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Reflections on Forty Years of Private Practice and Sustained Pro Bono Advocacy

Stephen H. Oleskey

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REFLECTIONS ON FORTY YEARS OF PRIVATE PRACTICE AND SUSTAINED PRO BONO ADVOCACY

Stephen Oleskey

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REFLECTIONS ON FORTY YEARS OF PRIVATE PRACTICE AND SUSTAINED PRO BONO ADVOCACY*

*Stephen Oleskey***

I. INTRODUCTION

I am going to address two topics. The first is the one Judge Coffin asked me to address in October 2009, when I was invited to give the 2010 Coffin Lecture: how to combine the private practice of law with an active pro bono practice. The second topic is the one Dean Peter Pitegoff and I agreed to add: a brief discussion of legal developments in national security law since 9/11. My pro bono involvement in Guantanamo Habeas litigation began in 2004 and led directly to my interest in national security law and to my recognition of how difficult it often is to reconcile national security concerns with respect for individual rights.

The previous seventeen Coffin lecturers have been a very impressive and distinguished group of judges, law deans, law professors, and attorneys general; but none has been a practicing attorney whose career had been spent almost entirely in the private practice of law, like mine. Judge Coffin wrote to me on October 29, 2009, just three weeks before he was hospitalized and on the very day of last year's Coffin Lecture, to explain why he wanted me to be the 2010 Coffin Lecturer: my sustained involvement over a now forty-two year period in a variety of pro bono representations, while building a successful career in private practice, aligned with his own deeply rooted conviction that a lawyer should make a significant place in his professional life for public service. He also said that he expected that what I have tried to do would be particularly attractive to the student body of the University of Maine School of Law and to the Maine Bar in general.¹

I recognize that the time available for young lawyers today to pursue meaningful pro bono legal opportunities while engaged in fulltime private practice can often seem dramatically constricted by the pressure on them to meet firm billable hour and related metrics and expectations, including marketing. Even before the current serious economic depression, I have watched with concern as the insistent demands of e-mail bombardment, the normal commitments to family and community life, and the financial pressures imposed by college, law school, and other debt, have led to the seemingly inexorable development of what could be called the practice of "bullet point" law. We are all rushed and pushed daily in our

* This Article is adapted from a speech attorney Stephen Oleskey delivered on October 26, 2010 at the Eighteenth Annual Frank M. Coffin Lecture on Law and Public Service discussing his career as a pro bono advocate, his involvement in Guantanamo Habeas litigation, and emerging conflicts between national security interests and individual rights in the decade since the September 11, 2001 attacks.

** Partner at WilmerHale in Boston, Massachusetts. B.A., Wesleyan University, 1964; J.D., New York University School of Law, 1968. I want to express my deep appreciation to my colleague, WilmerHale attorney Leslie Stierman, for her considerable research assistance in adapting my Coffin Lecture for publication.

1. Since then, I have come to know more about the Maine Bar's impressive pro bono commitment and record.

practices to do more and more at a faster and faster pace. This new paradigm can appear to limit both the horizon and opportunities for young lawyers to become meaningfully involved in sustained pro bono work. Moreover, to the extent pro bono service comes to be seen as merely another timesheet entry involving a routine professional obligation averaging perhaps two or three hours a month, the passion and commitment to change law and to serve the public good that animates truly satisfying pro bono work is reduced to just another statistical obligation. It does not have to be that way; but to pursue a different, more satisfying and professionally productive route takes planning, real discipline, and unwavering commitment.

Combining the private practice of law with a sustained and enduring commitment to pro bono work requires both a vision of what you want to accomplish and the determination to work consistently toward that vision as you find opportunities to realize it. There will, inevitably, be periods when health, family, or paying client obligations will require you to scale back your pro bono commitment, but you should look upon these as temporary detours, rather than as justification to abandon your long term involvement in such work.

Like Judge Coffin, I felt from the beginning of my legal career that I wanted to accomplish more than just being an advocate for paying clients, as rewarding as that is generally. I also wanted to help effect legal and political change as I developed my legal skills. I wanted to be an attorney who was also a citizen advocate. As a young attorney, I came to see that I could best accomplish this by involvement in areas that I had cared about since my late teens: advocacy involving the vindication of constitutional rights; access to justice for poor people; and supporting capacity building development efforts for the desperately poor both at home and in other parts of the world.

