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War, Terror, and the Federal Courts, Ten Years After 9/11

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War, Terror, and the Federal Courts, Ten Years After 9/11

WAR, TERROR, AND THE FEDERAL COURTS, TEN YEARS AFTER 9/11

CONFERENCE*

Martin S. Lederman: [Note: Introduction and administrative matters have been REDACTED.] This is the AALS section of Federal Courts of the AALS, 2012 annual meeting. We're very, very pleased to have federal Circuit Judge Brett Kavanaugh from the D.C. Circuit joining us for this panel. We thought it would be appropriate, since he is on a virtually weekly basis rewriting *Hart and Wechsler*,¹ that we should probably have him come by and say what he can about these issues. He's obviously under certain constraints, as are Sarah [Cleveland] and I because of our involvement in the Executive Branch, but he will be able to speak at least broadly to some of the topics that we'll be discussing, and some of the fascinating federal courts issues that have come across his desk in the last three or four years. So it's great to have you with us, Judge Kavanaugh.

The Honorable Brett M. Kavanaugh: Thank you.

Marty Lederman: And then going in order, to my right are Sarah Cleveland of Columbia, Curt Bradley of Duke, Judith Resnik of Yale, and Steve Vladeck of the Washington College of Law at American University. There are three major topics that we're hoping we'll have time to discuss here; and I'll also mention three minor things that I don't know if we'll have time to get to before the Q&A.

Number one, this panel concerns the intersection of, or the interaction between, federal courts doctrine and terrorism—that is post-9/11 litigation of all sorts, such as civil causes of action, various criminal and military commissions cases, and habeas cases. What is

* This event, held on January 7, 2012, was a part of the Association of American Law Schools' Section on Federal Courts program at the 2012 AALS Annual Meeting in Washington, D.C. This transcript has been edited.

1. See generally RICHARD H. FALLON, JR., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009).

the interaction? How is federal courts doctrine affecting how the political branches and courts are dealing with counterterrorism? And on the other hand, what effects are such terrorism-related issues having on the content of federal courts doctrines, if any? Which way is the doctrine pushing the substantive results? . . . and vice versa.

Number two: Numerous very important, contested, hotly debated topics have arisen in the last ten years, many of them in the Bush Administration, involving for example interrogation techniques, the scope of detention authority, habeas review, military commissions, targeted killings, and the use of force more broadly. On some of these questions, the federal courts—and the Supreme Court in particular—have had quite a lot to say; and on others, not so much, at least in part because of several different federal courts doctrines that prevent the courts from speaking too much about those. You're all familiar with standing limits, political questions, state secrets, etc. We're going to focus particularly on a couple of them, which are immunity doctrines and the weakening of the *Bivens*² and state court sorts of causes of action.

We will also discuss the fact that there are many people who think the federal courts have become too involved at supervising and resolving substantive questions involving the political branches, including some of Judge Kavanaugh's colleagues, who have been particularly vocal about that, engaging in what appears to be a form of resistance to the Supreme Court's *Boumediene*³ decision. By contrast, many other people think the courts have not been nearly involved enough at resolving some of the unresolved questions about the scope of interrogation and detention and military commissions and the like, that might be lingering from the last administration, or occurring now in the new administration, such as with respect to use of force. So that's the second broad topic—whether the federal courts have been too timid or too aggressive in this area.

The third of our principal topics is the increasingly important role of international law within federal court adjudication, and how the federal courts are dealing with international law in several different respects. The Obama Administration has urged the courts, for instance, to construe the 2001 Authorization for Use of Military Force⁴ both as constrained by and as informed by the laws of war. When I was in OLC between 1994 and 2002, I probably did not spend

2. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

3. *Boumediene v. Bush*, 553 U.S. 723 (2008).

4. Pub. L. No. 107-40, 115 Stat. 224 (2001).

any time at all on the laws of war. But in the twenty or so months that I spent in the Obama Administration, it seems as if Sarah and I had approximately forty-two conversations a day about the laws of war.

Sarah H. Cleveland: We didn't spend any time not on the laws of war.

Marty Lederman: Right. United States Government actors, both in the Judicial Branch and otherwise, are deeply immersed in international law questions, both as a matter of construing federal, constitutional and statutory law, and trying to figure out what force international law has of its own accord. We're going to talk about that in connection with at least two issues. One is the degree to which the courts should use international law as a basis of construing federal, statutory and constitutional authorities, and secondly, the question now arising in the *Hamdan*⁵ case now at the D.C. Circuit, and I think it's public that Judge Kavanaugh has unfortunately for us, been assigned to the panel, so he will not be able to discuss it. But the question there is the extent to which international law authorizes the sorts of material support charges that are being brought in military commissions cases.

The three more minor topics that I hope we'll touch upon—but if we don't, please bring them up in the Qs and As—are: First, the emergence in several different contexts—such as in habeas cases, in the construction of the laws of war, and in immunity cases—of what we might refer to as federal common law. Second, the difficulty of adjudication where much of the evidence is necessarily classified and has to be redacted—that is to say, nonpublic adjudication by the federal courts. It's not really that common, but Judith has with her a great prop, one of the most important court of appeals decisions in recent years related to terrorism—*Latif*.⁶ This is what it looks like. I don't know if you can all see.

Judith Resnik: [The slip opinion was held up, to show the many blackouts in the text of the decision.] There's a lot of black.

Marty Lederman: We know from the tone of Judge Brown's and Tatel's competing opinions that there's a lot going on in this case . . . but we don't know what it is. And it's now on its way to the Supreme Court. What's the Supreme Court supposed to do with this, where not even the legal question can be publicly clarified?

The third less central issue is a very discrete but important question that might arise in *Hamdan*, if and when the government argues that

5. *Hamdan v. United States*, No. 11-1257 (D.C. Cir. argued May 3, 2012).

6. *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3510 (U.S. Jan. 12, 2012) (No. 11-1027).

whether or not the material support charges are international law offenses, they are a common law United States *domestic* offense. Are there Article III limits to the sorts of criminal prosecutions that Congress can take out of Article III courts and put in Article I courts? I don't know if we'll get to those three things but I hope we will.

So I'm going to start by posing a question for Sarah in the first instance: Sarah, to what extent are these federal courts doctrines, in particular *Bivens* and official immunity doctrines, preventing the federal courts from resolving some of the most important *substantive* questions, such as permissible means of interrogation, the extent to which persons apprehended in the United States can be militarily detained, and the like? President Obama has rejected some of these as a matter of policy, but the result of those decisions is that we won't resolve whether they were legal or not in the last administration and in the next administration. Many thought we would finally get some resolution through damages actions, such as *Bivens* actions and state court tort actions against contractors. How have the federal courts been doing? Should they be doing more or less to resolve these substantive questions, and how do federal courts doctrines affect whether such questions might be resolved?

Sarah Cleveland: Okay great. So first, thank you to Marty for including me on this. I think one of the most important developments post-9/11 was the Supreme Court's reaffirmation of the independent role of the Federal Judiciary in reviewing legal questions in the context of an ongoing conflict, you know *Hamdi*⁷ says the Supreme Court—you know, war is not a blank check for the Executive and the Supreme Court has a role. The Supreme Court itself has the two most important and in fact only decisions that recognize the application of binding law on Guantanamo, and that is *Boumediene* recognizing the application of the Suspension Clause and *Hamdan*⁸ recognizing the application of Common Article 3. Those two decisions, I think have been extraordinarily important in helping the U.S. Government to bring its detention policies within a rule of law framework that is internationally recognized and accepted.

And so I think the courts, at least some have not adequately appreciated the really positive role that judicial review can play in this context. It can play a very important role in disciplining internal government conversations about policies and legal principles. It helps legitimate governmental action externally and it allows, in some

7. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

8. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

cases, the political practice to accomplish what may be politically difficult for them to accomplish on their own.

So if you think back to the civil rights movement—I grew up in Alabama—this is not a digression. Southern judges who actually wanted to comply with desegregation orders were much better positioned politically when they had a court order requiring them to do it, than if they had it to do on their own. So courts can play all of these positive things and they have, to some extent, post-9/11, that I do think that we are seeing in some cases, not all, a combination of the view that courts are sort of across the board, institutionally ill-equipped to deal with these questions and therefore, necessarily need to defer to political branches' decisions in nearly all circumstances. And on the other hand, reaching out to the kind of threshold doctrines that Marty was just talking about; political question, standing, mootness, *Bivens*, qualified immunity, Westfall Act⁹ substitution, battlefield preemption, all kinds of doctrines.

And the question as to how much of an impact 9/11 has had on these doctrines, I think can be hard to answer because it depends what your baseline view is of where the doctrine was before. I mean if you think *Bivens* was already dead, then the fact that courts haven't been very willing to adjudicate *Bivens* claims in these contexts is not surprising. If you think as the Seventh Circuit did in the *Vance*¹⁰ case, which involves two U.S. citizens who were detained in Iraq during the conflict there, that the kind of conduct that they allege they were subjected to would have obviously given rise to a *Bivens* action had they been subjected to it in the United States. Then at least some of the *Bivens* decisions that have come out of the national security cases are carving out new spaces for non-application of *Bivens* to similar conduct abroad.

I'm of the view that the courts in general have been quite reluctant to apply domestic law rules, to recognize *Bivens* damages, actions, in their application to substantive conduct that would be considered a constitutional violation that occurred in the United States. And they're reluctant for a number of reasons. They generally articulate this in terms of *Bivens* special factors. But I think in reality, in most of the cases, at least in the cases involving *Bivens* claims by aliens who are detained abroad, including in Iraq and Afghanistan, that what the court is really doing is sort of using the finding that there's no *Bivens* claim as pretext for a decision that either qualified immunity applies,

9. 28 U.S.C. § 2679 (2006).

10. *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *reh'g en banc granted*, No. 10-1687, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011).

because the rights were not clearly established at the time, or a decision on the merits, that the individuals actually had no substantive constitutional rights. Frankly, I think it would be preferable if the courts would actually engage with the appropriate applicable doctrine, rather than sort of mashing it all into the *Bivens* context, because you can end up feeling that *Bivens* is just sort of expanding so it will never apply in a national security context. I just spoke to *Bivens* but that's enough.

