# THE SIXTH ANNUAL GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY*

BRIGADIER GENERAL THOMAS L. HEMINGWAY[1]

Thank you. Thanks very much. Thanks for the invitation to be here today at this prestigious event. General Prugh, as most of you know better than I, was one of the most accomplished lawyers ever to wear the cloth of our nation. Interestingly when he was the Staff Judge Advocate of Military Assistance Command, Vietnam, in the 1960s, he faced some of the certain challenges that were similar to those we faced a generation later in 2001. In his monograph he wrote, "Most difficult for us was to determine applicable international law for much depended upon the legal characterization of the conflict and the American role in it."[2] And that is very much what I found—the position I found myself in when I was recalled to active duty.

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* This is an edited transcript of a lecture delivered on April 25, 2012 by Brigadier General (BrigGen) Thomas L. Hemingway to the members of the staff and faculty, distinguished guests, and officers attending the 60th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Va. The chair lecture is named in honor of Major General George S. Prugh (1920–2006).

[1] A graduate of Willamette University (B.A. & J.D.), BrigGen Thomas L. Hemingway was commissioned in 1962 and entered the Air Force Judge Advocate General's Corps in 1965.

Over the next thirty years, he served in a variety of assignments, including staff judge advocate at the group, wing, numbered air force and unified command level. Brigadier General Hemingway also was an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review. His overseas service included one tour in Thailand and three tours in Germany.

Brigadier General Hemingway's final assignment was Chief, Counsel, U.S. Transportation Command, and Staff Judge Advocate, Headquarters, Air Mobility Command, Scott Air Force Base, Illinois. After retiring in October 1996, BrigGen Hemingway was recalled to active duty in August 2003 to serve in the Defense Department as Legal Advisor, Office of Military Commissions. He retired from active duty again in 2007, but continued his government service as the Senior Advisor to the Deputy Secretary of Commerce.

In addition to his many military awards and decorations, BrigGen Hemingway is the recipient of the Justice Tom C. Clark Award, which is given annually by the District of Columbia Federal Bar Association for outstanding accomplishments in career service to the U.S. Government. Willamette University College of Law presented him with its Outstanding Alumni Award in 2011. Brigadier General Hemingway presently serves as the corporate secretary of The Army and Navy Club, Washington, D.C.

[2] MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES, LAW AT WAR, VIETNAM 1964-1973 (1975) (published by the Dep't of the Army).

The attack of the September 11, 2001, stunned not only the United States of America, but the international community, as well, and the legal community was no exception. No one in the world anticipated non-state actors being capable of waging war on an international scale, and we were totally unprepared for that. I can remember as a retired officer standing on my porch that afternoon smelling the smoke from the fire at the Pentagon. And when I came in that evening, my wife said to me how do you feel and I said, "Well, it's the first time since I've retired that I wished I were back on active duty." That falls under the heading of be careful what you ask for, because you may get it. (Laughter.) I think this was the only time in our history that we had been faced with nonstate actors since the 1800s, when Jefferson launched the U.S. Navy after the Barbary pirates. And the Congress responded to this with the Authorization for Use of Military Force, North Atlantic Treaty Organization, ANZUS, Organization of American States, all invoked their self-defense clause or recognized that this was an act of armed conflict. That position, of course, was not without critics. Lord Peter C. Goldsmith, QC—always remember the QC, that's important—the Attorney General of the United Kingdom, was of the opinion that this was a law enforcement issue that called for a law enforcement response. There were some people in the United States who shared that view. A small, but what I considered to be very vocal minority, but nevertheless that triggered a great deal of debate. And I think it's useful to remember that there was no existing international tribunal at the time that had jurisdiction over these offenses.

