they were, but again, I didn’t hear his talk here. But I have heard General Martins and Attorney General Holder at forums, where they have said, “Well, it is almost. It is nearly. It is virtually. It is as good as federal court.”

Well, if it is that close, then why do we need two different processes? And we have proved that with Ghailani. Ghailani was one of the high value detainees held at Guantanamo, held by the CIA, prosecuted, and convicted in federal court, and doing life without parole.⁶⁹ So we have proven that the federal courts can work.

67. See Charlie Savage, *Who Decides the Laws of War?* N.Y. TIMES (Jan. 26, 2013), <http://www.nytimes.com/2013/01/27/sunday-review/military-tribunals-and-international-war-crimes.html>.

68. Warren Richey, *Obama Endorses Military Commissions for Guantanamo Detainees*, CHRISTIAN SCIENCE MONITOR (Oct. 29, 2009), <http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html>.

69. See *The Guantanamo Trials*, *supra* note 49.

We just prosecuted Bradley Manning.⁷⁰ I was an expert witness for Bradley Manning at his court-martial recently, which was a case that was centered entirely on classified information. I mean, every charge against him was based on classified information, and we had a court-martial, an existing process that was largely—I mean, there are some critics of the proceedings—but they were largely open in a credible forum, with existing rules and procedures, and he was convicted, and the world is still turning.

So we have got federal courts. We have got courts-martial. I think what Guantanamo and the military commissions is not so much about what they did to us—it is about what we did to them that we want to hide from the public.

With KSM, I can tell you, like I said, we were building the case against these guys without using any information we obtained with enhanced interrogation techniques. Like with KSM and the 9/11 cases, we were building the case, having set aside and walled off anything they said in U.S. custody. And I can tell you any attorney that can't convict KSM without using his statements ought to find another line of work.

So I think it is a question. I think there are some on the other side that say, by God, we are going to do this, and we are going to do it. And it has become more a principle than it is the practicality of whether it is really necessary.

So I am hopeful that at some point—and I don't have a real keen insight in how the President works or thinks, but it occurred to me—remember when they had the Bush library dedication a couple months ago?

And I remember the President was sitting there on the podium, President Obama, and that week on the news, there was debate about the Bush legacy and was Bush the worst president in the history of the United States? And what was his legacy from his two terms in office?

I was hoping that President Obama was sitting there on that podium thinking, "In a couple years, there is going to be a dedication of my library, and people are going to be debating what was my legacy. And I campaigned for office swearing I would close Guantanamo and end the military commissions and live up to those principles I talked so lawfully about, and do I want my legacy to be that I perpetuated for eight years the things that I condemned?"

So I am hoping these next three years he has focused on how he is going to be remembered and what his legacy is going to be and what's

70. See Julie Tate, *Bradley Manning Sentenced to 35 Years in Wikileaks Case*, WASH. POST (Aug. 21, 2013), http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html.

important for the country, and it is our values and our principles, and our respect for the rule of law that makes us exceptional.