Marty Lederman: I'm going to ask Steve, in a minute, about the *Bivens* cases and sort of the flipside, which is the *Boyle*¹¹ cases in which federal common law is being interjected to prevent state law claims. But Judith, taking off from where Sarah started, do you think that 9/11 and the terrorism issues that have arisen after it have affected these federal courts doctrines one way or the other? Do they look differently today than they would have? I'll give you two hypos. One, if we had never been attacked on 9/11, would all these federal court doctrines look the way they do now? Two: if the Bush Administration, and the United States generally, had chosen to go the more European route and used mostly law enforcement and covert action authorities, rather than treating this as an armed conflict, would the doctrines look different from the way they do today?

Judith Resnik: Let me start by underscoring that we're all in *medias res*, in the middle of the story that is unfolding. Moreover, we who sit on this panel are situated and part of that story; we are all participant observers—whether as judges, litigators, Executive branch members, advisors, or commentators. When we talk about the “law” and make claims about how we understand what “it” is, our discussions are embedded in what we hope that the “law” will be. This discussion is one of many that aims to shape the meaning of doctrines that could move in different directions. We are trying to affect how others understand the possible parameters and contours. Further, and of course, in this area as in others, we need to be mindful of the risk of reifying the federal courts doctrines, as if some set of pillars were fixed. An easy example is standing, which over the course of fifty years has changed a good deal.

To turn then to the next layer, intrinsic in the question posed is another—whether we can differentiate correlation and causation? Can we identify what effect 9/11 has had, as compared to what would otherwise have happened in the various aspects of legal doctrines that

11. *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

you have raised? Absent 9/11, there could have been a different presidency, in which case there would have likely have been a different membership within in the federal judiciary and on the Supreme Court.

Assuming, in contrast, the same federal judiciary that we have now, I will argue that a lot of the law would likewise look the same. Consider some of the rulings the Court has made, and you have mentioned the *Boyle* decision. Justice Scalia, in *Boyle*, found—on behalf of a five-person majority—a common law immunity for government contractors, even though Congress had considered but not enacted such a rule by statute. Informally, some report that *Boyle* is a decision that the Justice regrets, because he is usually not identified as a fan of court development and expansion of federal common law. Yet *Boyle* is not so different from recent decisions, such as *Connick v. Thompson*¹² (also 5–4), which is an opinion that came down this last Term, and which provides a remarkable degree of immunity for prosecutors. In that decision, the prosecutor in Louisiana had committed outrageous *Brady*¹³ violations resulting in the long-term incarceration of an innocent person, John Thompson, wrongly sentenced to death; Thompson won a jury verdict ordering the payment of hundreds of thousands of dollars in damages. In my view, it didn't take 9/11 for that case to have been decided; given *Boyle* and the composition of the Court, *Connick* would have come out the same way.

Moreover, those two decisions have something in common with other court-based lawmaking of the recent past. Take a very different context: the question of mandatory arbitration and waiver of rights to class actions. In the *AT&T v. Concepcion*¹⁴ case, the five-Justice majority opinion, authored by Justice Scalia, extrapolated from the text and the context of the Federal Arbitration Act¹⁵ (FAA) of 1925, which, through judicial elaboration over the last three decades, has obtained its current enormous aegis. The Court held the California law, finding a boilerplate provision that precludes group-based arbitrations (in this instance consumer class actions for failure of the wireless service to properly disclose information on price) to be unconscionable, was preempted, and the Court ruled that the 1925 FAA required bilateral arbitrations, even when obligations to arbitrate were not the product of bilaterally negotiated contracts.

12. 131 S. Ct. 1350 (2011).

13. *Brady v. Maryland*, 373 U.S. 83 (1963).

14. 131 S. Ct. 1740 (2011).

15. 9 U.S.C. § 2 (2006).

Returning to the focus on detention and 9/11, my answer is that habeas corpus relief for post-conviction relief was going in a trajectory that has only been accentuated by 9/11, but that path was neither invented because of nor derivative of 9/11. Thus, many Supreme Court judgments post-9/11 are not, in my view, “9/11 effects” (again holding aside the question of whether the composition of the judiciary would have been different).

More generally, I am leery of making the doctrine emerging from 9/11 appear to be exotic. Rather, what those rulings help us to see is what is ongoing elsewhere in the federal courts (see the limitations on *Bivens*).

Turn to the question of the closing-off of constitutionally required public access to proceedings for detainees by means of the use of “commissions” instead of courts, which are obligatorily “open.” As I sit looking out at the audience, I see Marin Levy, who recently published an article in the *Duke Law Review*¹⁶ that documents appellate court practices; in five circuit courts, a vast number of appellate judgments are made on the papers. As I recall her numbers, something like eighty percent of the cases are decided by virtue of reviews by staff attorneys and without oral argument. Should that be called “appeal”? And what happened to “open courts”? The point is to understand that Guantanamo is on a continuum, and it is but one of many instances in which commitments to open court proceedings in the federal adjudicatory arena have been called into question.

Turn next to what I call “democratic” versus “despotic” detention and to the decision mentioned at the outset—*Latif*. That judgment is, for me, an example of despotic detention in the sense that the government—the majority in the D.C. Circuit—presumed the correctness of the evidence that its sibling branch of government, that is the Executive branch, presented, largely in camera. The legal question in part is about whether the documentation (produced in the field, abroad, and under challenging conditions) constitutes a “regularly-created” government record, making it readily relied on as such and available to courts, but also whether the material contained in that documentation should garner presumptions of accuracy. As I read the majority opinion (with its many blackouts), it seems to build on its decision that the documentation suffices as a government record to turn that authority into a presumption that the evidence

16. Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011).

contained therein is correct and sufficient for detention. It's sort of slippery when reading the decision (again in part because of the blackouts) but in the end, it appears that the detainee has to show, through independent, clear, and convincing evidence, that he should not be detained. The shift substantially enhances the government authority to contain and detain individuals.

Moreover, there is an important issue in *Latif* about the allocation of authority among trial and appellate courts. The district judge had found that the government had not met its burden to continue detention, but the majority (over Judge Tatel's eloquent dissent) took it upon itself to decide the evidentiary question again. What makes the result a despotic regime is the sense that the detaining authority is presumed to be authorized to detain, yet gains that authority based on its claims about an individual but in the absence of a trial and conviction.

Distress about this form of authority is longstanding. One can find it in Cesare Beccaria,¹⁷ who was an eighteenth-century theorist and a famous criminologist, who discussed the despotic methods of holding people without having to prove guilt. The great French, American and other revolutions exemplify a commitment to an alternative—to what participants thought was a different kind of authority of government and one that would, I argue, produce “democratic detention.”

What is democratic detention? Coming to U.S. case law of the mid-twentieth century, judges contrasted the democratic practices of this country with the despotic authoritarianism of totalitarianism, and that contrast became a leit motif in case law addressing the Fourth, Fifth, and Sixth amendments. U.S. constitutional guarantees were held up in opposition to totalitarian regimes. The relevant case law comes not only from federal but also from state courts. The concept, developed in the twentieth century, was that *all* individuals were dignified and equal persons before the law.

Democratic detention doesn't presume the legitimacy of government actors' decisions to confine individuals for long terms, nor does it authorize the use of coercive interrogations. Today, in contrast, we are seeing a struggle, and some licensing of government authority that was once understood as falling on the “despotic” side. And again, while the conflict about whether to use the “criminal law,” with its democratic protections, or special procedures for 9/11 cases

17. See generally CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Hackett Publ'g Co. 1986) (1764).

is the current prominent site of this debate, the debate and the issues of linedrawing are happening in other contexts as well.

Another factor is the relevance of the identity of the detainee, and whether treatment turns on a citizen/non-citizen distinction. The National Defense Authorization Act for Fiscal Year 2012¹⁸ (NDAA) is both a product of and has sparked more discussion about this issue (listservs are buzzing). The text under section 1021(e) provides that “[n]othing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” What has Congress done or not done? I do not read this text to inscribe the proposition that citizens are treated differently from non-citizens, for purposes of detention. But the text does not prohibit it either. What courts will do on this topic is still evolving, as the decisions related to Bagram make plain.

What is now being contested, and vividly so in the context of 9/11, is also under attack in other settings, including those dealing with migrants, sexual offenders, and prisoners (where a few cases even assert that a violation of the Eighth Amendment was “de minimis”). In short, the concept that all persons are holders of dignity rights is not only put into tension in 9/11, which is not *sui generis*. Further, if one thinks that it is important to have the independence of judges, as embodied in Article III or through other structural protections, that view is relevant in immigration as well as in 9/11.

Marty Lederman: Steve, picking up from those remarks, is it possible that either 9/11 itself, or particularly the policy choices of the Bush and Obama Administrations, will actually push the federal courts to have a more active role than anyone would have conceived the federal courts having over the political branches’ conduct of war or intelligence or national security? To the extent the political branches are perceived to have been too aggressive, will the courts push back, as some say they did in *Rasul*¹⁹ and *Boumediene*? Or do the *Bivens* cases and the *Boyle* cases suggest otherwise? The courts have been very reluctant to recognize *Bivens* actions and very quick to cut off state court actions under the common law, at least as applied to alien plaintiffs. But is it possible the courts might think differently about cases brought by U.S. citizens, thereby presaging a new, more

18. Pub. L. No. 112-81, 125 Stat. 1298 (2011).

19. *Rasul v. Bush*, 542 U.S. 466 (2004).

aggressive or more activist role for the courts in policing what the political branches are doing?