The ICTY, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, Sierra Leone, all of those had jurisdictional limits that were geographical to the area where the conflict they were addressing occurred and the ICC, the International Criminal Court, was created too late to have jurisdiction over these offenses. The international law at the time was pretty well limited to state practice and the Geneva Conventions. And as you know, Article IV of the Conventions gives privileges to those commanded by a person responsible or his subordinates, wearing a fixed, distinctive recognizable insignia and carry arms openly and who comply with the customs and laws of war. Al Qaeda and the Taliban did not qualify under any of those four bases. I think it is also important to remember, although some folks don't seem to, that the Taliban were never recognized by the international community as the government of Afghanistan.

The Bush Administration response to this was to declare that Al Qaeda and the Taliban were not entitled to the privileges of the Geneva Convention. I don't have any quarrel at all with the authority of the president to make that determination, but as to the individual belligerents, I think we should have conducted Article 5 Tribunals under the Geneva Conventions. I think a fair reading of the Conventions, so that when you get a belligerent you should run the tribunal to determine status. Now, once we did that and determined that they fit in with the president's category, I think that if we had done that the Administration could have avoided a lot of the criticism heaped on it in the media and in the courts. It is my understanding that both Southern Command (SOUTHCOM) and Central Command (CENTCOM) requested permission to run Article 5 Tribunals and they were told they should not because the president had already made the necessary determination.

In November of 2001, November 13, 2001, the president issued his military order directing the Secretary of Defense to create Military Commissions. And shortly thereafter Jim Haynes, the Department of Defense (DoD) General Counsel, suggested to The Army Judge Advocate General, Tom Romig, that he convene a Tiger Team to draft the beginning of military commissions. They did that and I reviewed some of the work of that Tiger Team later and not only was it good work, but I found it useful in some of what we developed later as we drafted additional directives. But for reasons that were never explained Jim Haynes shut down the Tiger Team and decided to create military commissions in-house within the Office of the General Counsel.

In January of 2002, I got a call from the Air Force Judge Advocate General asking if I were selected to be legal advisor for military commissions, if I would be willing to serve. And after a brief conversation with my wife, I told him sure, I'd be willing to serve. You know, bottom line is anytime you have spent your adult life in uniform, and somebody says will you serve? From my point of, view there's only one answer.

In any event, my first interview in the Office of the DoD General Counsel was in April of 2002. And I heard nothing for the rest of the year and I assumed, quite frankly, that I had fallen off the selection list. So I pressed on with other plans and I received another phone call from DoD General Counsel's Office in July of 2003 requesting that I come in for another interview. Several days after that interview, I was informed that I was selected and asked to come to work the following Monday.

Now, the only reason I mentioned that is because one of the frequent questions that I would get from Jim Haynes when we were dealing with this process was: What's taking so long? I might have said the same thing to him. (Laughter.) But when I arrived I found very small but dedicated staff working on DoD instructions and directives to establish the judicial structure which would be Military Commissions. The chief prosecutor and the chief defense counsel had already been appointed. But after learning of the appointment Secretary Rumsfeld pointed out to Jim Haynes that he had not approved those appointments. So for the next year, the chief prosecutor and the chief defense counsel had the title "acting" in front of their name, "Acting" Chief Prosecutor, and "Acting" Chief Defense Counsel, until such time as Secretary Rumsfeld felt that the DoD General Counsel understood where he fit in the pecking order.

Most of the development of the directives that had been completed when I got there dealt with substantive crimes. The author of most of those was Marine Corps Lieutenant Colonel Bill Lietzau, who went on and later retired as a Colonel. Interestingly he is now the Deputy Assistant Secretary for Law of War and Detainee Affairs in the Pentagon; so what goes around comes around, occasionally. But the remainder of the directives including rules of evidence had a tremendous amount of work to be accomplished. And so the staff devoted a tremendous amount of time to drafting these things and Jim Haynes, our general counsel, was an incurable editor. I honestly think if somebody gave him the King James Version of the Bible, he would edit it. (Laughter.) So we spent a lot of time, late into the evening, working on those things that I think, quite frankly, could have been avoided. But in any event the first six months was largely lost, from my point of view, to productive work because of our negotiations with Lord Goldsmith. At the time, we had three Brits down there at Guantánamo and the president had told the prime minister that we would either make accommodations for what they wanted in terms of trial or Britain could have them back. And so we spent a lot of time in discussions both in Washington and London and I've already mentioned that Goldsmith thought that this was a law enforcement issue. I really thought we were making progress in our negotiations with him until shortly before the end of six months, Goldsmith sent a note to DoD General Counsel that went all the way back to his original position, which meant Article III trials or nothing. And as a result of the President's promise to the Prime Minister, the so-called Tipton Three were returned to the United Kingdom and were never tried.