Of course, I did not know how this involvement would occur, or even if I would stay in private practice when I began my legal career. Indeed, when I graduated from New York University Law School in 1968 and moved to Boston, where I had no family or connections, I was drawn as much to civil legal aid work and the Massachusetts Attorney General's Office as I was to private practice. I ultimately chose to join the then venerable Boston law firm of Hale and Dorr, mainly because its renowned litigation practice appeared to offer the best training opportunities for an aspiring trial lawyer. I was also drawn to Hale and Dorr by the legacy influence of its longtime managing partner, Reginald Heber Smith, one of the founders of civil legal aid in this country, and of famed trial partner, Joseph Welch, who famously defended the United States Army in the 1954 Senate Hearings presided over by Senator Joseph McCarthy. Hale and Dorr's willingness to take on this highly controversial representation pro bono at a turbulent moment in this country's history left an enduring impression on me in grade school. If this was what lawyers could do to influence the course of events, it was what I wanted to do. Hale and Dorr proved to be an excellent fit for me, as I discovered early in my career that the firm would support me in pursuing a vigorous pro bono legal practice if I paid my dues and always did my fair share of the billable legal work that makes meaningful pro bono representation economically feasible in a private law firm. As I practiced at Hale and Dorr, I also came to see the considerable resource advantages a large law firm can offer its attorneys that enhance their pro

bono and public service advocacy. Similar resources exist in different forms and mutations in private firms and practices of all sizes.

Now, forty-two years later, including almost two years of full-time public service as Massachusetts Deputy Attorney General, I am still practicing trial law alongside active pro bono involvement. Hale and Dorr became Wilmer Cutler Pickering Hale and Dorr (WilmerHale) in 2004. The one-office regional law firm of sixty lawyers I joined in Boston in 1968 now is an international firm of 1,000 lawyers with offices in five United States' and five foreign cities.

The path I have traveled since 1968 ultimately led to my involvement, through WilmerHale, in the representation of six Guantanamo prisoners in 2004, a representation that is still ongoing. For several years, at the height of this case, several colleagues and I each devoted well over 1,000 billable hours annually to this representation. WilmerHale's overall commitment now is over \$25 million, as measured by our customary billable charges. During these six years, we have represented six men who were living in Bosnia with their wives and children on 9/11, mostly working as low-level social workers, before they were arrested by the Bosnians and later forcibly flown to Guantanamo Bay Prison. The United States originally demanded that the Bosnian Government arrest the men in October 2001, asserting publicly that they were terrorists plotting to blow up the United States and British Embassies. When the Bosnian police and justice system found no basis to hold the men after a three-month investigation, our Government nonetheless demanded that the men be turned over to the United States military peace-keeping forces in Bosnia. The Bosnians complied, and the men were illegally flown to Guantanamo. There, the men were badly mistreated and subjected to what has been euphemistically called "enhanced interrogation" during long term interrogations (many would consider this torture). WilmerHale's lengthy and ongoing representation has involved us in federal court trial and appellate litigation over profound legal and political questions, centering on the molten core of our fundamental constitutional protections: the writ of habeas corpus guaranteed against suspension by Congress in Article I of the Constitution. This writ was the Founders' commitment, drawn from its deep roots in English common law, that no person subject to our laws could be indefinitely confined without charge or trial at the whim of the Executive. How I came to be involved in this representation with my WilmerHale colleagues was not mere serendipity. It was the result of a series of professional choices arising from opportunities that I found and pursued because of my commitment to use legal advocacy to accomplish legal change and to achieve some measure of justice.

II. PRO BONO CAREER

Let me touch on some of those earlier opportunities I found that shaped what I have worked to accomplish. For those of you who are law students, or young lawyers, this will give you some concrete sense of how you can transform your own opportunities—often as volunteers—into fulfilling work that will transform and enrich your professional and personal lives. As one of my partners recently observed, deciding whether to pursue these opportunities is a personal decision of how to keep score about what truly matters to you. The reality is that this work

will enrich your life in causes and communities far beyond anything you will usually experience with fee-paying clients.

Wanting to become personally involved in the advancement of civil rights for African-Americans in the midst of the 1960s' Civil Rights' Revolution, I applied for and received a \$300 internship during the summer of 1966 following my first year of law school. With this three-month bankroll, I traveled to Mississippi to work as a law student intern on a wide variety of civil justice issues. There, working with the Lawyers' Committee for Civil Rights under Law (LCCR), I was trained by such remarkable young attorneys as Marian Wright (Edelman), who later founded the Children's Defense Fund, and Denny Ray, who had left a promising career at one of New York City's most prestigious law firms to lead the Mississippi office of the LCCR and who later came here to Maine to direct Pine Tree Legal Services. That summer, I saw at the grassroots level how the power of law to achieve justice is fundamentally limited both by the willingness of government officials to respect and enforce that law, and by the extent to which the judicial system is accessible to enforce accountability from those very officials. We have witnessed that same reality over the last eight years in light of certain of our Government's responses to the events of 9/11.