Stephen I. Vladeck: Some of the lower court decisions have indeed suggested that *Bivens* relief might be available in these cases; others have come out the other way. There's a remarkable passage right toward the end of Justice Kennedy's majority opinion in *Boumediene*, which says it's a happy coincidence of our history that the courts haven't had to be particularly involved in answering the complicated questions about the separation of (and limits on) the government's war powers, but that may change. And he doesn't explain why that might change. He sort of alludes to the circumstances of the past decade as the reasons why that might change. But it's hard to say what he's hinting at there, given the courts' role thus far. So the lower courts, in some cases, have more of an inclination to supervise military operations, especially in the cases in which the plaintiffs are U.S. citizens. *Vance* is a good example, although now it's being reheard en banc by the Seventh Circuit. There are actually five different pending *Bivens* cases right now, brought by U.S. citizens, arising out of various allegations of abuse related to or directly part of the war on terrorism, or Iraq or Afghanistan operations.

So I think this is a chapter that's not yet been written, and I think a lot of it will depend on what happens in the next couple of years in these (and other) cases. But just to be clear about the reason why I'm skeptical, Sarah alluded to the *Bivens* cases, and I think these cases would have come out the same way without 9/11—it's just that the reasoning would be different. Consider for example *Rasul v. Myers*,²⁰ which is the second iteration of the post-release damages claim by four Guantanamo detainees, trying to raise a *Bivens* claim. Most of the D.C. Circuit's opinion was about why qualified immunity would have barred the claim, but then they dropped a single footnote, which says "oh by the way, there are special factors counseling hesitation," and so we also rest on the alternative ground that we should not recognize a *Bivens* claim. Now that's not anything new for those of you who know *Bivens* law. Special factors are a common reason why courts have been cautious to recognize implied constitutional remedies. But the only special factor that can be identified here is "the danger of obstructing U.S. national security policy," as a special factor unto itself, with no analysis. And so I think that's why I'm skeptical.

The *Boyle* cases are also good examples. *Boyle*, which Judith

20. 563 F.3d 527 (D.C. Cir.) (per curiam), cert. denied, 130 S. Ct. 1013 (2009).

mentioned, is a 1988 Supreme Court decision. It's about federal common law preemption of state tort claims, because there's reason to infer, from the Federal Tort Claims Act,²¹ that the same claims wouldn't have been available as a federal claim directly, and that allowing relief under state law in such cases interferes with the federal government's interest in protecting the government's discretion in how it designs military equipment. *Boyle* itself was about the design of a helicopter, and the analogy Justice Scalia drew was to the FTCA's discretionary function exception. The cases that have extended *Boyle* in the last couple of years have been about the "combat activities" exception to the FTCA. And so there are a few cases, one by the D.C. Circuit, *Saleh v. Titan*,²² and then two in September by the Fourth Circuit, *Al Shimari*²³ and *Al-Quraishi*,²⁴ where the courts have said we can infer from *Boyle* the same sort of idea that the federal courts have the power to preempt these state tort claims in order to avoid interfering with federal policy. But this is what Justice Scalia actually said in *Boyle*: "Here, the state imposed duty of care that is the asserted basis of the contractor's liability . . . is precisely contrary to the duty imposed by the government contract." And so that was why preemption made sense, that was federal common law was justified.

In contrast, in the combatant activity cases, these are tort suits arising out of Abu Ghraib, and abuses at other prison facilities overseas, and it's hard to see how a tort suit is—to quote Justice Scalia, "precisely contrary to the duty imposed by the government contract in those circumstances." So there's lawmaking cutting off these claims—

Marty Lederman: You mean judicial lawmaking.

Steve Vladeck: —Judicial lawmaking cutting off these claims, and that's why I'm skeptical, even in these U.S. citizen cases, that this is sort of a moment for reasserting the federal courts in any other context than the *Boumediene*-like context where the issue was Congress overtly cutting off federal jurisdiction, never mind what the federal courts are actually going to do with that power.

Marty Lederman: Right. Just for those of you who don't know, these are worth watching out for: there are five *Bivens* cases brought by

21. Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.).

22. 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011).

23. *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

24. *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), *vacated sub nom. Al Shimari v. CACI Int'l, Inc.*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

U.S. citizens or U.S. persons that are currently percolating, of which the en banc case in the Seventh Circuit, in *Vance*, and the *Meshal*²⁵ case [in the District Court for the District of Columbia], are probably the two to watch most carefully. They could be very important cases. The *Boyle* cases that Judith and Steve are referring to are state tort actions against contractors. The Fourth Circuit case that Steve was talking about is now en banc in the Fourth Circuit. The court reached out to the Federal Government, to the Obama Administration, and asked for its views. DOJ has received two extensions on their brief. I was hoping to be able to tell you today what their views are, but apparently we'll have to wait until next Friday.

Steve Vladeck: But Marty, the Obama Administration was asked for its views in *Saleh*.

Marty Lederman: And filed a very careful Supreme Court brief.

Steve Vladeck: That said, we have concerns about the D.C. Circuit's analysis but you should deny cert.

Marty Lederman: Correct. So this is something to be on the watch for, both what the Executive Branch says and what the courts say in these two areas. You brought up that comment by Justice Kennedy at the end of *Boumediene*. It reminded me of Justice O'Connor's similar comment in her plurality opinion in *Hamdi*. I think the theme of those cases—O'Connor's and Kennedy's lesson, as it were, was something like the following. "To the extent you, the Executive Branch and Congress, are acting more or less in accord with the way things have been done in the past and in pursuance of international law norms and practices that the United States has historically engaged in, we will sit to review it but we're going to be pretty deferential. But to the extent you start deviating and doing things that are unprecedented or seem to be out of step with the international law, in Justice O'Connor's words, 'this conclusion may unravel.'" She doesn't explain whether she means "unravel" as a matter of statutory interpretation, which is nominally what she was doing in *Hamdi*, or some sort of constitutional limit on the political branches.

We haven't talked at all yet about Congress and the extent to which what the courts might reflect what they think the national legislature would want, even when the legislature has been oblique or silent on the question. And there's certainly a theme of that in Judge Kavanaugh's quite extensive concurrence in the D.C. Circuit's denial

25. *Meshal v. Higgenbotham*, No. 09-2178 (D.D.C. filed May 10, 2010).

of rehearing en banc in the *Al-Bihani*²⁶ case, about the role of international law in construing the AUMF. But then when it comes to a case such as *Saleh*—and I know you might be circumscribed in what you can say, Judge Kavanaugh—there the courts are creating a common law defense against a state court action. Based on what? Just the court's anxiety about adjudicating such questions, or do you think you're channeling what you think the national legislature wants? How do you think about that question when it's a common law question like that?

Judge Kavanaugh: Well, let me say quickly, in response to your question, that I think the difficulty there reflects the same difficulty you see in preemption cases throughout the jurisprudence of the Supreme Court. Those cases are ultimately about the foreign affairs preemption doctrine, and as Steve was pointing out, they raise the question of whether there is an expressed conflict or implied conflict. Obviously implied conflict preemption is one of the real uncertain areas of Supreme Court jurisprudence at present, not just in war powers but in drug manufacturing cases and what have you, involving state tort liability.

But let me take a step back and give you what I think, if I can, is the bigger picture of where we are with tort law . . . and more generally begin by saying thank you for including me in this panel. I benefit from the scholarship of the people on this panel, such as Marty's article [with David Barron on Congress's authority to regulate the Commander in Chief] that I have here.²⁷

Marty Lederman: At lunch we were comparing how many times Judge Kavanaugh cites to legal scholarship. He really does read your stuff, so keep writing it!

Judge Kavanaugh: Professor Vladeck's critique,²⁸ which I have read, and maybe wince, but I still learn from. (laughter)

Sarah Cleveland: Read but not cited.

Judge Kavanaugh: Yes, read but not cited yet. (laughter)

Steve Vladeck: *But see!* (laughter)

Judge Kavanaugh: And the people in this room, I want to thank you for what you do in studying what the courts do and writing about what the courts do, and I for one learn from what you do. As Professor Resnik said, this is an ongoing process that we're in. So

26. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (en banc).

27. See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb* (pts. 1–2), 121 HARV. L. REV. 689, 941 (2008).

28. See generally Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

thanks to all of you and thanks to the two of you [Sarah and Marty], for what you did in the Executive Branch, because I know how challenging that work is, as well.

So where are we? Marty mentioned a word that had not been mentioned before, which was “Congress.” What’s the big picture of where we are right now in terms of federal courts, separation of powers, war powers? I would start with, in the wake of September 11th, Congress authorizing two wars: it authorized the war against Al-Qaeda and the Taliban, and authorized the war in Iraq. That itself is a significant precedent. When you ask, twenty years from now, thirty years from now, what’s the most significant precedent arising out of the post-9/11 years? I think one of them, if not the most important, will be that those were congressionally authorized wars. A President, who in the future tries to engage in an unauthorized ground war of any significance, will be faced with those precedents used against them. President Bush obtained authorization for those two wars.

Second. As Marty’s article with David Barron points out so well, Congress has regulated the Executive’s conduct of war in many respects, both before and after September 11th. We tend to forget that and sometimes think, well this is all just the Executive Branch operating in kind of a free zone, free from congressional restraint. And in fact, whether it’s interrogation or detention, surveillance, a number of particulars of how the Executive goes about the war effort, Congress has been deeply involved, including in the wake of September 11th. I think it’s very important to remember Congress’s role there.

And then third—and this was not self-evident on September 12th—the courts have played a significant role, as Sarah mentioned, in enforcing restrictions on the Executive’s conduct of war. Where was the political question doctrine in *Hamdi* or *Hamdan*? Nowhere to be found. Nowhere to be found.

What about the President’s exclusive, preclusive Article II power, to ignore congressional restrictions or disregard congressional restrictions, depending on—what’s the scope of that? Not a single Justice in *Hamdi* or *Hamdan* suggested that detention or activities related to detainees were within the exclusive, preclusive power of the President. *Hamdan*, footnote twenty-three, I think, pointedly ends with, “The government does not argue otherwise.” Which was a recognition that not even the Executive Branch was asserting in that case, an exclusive, preclusive power. So the political question doctrine has not played a major role. The exclusive, preclusive power of the President was the big issue raised by some of the OLC opinions

in 2002/2003, but the Bush Administration later backed away from it, culminating in the January 15, 2009 OLC memo for the file essentially but publicly retracting or distancing itself from a number of prior OLC memos. So the courts are playing a role in enforcing congressional restrictions.