I can't criticize the president's decision. He'd already made that promise to the Prime Minister, but I was extraordinarily disappointed because we had what I thought were pretty solid cases against all three of those folks. Another issue that arose early on, was the authority or lack thereof of defense counsel to address the media and make public statements. Larry De Rita, who was the DoD Assistant Secretary for Public Affairs, was of the opinion that defense counsel should be gagged. When I asked why, he said because we can. I pointed out to him that none of the military departments had any such rules, all of them permitted public statements by defense counsel. And after several weeks of silence, he finally said okay, over to you it's your decision. As a result, we wrote a directive authorizing those public statements. Now, as far as the content of those statements and compliance with the cannons of ethics that was the responsibility of the individual service the Judge Advocates General. But anybody who's watched the media over the years has seen much of the defense counsel when they talk about their cases. And as I mentioned when we are talking earlier, before our session here this morning, most of the canons of ethics really deal with extra judicial statements of prosecutors not of defense counsel.

One of the challenges that I found in dealing with Reservists, not with any of the judge advocate's general (JAGs) who were members of the active force, but civilian attorneys who had been called or volunteered to be recalled to do defense work, some of them had the view that they weren't officers of the court unless they were before the Court. And whenever I had somebody express that opinion, in my usual calm direct manner I disabused them of that idea, that once you take the oath as an attorney, you are an officer of the court.

And pretty much I was satisfied with the behavior of and the statements of counsel, with a few exceptions which I discussed with some of the TJAGs. But as a result of the decision to turn over to us the responsibility for media we created what would best be called a shadow DoD public affairs office. And we found that it was a whole lot easier to teach a lawyer public affairs than it was to teach a public affairs officer the law. And so Air Force Captain John Smith was appointed the first public affairs officer. He was Air Force JAG, was appointed the first public affairs officer in Office of Military Commissions. And if any of you have ever dealt with the media, they don't sleep. So John's work schedule was horrendous. He did an exceptional job, but for the time he was working there he did not get a whole lot of sleep because he was there answering the phone until the wee hours of the morning. And he

and all of the officers who have succeeded him in that position, I think, have served with great distinction and all the JAGs from all the services; I think I had pretty much every service covered. All of the Title 10 services, including the Coast Guard which they always reminded me, oh, yeah, we're a Title 10 service, too. But we had JAGs from all the services as well as a number of civilians and later on, attorneys from the Department of Justice (DoJ) were added to the team.

Under the system which was developed at the time and consistent with the president's military order, there had to be a reason to believe determination (RTB) personally made by the president before we could prosecute a case. So, using classified information, the Office of the Prosecutor would prepare a memo to the president giving him facts from which to make a reason to believe determination that this individual was subject to the jurisdiction of a military commission. Once they were prepared I signed those, they went through the Secretary to the White House.