But, then what about these tort doctrines? I think courts still have reluctance [to recognize causes of action] when Congress has not regulated a particular activity, has not created a cause of action. The Federal Tort Claims Act and the Torture Victim Protection Act²⁹ for example, have exceptions that make it such that they haven't applied in a lot of these cases. Courts, I think, share the same reluctance they had before, about *Bivens*. As Sarah talked about, *Bivens* had been narrowed significantly long before September 11th. Preemption doctrine has been an uncertain area of the law in many areas, and these state tort suits reflect, I think, part of the uncertain nature of foreign affairs preemption. What is the role of states in regulating the war effort? I've said that Congress has a significant role in regulating the war effort, and courts have enforced those congressional restrictions, but going back to first principles of the founding, one of the principles of the founding was that war would be waged by the Federal Government. War and foreign relations were Federal Government activities primarily, not state government activities. Maybe it ultimately goes to whether you're thinking about conflict preemption or more of a field preemption, which is an issue that we see in multiple areas. So that is my longwinded response to your questions about *Saleh*.

Marty Lederman: Let me invite Curt now to bring international law into this discussion. And in particular, I'm particularly interested, mostly because of Judge Kavanaugh's concurrence in the *Al-Bihani* en banc case, and the recent National Defense Authorization Act, about what the federal courts should assume about the role of international law when construing U.S. domestic law—in construing the constitutional war powers and the national security powers of the political branches in the first instance, but also whether federal statutes should be construed to comply with and be limited by international law, in particular the laws of war—something Curt has written quite a bit about. Now Judge Kavanaugh can correct me if I'm wrong, but I think it's fair to say that in his *Al-Bihani* concurrence he starts from a presumption that if Congress has been silent on international law, we should not assume that Congress wanted to

29. 28 U.S.C. § 1350 (2006).

limit the President, let alone guide the President, by the international laws of war. One should not apply such a presumption and the laws of war should not bear upon how we construe the President's war authorities—something that quite candidly to my ears is an odd notion, that Congress should be presumed to intend the President to be able to violate the laws of war.

For the first hundred years or so of the Republic, there was a shared view of the three branches, that the President's and Congress's own war powers were themselves constrained by the law of war, and that there was no constitutional authority to go beyond that. Now we're not in that era any more. But it is notable that although the 2001 AUMF made no express reference to international law, recently Congress has—perhaps picking up on a cue in Judge Kavanaugh's concurrence—made several references to international law in the new Defense Authorization Act and its legislative history. As Steve and I have argued online, that should take care of the problem, at least for the time being. I don't know if it will be persuasive or not, but Curt, how do you think international law has been and ought to be influencing the interpretation of statutes? What is it fair to presume about Congress in the absence of any really clear cues from the Legislative Branch?

Curtis A. Bradley: This has come up most directly, as Marty indicated, in connection with how to construe the Authorization for Use of Military Force that Congress enacted a week after the 9/11 attacks, which broadly authorizes the President to use force against entities or organizations responsible for the attacks, clearly encompassing the Al-Qaeda terrorist organization and the Taliban forces that were harboring them. But it's a very short and rather vague statute and the question has come up about whether international law should be part of the materials that an interpreter should look to in trying to think about some of the things that are not really specified in the statute. My own view is that the answer is yes to that question, that international law should be relevant to that kind of interpretive enterprise. I differ a little bit with the Judge's views in *Al-Bihani* on that, even though I agree with the Judge as to a lot of other things he says in the case, and I commend his concurrence in *Al-Bihani* in general. He says a lot about why we should worry about very loose claims that are often made about international law in the U.S. legal system. I'm quite sympathetic to the thrust of those comments but I don't think they are determinative here.

Congress is legislating against the backdrop of not only U.S. history but U.S. history in the world, in a variety of conflicts in the past. It

uses language like “use of force” against the backdrop of that historical experience, experience that has always interacted closely with the law of nations or international law. The United States has always embraced international law as relevant in conducting prior conflicts, and so just as a body of history, international law is going to be part of the backdrop against which Congress is legislating. Again, if you look at the first major war on terror decision by the Supreme Court, *Hamdi v. Rumsfeld*, the lead plurality opinion, which holds that there is a conflict here and that the authorization of force statute that I mentioned should be read to include the power to detain, not just use force in the most obvious sense. The O’Connor plurality relied heavily on international law, and particularly the Geneva Conventions, reasoning that if you look at international law, when it refers to certain concepts, it includes the ability to detain the enemy forces and not just to use direct force against them. Now you might say, well that’s just an interpretation to help the Executive, but that’s actually not true. In *Hamdi*, the plurality goes out of its way to say that there are some things the Executive cannot do. For example, indefinite detention for the purpose of interrogation is ruled out of bounds in *Hamdi*, kind of in dicta, because it wasn’t an issue in the case. But why? Because the international law didn’t seem to contemplate it. So the courts have already indicated that it seems relevant.

Moreover, the current Executive Branch, which is involved in litigation, has expressly conceded that international law is a relevant set of materials to potentially constrain its own authority in this context. It is the agent responsible for carrying out Congress’s mandate and under normal deference principles, one would ask whether we have a concession against interest here that is deserving of deference, and I believe that in this context it is. It’s already been mentioned, but Congress now has very recently, finally addressed detention issues—and here I would criticize the administration for generally resisting congressional involvement, after having so many people for so long call for more congressional involvement. Congress did a lot of things the administration I think did not like, but it did refer to the law of war, which seems to further confirm international law’s relevance, since the law of war is a body of law that includes treaties and custom. Now, none of what I just said, I should emphasize, requires one to think that un-ratified treaties, non-self-executing treaties, or customary norms that haven’t been embraced and incorporated by Congress, are operating independently in the U.S. legal system. Those are separate difficult questions. It’s just

about whether, when Congress legislates in this way, whether this is part of the material that one could reasonably look to, in trying to figure out what Congress meant.

The other thing I would emphasize is that, under the approach I am defending, international law is not dispositive of the question. If one found as an interpreter that in many conflicts the United States did various things that may not be fully consistent with international law, that material would be quite relevant and probably more relevant, since Congress is probably more aware of and more appreciative of its own historical practice as a U.S. institution and its Executive's practice. But my point is simply that one should not rule out international law in thinking about that.

Marty asked more generally, how do we think about international law in interpreting materials beyond this enactment? There is a canon of construction, which has been around since the Marshall Court in the early 1800s, that is named after the boat in a case that's called the *Charming Betsy* case.³⁰ And even the modern Supreme Court has endorsed this canon in a number of cases, and it applies when interpreting a statute, if the statute is found to be ambiguous—and I need to emphasize that requirement of ambiguity. If the statute is found to be ambiguous, courts should try to interpret it in a way that avoids putting the U.S. in breach of international law.

Now here's where I probably diverge from some of the panelists, although in agreement with Judge Kavanaugh, I think that the *Charming Betsy* canon has little to tell us about a statute like the authorization of force statute after 9/11. Why? It is not a statute where if the court has interpreted it one way or the other, the United States is placed in breach of international law or not placed in breach. The question is simply, how to construe the amount of authority, given from one democratically accountable institution to the other, the Executive, and how the war on terror is managed would then be determined by that politically accountable institution, the Executive Branch. And whether the United States happens to breach international law in some of those choices will ultimately be determined by the electorally accountable institution, not by some misconstruction of the statute, which is what I think the *Charming Betsy* canon is most designed to address. It's not really designed for big grants of enforcement discretion to the Executive, since again, the construction wouldn't place the United States in breach. But I don't think you need it here anyway, even though a lot of people do

30. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

invoke it in this context. I think the better argument is, international law and U.S. history and obviously the text of the statute and other related statutes like the Military Commissions Act,³¹ in my view, are part of the materials one would normally look to in trying to figure out what Congress meant.

Marty Lederman: I'm going to let Judge Kavanaugh respond to that directly, because this is such a rich topic. But after you do so, Judge, I'm going to ask Judith and then Sarah to offer any additional words they have about international law. Sarah and I—and Bob Taylor and Trevor Morrison, in the audience here, and many others in the Executive branch—were deeply involved every day not only in trying to construe the AUMF not to violate the laws of war, but also to try to find the proper analogies, as Justice O'Connor suggested in *Hamdi*, to try to understand how past practices under the laws of war, in other kinds of conflicts, should be understood in terms of construing this statute.

Judge Kavanaugh: I think I'd start again, from the big picture, which is that courts review Executive action in times of war. That's the lesson of *Hamdi* and *Hamdan* and *Youngstown*,³² and you can go throughout our history, it's been reinforced strongly by the Supreme Court. The courts will enforce statutory restrictions on the President's conduct of war as well. And separately, the Executive Branch and Congress should, as I said upfront in my concurrence, should pay attention to international law obligations when thinking about what to put in the statutes. And when the Executive Branch is exercising its discretion pursuant to an authorization for the use of military force, or the President's Article II authority. So courts have a role and Congress and the Executive should pay attention, close attention of course, to international law principles. Congress, on many occasions, has taken international law principles and put them into federal statutes, sometimes directly, by borrowing from the principle that's at hand, sometimes by just having a reference, as in *Hamdan*, to international law or the laws of war more generally or the law of nations more generally.

The difficult question comes when there's an authorization for the use of military force, and a court is presented with the question whether to restrain the Executive in the conduct of war, and

31. See Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

32. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Congress has not done what it's done so many times, which is to take the international law principle and put it into a statute, or to refer generally to international laws. Should courts nonetheless, restrain the Executive's conduct of war, based on a principle that Congress has not expressly put into the statute? And I start with background notions of judicial restraint in times of war. That's not judicial abdication—again, the lesson of *Hamdi* and *Hamdan* and *Boumediene*—but judicial restraint. And if Congress hasn't put a restriction in and if the Executive action is not something that's concrete or our history talks about, or is contrary to something that the Executive has done before, may a court reach out and say, we're going to restrain the Executive nonetheless, because we think it's contrary to international law?