Before we got to that stage, we had to go through the Interagency Coordination Process. And I always thought, you know, anybody who was of the opinion that the Bush administration marched together in lockstep had never tried to get anything through the Interagency Coordination Process. Because each agency had his own view, from my point of view it seemed, gee, the president has made the determination, he wants these people tried by military commission, let's get with the program. But it was a greater challenge than I ever thought getting these things through. And once we got a signed RTB, a reason to believe, back then the prosecutor would go ahead and start drafting charges consistent with those that had been laid out in the original directives. I think it is fair to say that we had pushed, in those early directives, some of the international law dealing with war crimes in terms of a common understanding. But since the international law is determined not only by treaties but by state practice, I think it was a reasonable move to include some offenses simply because of the change of events as time developed within that directive. And there also was, it seemed to me, considerable angst as to whether judge advocates were up to prosecuting these cases. As a result Jim Haynes asked that a moot court be conducted with what were called SAGES. These were volunteer consultants to the secretary of defense. We were told that the moot court had to be done in two days. Kind of a tough challenge when you've got cases that are going to take weeks and maybe months to prosecute.

In any event, we did conduct the moot court before the SAGES. The first day was the actual moot court format just like some of you have gone through here. But the second day because of the time compression was more a briefing on what the prosecutors intended to do in terms of introduction of evidence, what they had, and things like that. As a result of that nobody criticized the JAGs, but we did get some suggestions as to trial strategy and things like that. From my point of view, I don't think we got any information from them that we hadn't already considered. But these people kept expressing any concerns about the talent that we had available to prosecute the cases.

As we continued to draft the rules, we spent a considerable amount of time looking at the rules of evidence for the different international tribunals that existed; ICTY, ICTR, and the International Criminal Court. And it always struck me as strange that some the greatest supporters of the international tribunals criticized our rules of evidence, because we tried to, as best we could, pattern them after existing international standards.

The hearsay was—the hearsay rule was the biggest target of criticism. And I have a somewhat cynical view of the hearsay rule. You know, there are in most jurisdictions, seventeen exceptions to the hearsay rule. So it seemed like we've already made the deal determination that in many circumstances hearsay is reliable evidence. And then the other is that there is no hearsay rule once you get outside of Anglo-Saxon jurisprudence. It's not recognized in Asia. The civil law in Europe even makes exceptions for it and of course all of the existing international tribunals permitted hearsay. And so it seemed that the crux of the argument was how far were you going to expand or contract the rule and how reliable was the evidence going to be? And then because we made adjustments to the rules of evidence as we went along, defense counsel said, oh, you know, look at this system, their changing the rules on us. Well, every time we changed the rules of evidence, it was to the benefit of the accused. And I remember addressing the American Society of International Law and I got a question about, well, you're willy-nilly changing the rules. I said we've changed the rules seven times, each time for the benefit of the accused. I said the International Criminal Tribunal for the former Yugoslavia changed their rules seventy-six times before they got rolling and quite frankly I never heard anybody complaining about that. So that fell in the category, from my point of view, of sit-down, shut up. (Laughter.)

Another issue that I thought was problematic in the Bush administration was their choice of words 'enemy combatant'. The problem you face is an enemy combatant can be either lawful or unlawful. So what are you talking about? When I testified before Congress, which I did a number of times; I had ruts in the road between my office and Capitol Hill, I always used the term 'unprivileged belligerent' to discuss the people at Guantanamo we wanted to try, because that is the language of the Geneva Convention. You have to meet certain requirements to have the privileges. So if you don't meet those requirements what are you? You're an unprivileged belligerent. And it just made a whole lot more sense to me.

I talked to Jack Goldsmith about that when he was over in the office of legal counsel. His comment was, "oh, Tom, I agree with you 100 percent, but we arrived too late." But that term has now been encompassed in the legislation that addresses military commissions. One of the other issues when we talk about unprivileged belligerents is that the media attention toward Guantánamo and the detainees down there. Defense counsel will say well, you know, my client's being held down there incommunicado. Well, incommunicado means without communication. During my four year tenure as the legal advisor, there were 90,000 pieces of mail in and out of there between detainees and their homeland. I scarcely call that incommunicado.

And the other thing was the International Committee of the Red Cross had access to detainees from two weeks after we opened the camp. As a matter fact, for the first two years, they maintained a permanent presence down there twenty-four hours a day and they were permitted to access to any detainee they chose to speak with. If they had complaint they were given immediate access to the camp commander. Sometimes they were well founded complaints, sometimes they—you know, we took note of the complaint and told them you will have to do some adjustments to your expectations. The ICRC has always had a presence there. After two years they started just dropping in. They quit having people stationed down there permanently; and just made periodic no notice visits. Also as far as the food is concerned down there, the detainees were offered and still are offered a diet which amounts to 4,000 calories a day. If they ate everything that was offered to them, they would all be 400 pounders by now. And it was good food. Every time I went down there, I always had at least one meal that was being served to them that day, whether it be breakfast, lunch, or dinner, and it was really good food.

Now, not everybody thought it was really good food. David Hicks, who is the Australian detainee, who was later tried and sent back to Australia. When his defense counsel went down there, the first question the defense counsel said is, is there anything we can do for you? And he said, yes, I'm tired of culturally appropriate food, could I have a hamburger? And so they went to the local Burger King on the camp there and got him a hamburger; but the food there is really good. And during Ramadan the galley shifts its schedule and so they serve them breakfast before five in the morning and serve them their evening meal after sundown. So they really do—the cooks down there really do a fantastic job of accommodating the needs of the detainees. I guess unrelated to military commissions, but the treatment of detainees, they are medically monitored. All of the detainees are medically monitored and if they lose too much weight because they are refusing to eat, then they are force-fed. That is done in the clinic by doctors.

There's been a great cue and cry occasionally about that, but I've observed it. One of the camp commanders had it done to him just to make sure it wasn't painful. If you've ever had your stomach pumped, it's not painful. The tube that goes in there is very narrow. The doctors doing everything they, can see to it that they don't create any health hazards. Now, most of the fellows who from time to time, have gone on food strike understand they are going to be fed by tube. They go in there sit down, their wrists or restrained as they can't pull the tube out but other than that they sit there have their meal and then return to their facility. (Laughter.) But they feel like they have to keep faith with the other detainees, so they continue to go through that process. Now, there were as, you know, several suicides down there. We had three at one time. Admiral Harris, the Navy commander, took a lot of criticism for saying, hey, its asymmetrical warfare. And I think his assessment was probably pretty good. Oh, no, how could somebody commit suicide? They hung themselves. Would you rather they blew themselves up? You know, they are doing that all over the globe. You know, so when somebody is a zealot and they want to sacrifice themselves they're going to do it one way or another, if they think it is going to advance their cause.

As we continued the drafting of the directives for military commissions, we also had administration lawyers who failed to appreciate the profound changes which had occurred in the military since World War II. Often compelling military advice was waved off. Benjamin Wittes commented in the Journal of Policy Review, "When the

history of this period is written I feel confident that Bush will be deemed exceedingly ill served by his top legal advisors." I tell you that jumped off of the page and slapped me in the face when I read it. But I am satisfied that that is probably a good assessment. Some of the senior DOJ attorneys we had to work with knew so little about military law. They thought military judges were bound by the presidential determination regarding jurisdiction over individual defendants and lacked the authority to make independent jurisdictional findings. They found out to the contrary, the hard way, when our judges had started making those findings. A statement by an attorney in the DOJ Office of Legal Counsel, "US troops have everything given to them, they are told where to eat, where to go, everything is given to them in one location, they suckle at the womb of the military," gives you some idea that the degree of sophistication we occasionally found in dealing with our civilian counterparts. Some of you know Ron White, he's a retired Army judge advocate who worked for me as a civilian. When he left the office I gave him that quote on a plaque, because he was at the negotiating session where that comment was made. That simply took my breath away. And I think you could understand it, but it gives you some idea of what we were up against. Another time I was called over for lunch with Alberto Gonzalez, when he was then the Attorney General. The issue of public release of charges as soon as they were signed rather than waiting until they were referred was discussed. This was puzzling to the attorney general and some of his senior staff. And they said what do you do if the charges are changed or aren't referred? I said, well, that's what we say publicly, they were altered, amended, or they weren't referred. And so anyway we didn't change our practice although I viewed having lunch with the Attorney General as a not-so-subtle hint that we ought to consider changing it, but we didn't. So, again, the unsophisticated view of military jurisprudence created some problems.