Now what's the difference in practice? Judge Williams, I think had a separate opinion that was very similar to what Curt Bradley has suggested here, and ultimately said there's probably not much daylight, if any at all, between how this would work under his view of deference to the Executive's interpretation of international law and my view of how the court should go about it. So the practical significance of this may be quite small, but it does suggest, as Marty points out, to the extent it prompts Congress—this principle, I'm not suggesting this opinion. But the idea that this principle is out there prompts Congress to pay attention to whether they want to refer to international law, so much for the better, because as I started with, I think it's a good thing when Congress pays attention to international law principles. I think it's a good thing when the Executive pays attention to international law principles for purposes of our international relations and otherwise.

Marty Lederman: I will say, I mean it's certainly something that we in the Executive Branch, were concerned with, including as to a bunch of different issues that will never be adjudicated, such as the use of force more broadly in this kind of an unusual conflict that is relatively unregulated directly by treaties and customary law. How does one, for instance, treat civilians who are not part of the enemy but are somehow in association with the enemy? How should they be treated? What is the proper analogy?

Judith Resnik: On the big picture, I was actually just looking at my watch and thinking we're an hour into talking about 9/11, and we haven't used the word "torture" yet—as one of the major 9/11 effects. This point is not simply free-floating, for the practice of torture relates to the role of both comparative law and international law in

U.S. courts. Specifically, the *Miranda*³³ decision that Chief Justice Earl Warren wrote is drenched with comparative law—about how Scotland and India and other countries do or do not engage in coercive interrogation. The dissent, in turn, doesn't object to the referencing of other countries, but on occasion disagrees with the majority's characterization of the practice in that country.

I should add that in the nineteenth century, when ruling on a claim of cruel and unusual punishment, the Supreme Court referenced jurisdictions outside the United States. Only more recently—after the 1989 decision when Justice Scalia raised his objection³⁴—did the debate heat up about the legitimacy of looking beyond this country's case law and practices. Non-U.S. law has been informing the understanding of either our own law and/or what our law might be. Further, what we think of as “our law” does not come wholly from within; the precepts were not manufactured exclusively inside our borders. A classic example is the “due process” clause—whose language builds on England and France, and whose interpretation has been informed by evolving understandings of what constitutes “fairness.”

So coming back to Sarah's initial launch about whether courts are well or not well equipped to provide particular kinds of judgment and oversight, that question is another “federal courts” leit motif. Debates are plentiful about what can and should courts do, and about what they can't or should not do. Mention was made of the South, which was a paradigm for that debate—in the context of both questions of desegregation and of the treatment of prisoners. And actually, in terms of our dealing with the challenges that 9/11 detainees pose, the U.S. criminal justice system has been thinking about questions of force and interrogation for the last half a century and more; courts are well equipped, in the sense of being practiced in, dealing with various forms of fear and risks that certain defendants pose.

Let me add on the capacity point the publication of a relatively new Federal Judicial Center study, called *National Security Cases: Special Case-Management Challenges*³⁵ that goes case-by-case through a large number of cases to try to map how the courts are or are not

33. *Miranda v. Arizona*, 384 U.S. 436 (1966).

34. See *Stanford v. Kentucky*, 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

35. ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (2010), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/ts100222.pdf/\\$file/ts100222.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ts100222.pdf/$file/ts100222.pdf).

responding to challenges and to the claims of the need for special procedures.

I wanted to come back to Judge Kavanaugh's important point about the notion of a court avoiding advocating or taking positions. I think courts should not abstain from becoming involved. What's needed is an incredibly thick conversation about terribly difficult problems, and we need all branches to participate.

Therefore, I think it important to highlight a paragraph in the majority opinion in the much blacked-out *Latif* opinion. The majority wrote: "*Boumediene's* airy suppositions have caused great difficulty for the Executive and the courts. *Boumediene* fundamentally altered the calculus of war, guaranteeing the benefit of intelligence that might be gained—even from high-value detainees—is outweighed by the systemic cost of defending detention decisions. *Boumediene's* logic is compelling: take no prisoners. Point taken."

I found this paragraph both troubling and shocking. To suggest that court rulings are a source of a problem and that the government would respond to a complex ruling by shooting people is, I think, wrong. So too is the dismissal of the hard work of five members of the Supreme Court as "airy suppositions." To argue that, in the face of tremendously challenging legal issues, courts should be silent is to suggest a form of abdication that we should firmly reject. Courts have been generative contributors—in the U.S. and elsewhere—to debating very hard questions about the sources of rights of individuals, the needs for safeguarding communities, the obligations of government, and the proper and improper exercises of authority.

Marty Lederman: I agree with Judith. I think that is an important paragraph that took me aback—the disturbing suggestion by Judge Brown that the Executive Branch would adopt a policy of "take no prisoners," which would be in violation of the law of war.

Sarah, I want to stress another passage in *Boumediene* that may be relevant to our discussion—an exchange between Justices Kennedy and Scalia. Justice Kennedy had to go to pains to distinguish *Eisentrager*.³⁶ He says, in particular, that at the Landsberg Prison, unlike at Guantanamo, the United States was acting as part of a multinational force there and engaging in conduct that was in coordination [with] our European allies. Justice Scalia is just incredulous that Justice Kennedy suggests that such a distinction has constitutional valance: What does this have to do with whether we should have habeas review?, he argues. You're telling me the fact

36. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

that the Germans were onboard there matters to whether we should have the power to review the Executive's conduct? And Kennedy's implicit response is "Yes, it matters a whole lot, because the Executive is checked when it's acting in accordance with international law, and it is part of the international community; whereas if the Executive acts alone, untethered to its allies, it might more likely start acting in ways—and this is similar to the O'Connor *Hamdi* opinion—that deviate quite significantly from international norms and historical norms, which is when the courts will be most inclined to step in. So Sarah, are these two themes at loggerheads? To the extent the Executive Branch and Congress are more cognizant of international law and international organizations, is it true there's less need for the Judiciary to play an oversight role?

Sarah Cleveland: Well, I would also read the Kennedy-Scalia exchange in *Boumediene* as going to the question of the level of independent U.S. control over a particular circumstance. So Landsberg Prison in *Johnson v. Eisentrager* is different from Guantanamo because it was in Germany, not on a U.S. military base, in an area under exclusive legal U.S. jurisdiction and control, but actually subject to a sovereign interaction of multiple countries. The question of when a country's own domestic legal obligations apply in acts of territorial context, in which they act with other countries, is a very complicated one and it's one that arises in many contexts. It was not implicated in *Boumediene*.

I have found the conversation between international law and U.S. domestic law, and with the courts on this issue, quite fascinating. The original premise behind the *Charming Betsy* doctrine is that Congress should be presumed not to have violated international law, unless they make it clear that they are doing so, because having federal legislation that puts the U.S. in violation of international law causes significant problems for the United States, with unintended consequences that could spiral out of control and significantly adversely impact U.S.-international relations. So whether Congress knew about a particular international law rule or not, so *Charming Betsy* says, we'll assume that they didn't mean to violate it, unless there's evidence otherwise. As Curt indicated, I think it's particularly historically appropriate to look to international law in legislation involving armed conflict, since armed conflict is generally transnational and it's heavily regulated by international law.

International law is playing a very important role here, not only as a limit, but also as empowering the Executive Branch, right? I mean, *Hamdi* looks to international law to find that the President has the

power to detain a U.S. citizen in the face of a statute that says you can't. That's a pretty robust role for international law and the question is where in the AUMF would you find this power if you weren't looking to international law? So if looking to international law in that manner is appropriate, then the other questions is don't the limits in international law also get carried with it, so that if international law recognizes the power to detain in armed conflicts, that power that comes from international law also is limited by the scope of international laws relating to detention?

So interestingly, in this, the Bush Administration argued to the courts that international law didn't limit what it wanted to do, and the courts pushed back and said no, actually international law does. And then the Obama Administration comes in and says international law limits what we do, and at least some judges have come back and said no it doesn't.

Marty Lederman: In fairness to Judge Kavanaugh, he argued that it shouldn't be viewed as a limit until Congress speaks clearly.

Sarah Cleveland: Right. I mean, so should courts restrain the Executive—as Judge Kavanaugh put it in this context—is sort of an interesting question to ask, when it was the Executive going in and saying, we are limited by international law. And then the court comes in and says, actually no you're not. I think in this kind of context, courts need to appreciate they are not neutral, right? When they issue a decision, they alter the legal baseline against which the Executive Branch and Congress are operating. And so if courts come in and say no you're not, then I mean, as in the *Al-Bihani* case, the Administration actually went back in, in the en banc proceeding, and said well actually, really we are, we really mean it. International law really does what we want to say our authority is. And I think in this context in particular, when the Executive Branch is onboard and there's a long history and it's an area in which international law has tradition, well then it seems that that has to be correct.

On Curt's point on *Charming Betsy*, I think I would be inclined to give somewhat more of a robust role for the *Charming Betsy* doctrine, and construction of the Authorization of the Use of Military Force the Court suggested, because of course no judicial construction of AUMF is going to be an abstract. It will always be in relation to some intended action by the government. And so then the question is, does the AUMF authorize acts? Does the AUMF authorize the detention of a doctor who is a member of Doctors Without Borders—this is a hypothetical—or not? And in that context, it seems to me that what you're saying is the AUMF is presumed not to have

authorized the President to violate international law and therefore would be presumed not to authorize someone who would be a protected—the detention of someone who would be a protected person under international law.

Marty Lederman: So Steve, let's try to tie a lot of these threads together in the context of the *Hamdan* case, which I urge you all to keep an eye on as it is litigated in the D.C. Circuit. Steve, in the Military Commissions Act (MCA) we have this interesting dynamic in which the political branch has spoken directly to international law, and possibly to the "domestic law of war." Congress, in the 2006 Military Commission Act, provided that military commissions could adjudicate prosecutions for "material support" to terrorist organizations, Al-Qaeda in particular, i.e., supporting such an organization without proof that the defendant was actually engaged in helping the organization achieve a particular law of war violation or terrorist act—merely general support, such as Hamdan being bin Laden's bodyguard and driver, that sort of thing. Such a material support offense is now found in our own Title 18 as a criminal law offense that can be tried in an Article III court, but it wasn't in Title 18 at the time Hamdan acted, at least as to his conduct. Congress said that's a violation of the law of war that can be prosecuted in a military commission.

When the MCA was being amended in 2009, the Obama Administration came in and urged Congress to remove this offense, with both Jeh Johnson, the General Counsel at the Pentagon, and David Kris, the National Security Division head at DOJ, testifying to the effect that "our experts believe there is a significant risk that appellate courts will conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions and leading to questions about the system's legitimacy." Congress went ahead and recodified the offense, however, and Hamdan had already been convicted of the offense under the 2006 act. So Congress did not take the Executive Branch's view on this. It instead said no, we think this is a law of war offense.

Here the legislature has taken a fairly aggressive view—one that is not, I think it is fair to say, the majority view around the world of what international law prohibits. In upholding Hamdan's conviction, the Court of Military Commission Review relied principally on some convictions at Nuremberg by Telford Taylor, under a theory that has been . . . let's put it this way, ignored by international law thereafter. And it's now before the D.C. Circuit. (So Judge Kavanaugh will not be able to opine on this issue here.)

I have two questions for you. Number one, is this within Congress's define and punish power, to say that this is an offense, even if it's not the majority view around the world? And second, even if it's not an international law offense, does Congress have the power to create "domestic law of war offenses" that can be tried not in Article III courts but in these special military courts? Could you speak to those?

Steve Vladeck: Let me also add, I think there's a threshold question, which is even when the answers to those questions are yes, can Congress apply that offense retroactively to conduct that took place before 2006?

Marty Lederman: Oh I'm sorry that's right, there's a huge ex post facto question, too.

Steve Vladeck: So let me just say for the sake of argument, and let me underline that this is just for the sake of argument, that Congress has the power to do this prospectively. I think there's still a question of whether you can apply a new offense retroactively in that context.

Marty Lederman: Correct.

Steve Vladeck: On the point whether Congress can create such an offense in the abstract, I think that really depends on how we are to understand the Law of Nations Clause,³⁷ which provides that Congress has the power to define and punish offenses against the law of nations. It's fairly clear from the constitutional convention, the notes, and so on, that the goal was not to give Congress a completely unlimited power to say that anything was a violation of the law of nations. If Congress did have such power, it could say that having a gun near a school was a violation of the law of nations, or a state's failure to provide civil remedies for gender motivated crimes of violence was a violation of the law of nations, which would come as a shock I think, to the *Lopez*³⁸ and *Morrison*³⁹ Courts.

Obviously, then, there's some constraint. The question is how much interpretive constraint is there on Congress's power to decide for itself which offenses are recognized under the "law of nations"? My own view is that the constraint has to be certainly no weaker than the constraints that the Supreme Court has imposed on Congress's other Article I powers, but that in the context of military commissions, they have to be stronger. And the reason for that is twofold. First, it's worth reminding ourselves why can certain offenses be tried by military courts in the first place. When the Supreme Court has grappled with the question, the answer has always

37. U.S. CONST. art. I, § 8, cl. 10.

38. *United States v. Lopez*, 514 U.S. 549 (1995).

39. *United States v. Morrison*, 529 U.S. 598 (2000).

been because the Fifth Amendment has an express exception for cases arising in the land and naval forces in the Grand Jury Indictment Clause, and because Article III and the Sixth Amendment have an implied exception to the Petit Jury Clause for such offenses. This is reflected in *Quirin*.⁴⁰ When the Court says the reason why it doesn't violate the Sixth Amendment to try the saboteurs before a military commission, it is because we understand the Sixth Amendment, the right to jury trial, to not apply to "offenses committed by enemy belligerents against the law of war." So *Quirin* itself tied the Sixth Amendment question to what the content of the laws of war is, independent of what Congress *says* the context of the laws of war is.

So the first piece of this is, even if Congress could define an offense triable in civilian court, what about the jury trial problem with respect to trying the offense before a military commission? The second aspect is, let's just say for the moment it's not a law of nations offense; let's assume it is a domestic common law—

Marty Lederman: On that first question, to what extent should the judiciary defer to Congress's interpretation of the laws of war, especially if it tracks Telford Taylor's interpretation?

Steve Vladeck: Well, I mean I think—this is ironic, because I think it's the same question that arises in Alien Tort Statute⁴¹ litigation, about just how far we go and just actually what the law of nations is. I think the answer has to be, in the criminal context, we apply the most narrow approach that seems reasonable—what Justice Black described as "the least possible power adequate to the end proposed." When the Congress is creating criminal liability in the abstract, we might even hold Congress to the same standards that Justice Souter would hold courts to under *Sosa*,⁴² which is that there must be definite and near universal acceptance of this part of the laws of war.

Marty Lederman: We could have a debate among our panelists just about that.

Judith Resnik: I'm in disagreement.

Steve Vladeck: But before we get to that question, let me briefly jump to the other problem with the government's position. In *Hamdan*, the government now argues that the offense Hamdan was convicted of is an offense against the "domestic common law of war." But that raises a separate Article III question.

Marty Lederman: Right.

40. *Ex parte Quirin*, 317 U.S. 1 (1942).

41. 28 U.S.C. 1350 (2006).

42. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Steve Vladeck: And the reason why that's true is that to the extent *Quirin* is precedent, *Quirin* says it is okay to try violations of the laws of war in military commissions, but the offense being tried in the military commission here may not in fact be a proper violation of the laws of war.

Marty Lederman: The international laws of war?

Steve Vladeck: By the international laws of war. Then it's a question of first impression about whether military jurisdiction is appropriate, even over domestic criminal law offenses derived from the domestic common law of war. *Quirin* doesn't speak to that at all, and I think there are some fair arguments as to why the answer to that should be no.

Judith Resnik: Let me just domesticate that one second. Let me take a moment to note that this is a standard "federal courts" question—about when a non-Article III court is permissible. Recall that just last term, in *Stern v. Marshall*,⁴³ the Supreme Court held that a bankruptcy judge, who holds a fourteen-year appointment, has no jurisdiction over a cross-claim on a fraudulent transfer that arose under state law and that related to the bankruptcy litigation. Other case law addresses whether federal magistrate judges can take felony pleas, and what forms of "consent" can be inferred from participation or non-objection. We hear little about the idea that "consent" should be required for detainees to be tried before the non-Article III military commissions.

The 9/11 commissions/trial debate has been framed by asking about the paradigm of the criminal trial or not. Another frame is to bring the issue inside the fold of ordinary federal courts doctrine, and to ask about the permissibility of using non-Article III judges. This Court had drawn relatively bright lines, last term, around the power of bankruptcy judges, just as it did in the *Plaut*⁴⁴ decision, which held several years ago that Congress can't retroactively create jurisdiction for cases that the courts wrongly dismissed by virtue of misinterpreting congressional intent on statutes of limitations for claims alleging securities fraud. Given *Plaut* and *Stern* imposing limits, why does calling the issue "terror" and "national security" avoid this issue and transform the conversation?

Marty Lederman: I've been wondering when someone would point this out. I'd been thinking that this bankruptcy case, the Anna Nicole Smith case that the Supreme Court decided last year, which

43. 131 S. Ct. 2594 (2011).

44. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

could be the topic of a whole federal courts section here, is actually right now maybe the strongest precedent for *Hamdan* going forward, in terms of the Article III argument.

Steve Vladeck: I think there is a strong case already.

Marty Lederman: But Judith is absolutely right—in quite distinct circumstances, the Supreme Court majority is offering what may be the strongest arguments for aliens in terrorism cases. For example, if one looks at last Term’s cases about personal jurisdiction, and the *Nicastro*⁴⁵ case in particular, the plurality opinion, written by Justice Kennedy and joined by the Chief Justice and Justices Scalia and Thomas, is probably the strongest articulation that I can recall of the robust protections of the Due Process Clause to foreigners overseas—namely, foreign corporations. And you’d think that would have some overlap when it comes to the question of due process rights of foreigners being detained by the United States.

Steve Vladeck: And the Chief Justice wrote *Stern v. Marshall* too.

Marty Lederman: We’ll see whether these opinions have any play when it comes to Guantanamo cases.

Curt, you have a quick response and then I want to go to Q&A for half an hour.

Curtis Bradley: Everybody knows the *Sosa* opinion, which is the 2004 decision involving the Alien Tort Statute. Reading it, it is all about limits on judicial power. The ATS is a one-sentence statute from 1789 that does not in any way lay out the possible claims one could bring, nor did the intent of 1789 Congress help at all in 2004. The Court kind of had to resurrect what it called the ambient law of an era in bringing it forward. Justice Souter said we know there are lots of problems with judges doing that, one of which is that probably a lot of these suits the political branches won’t even like, because they’ll upset other countries. So we really have to be concerned, and it’s not enough to ask whether there is international law relevant to the case, and the Court adopted what it thought was a very strict test for when you’d ever have an ATS claim, because of the limits on judicial power and the lack of any guidance from Congress. Now, I’m not saying I disagree with your bottom line, but it’s a very different scenario when Congress actually does define the law of nations, and there’s at least an argument, putting aside the criminal versus civil point which you made, which is a good one, that at that point there is a much greater basis for judicial deference, when it’s not the courts’ own power they’re worried about, but the powers of the accountable legislature.

45. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

Marty Lederman: I know you were all worried we wouldn't get to the ATS and *Kiobel*⁴⁶ here, but now we have . . . and so I think that's a cue to open it up to the floor for questions. Please tell us who you are and where you're from, and try to keep your questions brief so that we have time for a useful dialogue.

Judith Resnik: We answered them all.