Another issue and I've talked about this publicly ever since I left the job, was the Bush administration, from my point of view, failed in their public diplomacy. As a result the public discussion was driven by the defense bar, nongovernmental organizations and the media. I've made several trips to Europe to talk about our position. I've published several law reviews, courtesy of my good staff and I spoken all over the United States and Asia once. But I have to tell you anytime a brigadier general is your principal spokesman on a matter of national importance, you are in deep kimchi. You have got to have somebody very senior in today's climate who's out there explaining what you are doing and why you are doing it and you better be out there at least every month because we now

live in a sound bite society. In dealing with matters of international law, military operations, and things like that, these topics are very sophisticated and sometimes arcane. And so you've got to keep reminding people what it is you're doing, why you're doing it. Otherwise you simply lose the debate. And I think that that cost the administration a great deal.

I also became convinced that federal judges read newspapers. Now, I know there is at least one on the Supreme Court who says he doesn't pay attention to newspapers, but at the federal district court level and at the circuit court level, they read newspapers. And you can see that reflected in their opinions that considered some of the litigation that developed later on. So that, from my point of view, is a foot-stomper as to why public diplomacy and explaining what you're doing and why you're doing it is so important. So that you can have a reasonable debate about public policy.

As we struggled to do directives for military commissions habeas counsel was just as busy. In 2004, in what I consider to be a major shift in the law, the Supreme Court in the *Rasul* case held that it was not necessary for the federal district court to have jurisdiction over the prisoner if they had jurisdiction over the custodian.[3] At the same time, the court pointed out that the habeas process was a statutory right. I took great note of that. In the *Hamdi* case, the Supreme Court held that a detainee with a claim of citizenship has a right to a hearing to contest the propriety of detention.[4] And in response to that, the DoD created the Combatant Status Review Tribunals, the CSRT, proceedings which are like Article V Tribunals on steroids. And they are quite detailed and would have been unnecessary if we had done Article V Tribunals in the first place. In addition to that, the DoD created the Administrative Review Boards which reviewed the file of every detainee, every year to determine whether or not they were eligible for release. The inquiry was: Is there a continuing intelligence value in detaining the individual? Are they a candidate for trial? Are they a continuing threat to the United States? If the answer to those was no, of course, they were into the shoot for the State Department to work out a return to their nation. I reviewed all of those cases; they came through my office for coordination, mainly to see if we had any exception on it whether or not they were candidate for prosecution. And the decider on those was the deputy secretary of

[3] Rasul v. Bush, 542 U.S. 466 (2004).
[4] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

defense. Gordon England was the secretary of defense the majority of time that I was on active duty for military commissions. And I never ever saw him overrule a decision to release, but I did see him—every time he disagreed with a recommendation of the Board, it was for release rather than detention. But the fact that it was so challenging for the State Department to find countries that would accept these people when they became a candidate for release, I think, demonstrates that we didn't have a camp at Guantánamo full of innocence; because the State Department has worked very long and very hard to find places. And, you know, we had at one time almost 600 people, I mean 800 people at one Guantánamo. And that's gone down to just around 200. So the system, I think, has worked very well. And it's the only time in history that a nation has set up that kind of review for belligerents who were being held off of the battlefield. Now, it gets some attention because some of those folks had returned to the battle. How do we know that? Because we either see them or we kill them. And some of them have shown up on TV from time to time. But I think that the rate of recidivism varies depending on the country that they are from, from ten percent to twenty percent. There has been an investigation going on in the House for over a year on how to deal with this. They called me in to interview me and they said, how do we guarantee there will be no recidivism? I said, that's easy, don't release them. (Laughter.)