Peter Margulies: I'll come up with one. Peter Margulies from Roger Williams Law School. I have a question about one of the extraordinary rendition cases, the *Arar*⁴⁷ case, in which we send someone allegedly to Syria, who ended up getting tortured for a good part of a year, before we discovered he was apparently not involved with terrorism at all. So then the Canadian Government acknowledged, in a report a couple of years later—the Canadians also pay Mr. Arar \$10 million for his pains. We have said, the government has said that that case is one in which the *Bivens* factors counsel hesitation mean that this lawsuit cannot proceed; the Second Circuit in an en banc decision, agreed with the Executive Branch. But exactly what factors counseling hesitation are we talking about in that case? We're talking about an error that the Canadians themselves acknowledged. Perhaps we're talking about embarrassing Syria, but recent events in Syria should show that the Syrian Government is well beyond embarrassment. So why not entertain the lawsuit?

Marty Lederman: Who wants to answer that question? I'm going to play devil's advocate a little bit. I think what's going on—what the courts might say and what they did say there—is that rejection of damages is supposed to be a default presumption unless and until Congress decides what to do, and there's no stomach in the American Legislative Branch currently for damages actions, even for wrongdoing by the Executive Branch in this context. That would be the argument—that unless and until Congress steps in and says okay, as the Canadian political branches did, far be it for the Judicial Branch to start permitting damages actions.

Steve Vladeck: You know, but there's a contrary argument that Jim Pfander, among others, has made I think quite powerfully, which is that there are plenty of examples—well, two very common examples—of Congress actually expressing agreement and acceptance of *Bivens*. And so the notion that this is all sort of judge-

46. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011); *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.) (setting the case for reargument during the October 2012 Term).

47. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

made law with no legislative clues, I think is a bit off. But I think the real point here is one Judge Kavanaugh made, which I think had that been the basis for the majority opinion in *Saleh*, as opposed to what Judge Silberman actually wrote, would have been a lot more interesting, which is the idea of sort of a field preemption, you know when it comes to claims arising out of war. And I think if that's really the sentiment that's going on here, if that was behind the Second Circuit in *Arar*, saying rendition is a special factor, the D.C. Circuit saying it interferes with national security policy special factor, I think that's problematic, because it suggests that Congress somehow has to act positively, to open the door to remedies that were otherwise previously available the second that we cross into a war footing, even for things that either aren't on the ballot yet or seem unrelated to the common outcome here.

Marty Lederman: Anyone else want to speak to that? Sarah?

Sarah Cleveland: So just on this, I mean the ironic thing about the *Arar* decision is of course there are other bases for bringing damages claims for acts of torture or complicity in torture that Congress had adopted. Congress has adopted a statute, the TVPA, that allows foreign nationals, or at least people subjected to torture under color of you know, foreign law, to bring claims alleging torture in the U.S. State tort law would allow such claims. So in that context it's not—it wouldn't seem that controversial for a U.S. court to adjudicate a *Bivens* damages action arising on U.S. soil.

One thing that I found particularly troubling about the Second Circuit's *Bivens* analysis in *Arar* is that they essentially bootstrap a state secrets analysis into the *Bivens* reasoning, so that the mere cost that the court might have to think about the possibility that classified information might have had something to do with some part of this you know, conduct in this case, was a special factor counseling hesitation and therefore *Bivens* applied, and no claim. Whereas actually the court—so the state secret stuff that has been articulated most recently by the Ninth Circuit, and according to the Executive Branch's own internal procedures, requires a much more rigorous analysis of whether or not classified information really is implicated, how central it is to the litigation, and from the Executive Branch's side, whether it's going to assert it. You don't need to think about any of that in a *Bivens* case, and all you have to do is think well maybe there is classified information and in the claims.

Judith Resnik: Reading the Second Circuit decision in *Arar* makes plain that, when sitting en banc, there was a deep divide. The four dissenters each wrote to express their own objections—Judges Parker,

Pooler, Sack and Calabresi, all of whom had very different understandings of the role for courts and access to them than did the majority written by Judge Cabranes.

I also wanted to come back to the question of preemption, the possible use of state law, and the role of federal judges in making law on these issues. Consider the doctrines of field preemption, the dormant foreign affairs preemption, and preemption based on the view of some impact on or relationship to war. Over the last few decades, federal judges have developed these common law doctrines in an extensive fashion to conclude that if, somehow the issues of foreign affairs, or war, or international interests, are in play, that states cannot legislate and courts should both find preemption and defer to federal executive or legislative enactments. The lower court decisions build on various Supreme Court decisions, including the *Crosby*⁴⁸ case involving what Massachusetts's legislation prohibiting state imports because of labor conditions in what was then called Burma and the *Garamendi*⁴⁹ decision, about California's requirement that to do business in that state, insurance companies had to detail their involvement in banking in Europe during the Holocaust.

Federal court jurisprudence regularly asks about the sources for judges' authority. If one wants to have judges understand themselves as limited, then the expansion of "preemption" is problematic. When lower court judges rely on a bucket called "foreign affairs" or loosely use the word "war," they are extrapolating from the silence of Congress and the Constitution, to shut off state lawmaking. What should be the grounds, what level of specificity ought to be there, by the Executive Branch or Congress, to displace the role of states? And when should the courts themselves say they can't address issues? The presumption in a federation should be on a multiplicity of participants in lawmaking.

Marty Lederman: I think Judith brings up a point that both she and Sarah raised earlier, that I think is very important. There's this general assumption out there that the Courts of Appeals have abdicated, and that the D.C. Circuit has, for instance, become a rubber stamp for detention in the habeas cases. I think that's a mistake. I think there's still a very vibrant debate going on among the judges, as demonstrated by the splits in *Al-Bihani* and *Latif*, and I think it gives lie to Judge Silberman's claim that no judge is ever going to rule against the government in these cases. Vicki?

48. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

49. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

Vicki Jackson: So the question I was thinking about is not a doctrinal question, but I was thinking about Charles Black's idea that when the courts are reviewing government action, that they—you know, we think of them as checking. But there also is an important measure of legitimate. And then I was thinking about arguments that have been made in a comparative context—you'll forgive me—particularly about the High Court or Supreme Court of Israel, which took very full jurisdiction, full justiciability over claims arising in the occupied territories, about the scope of ongoing military operations, while they were occurring, a habeas-like review of detention, I mean a huge range of things, which you know, it was argued in the literature that this was in part legitimate. It said if the claim doesn't succeed, and sometimes that prisoners won and sometimes they lost, but it suggested that there was law in the story. And I'm just thinking about the debates that I've heard, because I don't have the expertise that this wonderful panel has, in all of the *Bivens* cases and the like, in the lower courts—I've read some but not all of them—of whether those concerns about the legitimacy that comes from courts being there to perform a checking function, is not relevant in our story, or is different. It's not a very pointed question, but I'd just be interested in your reflections on it.

Curtis Bradley: I just have a quick thought for that. I'm so glad you brought that up, Vicki, because I am in general in agreement with the recent endorsement of the role of the courts that has been mentioned from the beginning, a somewhat surprising intervention of the courts in trying to supervise some of these liberties implicated by the war on terror. But there is kind of a dark side to it too, which tends to be brushed over a little bit, which I think you're touching on. One can argue that the Supreme Court, despite kind of minimalist decisions, has given some legitimacy to indefinite military detention without trial. That should not be an uncontroversial proposition. In fact it wasn't uncontroversial early on. It has become less controversial, even though the Supreme Court has not released a single person itself, but there's the general idea that people could be held without a trial, in Guantanamo, as long as they're not U.S. citizens, for their lifetime. It should be a very dramatic, significantly controversial proposition, and it is much less so because we have judicial review in the backdrop.

Marty Lederman: Trevor.

Trevor Morrison: I think it's been a terrific panel. My question is what we should think the content is of judicial restraint. So the question is about how active should the court be, but I think there's,

in at least some contexts, disagreement over what it would mean for a court to be restrained. And I was thinking of this in the context of Judge Kavanaugh's really important opinion in *Al-Bihani*. It's exhausting to read, so I can't imagine writing it.

There's a footnote there Judge, I'll paraphrase, where you say something—it's actually after running through the various arguments for why *Charming Betsy* doesn't apply, et cetera and so on. It says ultimately also, the courts need to be very wary about endorsing as legally correct, a restrained interpretation of Executive power proffered by the Executive Branch.

Judge Kavanaugh: Oh right.

Trevor Morrison: And because it's something like the reverse of a loaded gun, I guess. It's like emptying out a gun, why leave it to be loaded for the next guy. So in other words it's that this administration might take a more narrow view, but the danger is that that's going to then kind of strain the next administration. I think maybe there's a sort of compare cite to the Chief's opinion in "Peekaboo" (*PCAOB*),⁵⁰ where he says something similar. And so there's a concept of deference there that I think is quite complicated to think through. Part A of the question is I'd love to hear more about your thoughts on that, but Part B is why is it that the restrained position isn't saying we don't need to decide in this case? We can accept the government's position that its detention authority is lawful, and that in doing that, it says it's acting consistently with international law, and we shouldn't decide more in this case. My conception of judicial restraint would ordinarily be in this area, courts should slide to the side less rather than more, and so it's an interesting account of restraint, that entails deciding more and in contrary to the Executive Branch.

Judge Kavanaugh: I think that's a fair critique of why did I do this. It took a long time, why was it necessary? I've mentioned before, as a practical matter. Marty and others here have used the term international norms and historical norms interchangeably, to the extent those two things are the same. This is not going to make a practical difference because they're under the approach I articulated. Historical norms will constrain the interpretation of the AUMF. I thought it was an important point though, to reemphasize something I had said before in written opinions, and something that I believe very strongly and have said today, which is the central role of

50. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

Congress in war powers issues, which is not necessarily something that was evident in the immediate wake of September 11th or going back really since the post-World War II era. When Congress imposes limits on the Executive Branch's conduct of war, courts will enforce those limits and again, *Hamdi* and *Hamdan* are the measure of that.

I have a narrow conception for example, of the political question doctrine. I have a narrow conception of what's exclusive preclusive power, that the President can ignore Congress. But when Congress has not put something into the statute, has not put something in, how should the courts then act? Just to reiterate, Congress puts international law restrictions either by cross reference or by incorporating them itself, quite often. Why do it and why cite? The Chief had just said this, in *Free Enterprise v. PCAOB*, that was a majority opinion, so something I'm paying attention to, case I had written at the lower court, a dissent in, and he made the point that just because the Executive Branch interprets Article II more narrowly than we do, it's not the Executive's role to—the Executive may want to tie its own hands, but it can't tie the hands of future presidents. That was the statement of the Chief and I just quoted that there.

In terms of deferring to the Executive, sure if they want to release the person, that's the ultimate. If they think they're detaining someone in violation of international law, they can release the person, but to the extent they come to court, it's usually up to the courts to decide whether the tools of statutory construction and the like.

Marty Lederman: We have about twelve or thirteen minutes left. Sir, could you identify yourself?

David Frakt: Hi, I'm David Frakt from *Barry Law School*, and actually my question goes directly to what Judge Kavanaugh was just saying, and it's something that's been bothering me for a couple of years. I represented a detainee at Guantanamo, in both the military commission and on habeas, and as we were getting very close to the hearing of the merits, the Justice Department changed their mind and decided that my client, Mohammed Jawad, was not, and was being unlawfully held, and asked the judge to grant the habeas petition, which he did. So you would think at that point that he would be released, but he wasn't right away, because Congress had passed a waiting period notification, that the Executive Branch had to notify Congress and there had to be a waiting period before a detainee could be transferred or released to a third country. So I wanted to ask you guys to comment on that, from a constitutional perspective. Does Congress have that power? Because they

subsequently imposed a lot more of these waiting periods or transfer requirements. I think the President just did a signing statement on the NDAA, saying that he wasn't sure if that was constitutional. Any thoughts on that question?

Judge Kavanaugh: I have opined about a case called *Kiyemba*,⁵¹ that the President does not have exclusive preclusive power with respect to transfers, and thus Congress can regulate transfers, about the signing statement last week. And that was ultimately where the Bush Administration ultimately came eventually to, in a Steve Bradbury final OLC opinion in January of 2009, that the President does not have exclusive preclusive power with respect to transfer, meaning Congress can regulate the transfer of detainees. The signing statement last weekend does have an interesting, I would say vague, reference to potential uncertain exclusive presidential power.

Marty Lederman: Would this be the case in which it would be unconstitutional: If there is no affirmative legal authority to hold someone, and Congress has said you have to hold them anyway, for a particular period of time and give us notice? If the Executive decides it made a mistake, we shouldn't have had this guy in the first place, is that transfer restriction constitutional then? Is there a tension with the President's constitutional obligation to take care that the laws are faithfully executed?

Judge Kavanaugh: There's a tension with what does "release" mean in *Boumediene* ultimately, and that can bump—I think that's what you're getting to, what does release entail if Congress has essentially prevented the release? There's a question about release into the United States, release to foreign countries. None of that has been teed up yet, it hasn't come to pass. The Executive has been able to transfer everyone who has had a release order to a foreign country.

Marty Lederman: Or make an offer of transfer.

Judge Kavanaugh: Or give an offer.

Steve Vladeck: It happened in that context, but Judge Kavanaugh may be too modest, because he's written the majority opinion in *Omar v. McHugh*,⁵² which is about the sort of—

Marty Lederman: I told you, he's rewriting the law.

Steve Vladeck: No, but I mean I think *Omar v. McHugh*, I think is actually one of the most important decisions to come out of the D.C. Circuit in the last couple of years, because I think it's transformative, or at least trans-substantive in the sense that it's going to go beyond

51. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

52. 646 F.3d 13 (D.C. Cir. 2011).

the Guantanamo context. *Omar* is about whether an individual—Omar was one of the detainees who was in *Munaf v. Geren*,⁵³ a U.S. citizen being held in Iraq, and the question that was finally before the D.C. Circuit in *Omar II*, whether the Foreign Affairs Reform and Restructuring Act,⁵⁴ which purports to bar judicial review of claims arriving under the torture convention, except in the context of deportation proceedings, validly takes away that habeas jurisdiction of the federal courts, or whether in fact it violates the Suspension Clause. And I think a fair summary of Judge Kavanaugh's opinion is that he concluded that it did not violate the Suspension Clause, although I think there are a couple of different bases for the holding, one of which being that perhaps Congress actually repealed whatever right to challenge transfers that FARRA had provided. The other being that Congress had validly taken away statutory jurisdiction, even though it hadn't repealed the statutory right. I actually think *Omar* matters a lot more to David's question than we might realize, because if the Suspension Clause doesn't protect *that* kind of claim, I worry about why it would protect the transfer claim in the case David describes.

Judge Kavanaugh: The precise issue in *Omar* was someone being transferred to another country—and the Supreme Court had had an issue like this in *Munaf*, who claimed he did not want to go. He did not want to be transferred to the foreign country because of the possibility of torture in the foreign country. The Supreme Court said unanimously in *Munaf*, there is no due process or constitutional right, even for an American citizen, to get a judicial order preventing a transfer because of the possibility of torture in a foreign country, so long as the Executive had certified that it was not more probable than not that he'd be tortured.

We had a similar issue in *Omar*, which helpfully raised the statutory question. It's very complicated. I think *Munaf* is an extremely important case. I'm not sure if *Omar* is as important as *Munaf*. I'll leave it at that.

Marty Lederman: Laura Donohue.

Laura Donohue: Thanks. Laura Donohue, Georgetown Law. I want to come back Sarah, to something that you mentioned, and as a challenge Judge Kavanaugh, to your faith in the Judiciary to step up and the courts to step up. You mentioned *Hamdan* and these other cases, but *Jeppesen*⁵⁵ and the torture question, I think is an enormous

53. 553 U.S. 674 (2008).

54. 8 U.S.C. § 1231 note (2006).

55. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en

elephant in the room that really has to be addressed. In *Jeppesen*, this was that the government stepped in before Jeppesen even answered the complaint, before they even had a chance to step into the lawsuit itself. And the Ninth Circuit in that case, was very uneasy about their decision and the impact, and also pled with Congress to do something about this, because of this enormous area that it opened up, that torture could not be alleged in a U.S. courtroom under any circumstances, on the basis of that suit. The reason this is concerning is it turns out that during the Bush Administration, there were more than a hundred times that the government actually invoked state secrets, and dozens more are pending, dealing with contractors specifically, and these cover a wide range of suits. They involve environmental charges, personal injury, wrongful death. They involve patent disputes, copyright, and they deflect the extent to which what was an Executive privilege, is now a form of private indemnity for these contractors in these suits, and while they signed agreements with the State Department or Defense, that they won't be prosecuted under Iraq or Afghani law, they come into a U.S. courtroom and state secrets arises, and lo and behold, this judicially created doctrine gets them off the hook, so there is no sense of accountability in the courtroom.

Now, you talked about the conduct of war. CACI International conducted interrogations, they built the bases, they come into a U.S. courtroom, they claim state secrets. And the problem is that Congress, there are constitutional challenges if the legislature steps up. So my real question is, with torture a major issue, in this—you speak about *Omar*. Well, we will receive a grievance. The inability to even have these suits come forward and to have many similar suits that are dismissed, that have to do with contractors under state secrets doctrine, somewhat undermines this believe in the courts as playing role in the common law hostilities.

Marty Lederman: Laura's question ties into the other areas I was hoping we would get to, such as how to reconcile the need to preserve legitimate secrets and the importance of adjudicating the legality of the government's conduct. Moreover, as Laura points out, this is another example of judicially created common law—courts are kicking cases out based on their own common law, just as is in the *Boyle* cases. Does anyone want to address this quickly? We have time for only one more question. Can you talk in two minutes, about secrecy?

banc), *cert. denied*, 131 S. Ct. 2442 (2011).

Judith Resnik: The idea is that everyone has rights of access to courts, but the question is what is a court? My argument is that courts, operating in democracies, are defined by their provision of equal treatment of all litigants, by open access so that third parties can come freely and without permission to observe, by independent judges, and by procedural fairness. This definition is one of the reasons that the creation of military commissions on Guantanamo are so troubling. Yet the issue of openness is not only a problem there. In the Ninth Circuit *Jeppesen* oral argument, before the court en banc, the lawyer representing Jeppesen was asked to leave the courtroom while the government continued to argue.

The current plan for “commission” trials is broad, and thus far, judges have not insisted that their obligations include openness as a matter of constitutional right, as contrasted with government largess. We need to understand that the 9/11 cases are part of the larger picture, and when rights of equal and dignified treatment erode there, they are also eroding in other arenas seeking to be seen as legitimate as “adjudicatory” venues. And of course, it is not only in national security cases, but also in other criminal cases that the government says—and may well have good reason to say—that there need to be secrets. So I think your question needs to be framed not only in the war-on-terror context or the torture context, because it’s a broader set of claims that are being made. Some of the responses and new procedures are undermining what it means to the court.

Marty Lederman: I’m told that because of the business meeting, this has to be very short, so sir, if you could make it very short and the response is short.

Joseph Dellapenna: Joe Dellapenna from Villanova University. It’s one thing to say that a plaintiff’s suit must be dismissed because of state secrets, but there’s an even more troubling dimension. I spend a lot of time working with foreign lawyers, and in terms of how our courts are involved in these, the things I find most shocking is the idea that the decision to keep someone in prison, whether as a result of criminal prosecution or a detention hearing, can be based upon secret information, they find that the most troubling feature, and they inform me that in their country, the government is put to a choice. You either keep the information secret or you keep the prisoner, but not both.

Marty Lederman: That's typically our tradition too, in the criminal context of course, and the question is whether, in the habeas context, that traditional norm is being called into question, as the heavily redacted opinion in the *Latif* case might suggest.

Please give a round of applause to our great panelists.