But really there are sometimes when you just have to take a calculated risk if you want to do something. Now, during the time we were enjoying from trying cases General Altenburg asked the staff to create a new *Manual for Military Commissions*. And it is interesting, I think it was a stroke of leadership genius because it kept the staff busy at a time when otherwise the morale might have suffered. And when we were done with it, it looked very similar to what exists today. The political appointees above us viewed it as toxic and kept it from publication. It was toxic, I guess, because the vice president's office would have disagreed with it; that was their definition of toxic. In 2006, in the *Hamdan* case, and what I viewed as a clear misreading of the legislative history of the Uniform Code Military Justice, the Supreme Court held that existing military commissions were inconsistent with the grant of authority under Article's 21 and 36 of the Code.[5] And the court also held, in that case, that Common Article III, dealing with conflicts not of an international character applied to this conflict even though the travaux préparatiore (preparatory documents or negotiating record) made

[5] Hamdan v Rumsfeld, 548 U.S. 557 (2006).

it clear that the drafters of the article obviously intended it to apply only to civil wars. Justice Kennedy made the comment during oral argument that still gives me headache: "We have people from 23 nations with whom we are not at war involved here." What's your point? It is still an international armed conflict, from my point of view but, in any event, that's the law and we adjusted to that.

In 2006, also, Senator McCain introduced the Detainee Treatment Act and it and was passed.[6] I had lengthy conversations with Senator McCain's staff on that and they said, what's wrong with Common Article III? And I said its nowhere defined. I said, we're dealing with eighteen-, nineteen-year-old soldiers, there's no bright line, you've got to define it. And so his response to that, and I paraphrase here, was to say, okay, if the police can do it, then you can do it; if they can't do it, neither can you. And I thought boy, that's great. Anybody who spent any time reading constitutional law and criminal law in the United States realizes the police can do a lot. And so, but the point is, in doing that, you can develop bright minds just as the police do - therefore, you can train to it.

Common Article III, standing alone, I thought was too amorphous for military training purposes. Shortly after the *Hamdan* opinion released, and this has never received much publicity, we offered an amendment to the code which we called Article 135(a). Copies were provided to each of the TJAGs and it would have provided a structure for military commissions for now and eternity. What we've ended up with is a structure that addresses what we have at Guantánamo, so it is not an enduring thing. If we had gotten this Article 135(a) through, it would have been a continuing and viable and useful modification to the Code. But again, the only time it came up before Congress was General Rives, then the Judge Advocate General of the Air Force, mentioned the proposed Article 135(a) in his testimony before the Senate Armed Services Committee. But again, just like the manual that we had drafted, Article 135(a) suffered the same quiet death.

Among other things, we clarified, you know, how to handle classified proceedings. We also provided that the accused could not be excluded from any proceeding even though it was closed to the public. A year later in the *Boumediene* case, in what I view as the Supreme Court's version of King's X, they held that no habeas is a constitutional

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[6] Detainee Treatment Act of 2005, 42 U.S.C. ch. 21D (2006), *available at* http://uscode.house.gov/download/pls/42C21D.txt.

process not a statutory process.[7] So, again, that changed the rules. Now, all of that leaves us with the question: Is there any viability left to the *Eisentrager* case?[8] I've had discussions with a number of professors who maintained the Supreme Court didn't overrule the *Eisentrager* case. But in that case the court held that federal courts do not have jurisdiction in cases that arise in territories in which the United States sovereignty does not extend. In the *Hamdan* case the Supreme Court said that our lease of Guantánamo Naval Station was enough to grant jurisdiction. And they said that was different than the *Eisentrager* case. In *Eisentrager* case, the petitioners were being held in a confinement facility in occupied Germany. You never exercise more jurisdiction over another nation's territory then you do when you occupy it because you are the government. So I'll leave it to you, has *Eisentrager* been overturned? From my point of view, you know, it's no longer a viable precedent for anything the president or the military would want to do.

Another problem that plagued us was the release of classified information and how to use it in prosecutions. The intelligence community is familiar with collecting intelligence and sharing it for operational purposes, at least that's what we think they're collecting in for. General Schwarzkopf took some exception to that, but that is what they are supposed to be doing but they are not accustomed to collecting intelligence and sharing it with lawyers for purposes of prosecution.

We had a great deal of problems and a matter of fact it reached the point at one time when Secretary Rumsfeld classified on all photographs of detainees. All photographs. Didn't matter what the source was. We had open source photographs of detainees walking along with Osama bin Laden and things like that. They were now classified. Okay. Now, how do we go about getting them released? Since then, I found that there is a place to resolve that conflict is, of all places, in the archives; Office of the U.S. Archives. But in my discussions with the folks who have followed me that has been a continuing challenge. Now, I'm not concerned too much with the high-value of detainees because the CIA has been geared up and ready to participate in the prosecution of those cases. But in the other cases I found the Defense Intelligence Agency fairly cooperative, but the folks inside the building under the Under Secretary for Intelligence were less cooperative. Matter of fact, one time I was bellyaching to the General Counsel about this and he said—and I

[7] Boumediene v. Bush, 553 U.S. 723 (2004).
[8] Johnson v. Eisentrager, 339 U.S. 763 (1950).

was doing it in a fairly animated fashion—and he said, "Well, I want you to write me a memo, just say it just like that." So I did. Well, his idea of resolving this was, you know, putting a note in the upper right-hand corner, Steve can you help with this? Steve Cambone was the under secretary of defense for intelligence at the time and the answer came back: "Next time your Brigadier General should be a little more politic in his language." No intelligence information there. But that was a constant battle for the office and it is only when the secretary or deputy secretary got involved that I found that we were successful in getting what we needed. I can only say that I hope that the problem is no longer being held.

That leaves us with where are we now? It's interesting when I was dealing with the transition team before the current administration took office, I got the reaction from some of the folks who were looking at military commissions and the issues that surrounded them was, boy, this is really tough. And I think a lot of them had listened to and drank the Kool-Aid of the non-governmental organizations before they actually took office. And it is obvious that the views of national security of a candidate and the views of one with the ultimate responsibility for making national security decisions are quite different.

And I would commend you a book that has been written by Jack Goldsmith, a very interesting book called *Power and Constraint*, which discusses what has brought this administration to many of the same conclusions as its predecessor.[9] And there are other books out there that I commend to you one is Barton Gellman's book, *Angler*, which is about the Cheney period of vice presidency.[10] You read that, you'll understand why my job was a whole lot tougher than I ever imagined it would be. And then there is another one, shorter and at least from a lawyer's point of view an easy read, Charlie Savage wrote a book on *Takeover: The Return of the Imperial Presidency*.[11] He goes back to the tenor of Abraham Lincoln to the present time about the unitary executive, which a lot of critics of the Bush administration said that was over reach, but there are good examples of that throughout our history. Charlie and I had lunch together after that book was released, and I said, "Don't you

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[9] JACK GOLDSMITH, POWER AND CONSTRAINT, JACK GOLDSMITH (W.W. Norton & Co. 2012).
[10] BARTON GELLMAN, ANGLER (Penguin Press 2008).
[11] CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY (Little, Brown & Co. 2007).

think that this will change with the change of administrations?" And he said, "Oh, no." He said every administration builds and does not discard the precedence set by prior administrations. And I think we're seeing that in spades right before us now.

So anyway, those are books that I would commend to you, but we've now arrived at the point where our appellate processes provide for Article III, judicial review. Our rules of evidence are better than the international tribunals and have been significantly tightened. We have a state-of-the-art world class courtroom and our military judges have demonstrated to the American people they are every bit as capable as federal district court judges in dealing with the complex issues that face them. And as far as military commissions are concerned, there is absolutely nothing wrong with military commissions now that public education and transparency cannot address.

And with that, thank you, and I'm open to any of your questions.