I experienced it myself in an unforgettable way while driving at night on a lonely stretch of Mississippi highway that hot, turbulent summer of the James Meredith March Against Fear. After moonlighting at a Freedom Rally and March sponsored by Martin Luther King's Southern Christian Leadership Conference in the town of Granada, Mississippi, I was alone at night in my borrowed car driving toward Batesville and the home of Robert and Mona Mills, the rural African-American family who were my hosts that summer. Suddenly, two state police cars appeared behind and in front of my car, and five burly Mississippi state policemen pulled me over on a lonely stretch of highway. After some preliminary roadside interrogation, they arrested me on the pretext of reckless driving. I was immediately driven off into the dark countryside in the back seat of a patrol car, sitting between two state policemen (one with a shotgun in one hand, and in the other, a shotgun shell he flipped up and down with affecting menace). In the events that followed, I experienced for two terrifying hours something of what many African-Americans in Mississippi had experienced routinely for centuries.

Hauled before a local Justice of the Peace holding court in a converted chicken coop outside his farmhouse, deep in the back country, I was acutely aware that only two summers before, in the "Freedom Summer" of 1964, three young civil rights' volunteers my age, Michael Schwerner, James Chaney, and Andrew Goodman, had also been stopped by police in rural Mississippi, before they disappeared, only to be found later shot and buried under a hastily erected earthen dam. Yet, in what happened that night to me, I also saw the extraordinary reach of the law and of our Constitution, after that rural farmer-judge, roused from his bed, appeared in his nightclothes to preside over my late night summary trial.

After he convened his court and heard the charges, he asked me how I pled. With what I hoped was a calm tone, despite my rising panic, I said that I wanted to call a lawyer first. After what seemed an eternity but was probably only fifteen or twenty seconds, to my amazement, he agreed. What he said to those five state policemen is etched indelibly into my memory: "Boys, the Supreme Court says he

gets one call to a lawyer.” I made that call from a wall phone in the farmhouse to the only lawyer whose phone number I could recall, Henry Aronson, the same experienced civil rights attorney who had warned us interns in our training session “never be out alone at night in rural Mississippi.” His chilling counsel to me that night over the telephone was this: “We can’t help you out there tonight; it’s too dangerous. Plead guilty, pay your fine and hope you get out of there alive. If you spend the night in jail out there, you won’t be found in the morning.” I pled guilty and paid the fine—miraculously \$20 plus \$2 court costs—with a \$20 Travelers’ check and \$2 in cash, which was all the money I had with me, and was released back at my car with the warning, “We’d better not catch you reckless driving again.”

That Supreme Court decision, which was literally my lifeline that night, was the 1963 decision of *Haynes v. Washington*,² where Justice Goldberg wrote that it was inherently coercive to hold a person in custody for questioning without giving him the opportunity to call a lawyer. Somehow that decision had penetrated to rural Mississippi and caught the attention—if not the conscience—of this farmer-justice.

Later, as a young Boston lawyer serving on the board of my downtown neighborhood civil association, I saw that determined citizens groups hitting the statute books could stop a planned massive high rise project that would have badly overshadowed Boston Common and the Public Gardens. We citizens stopped that project after a long and ferocious battle with the able assistance of a very young, very talented first term State Representative named Barney Frank, after he discovered and successfully invoked an obscure state statute that required a two-thirds vote of the Massachusetts Legislature to take dedicated public park space. That project required the taking of a tiny public park to proceed, but could not muster the high standard of the two-thirds vote required of the Legislature.

My career in pro bono and public service has not always been one of wins for the underdogs; inevitably, it has also contained its share of losses. In 1986, as Massachusetts Deputy Attorney General, I was in charge of the legal efforts by the Commonwealth of Massachusetts to prevent the federal licensing of the Seabrook, New Hampshire nuclear power plant because of the risks a nuclear accident could pose to tens of thousands of nearby Massachusetts residents. Nonetheless, after a long and difficult legal battle against the plant operator, the State of New Hampshire and the Federal Government, the plant was licensed, constructed, and operates today.

Choosing as a first-year attorney to spend one lunch a month at the Massachusetts Civil Liberties Lawyers’ Lunches, an older Hale and Dorr colleague and I volunteered one day to represent pro bono a woman named Lucretia Richardson who had just been denied a job as a state social worker because she could not offend her conscience by swearing to a sweeping state employees’ loyalty oath, which she believed was unconstitutional. Eighteen months later, when the older associate who was lead counsel left the firm, I found myself, at age twenty-nine, at the lectern in the well of the United States Supreme Court before Chief Justice Warren Burger, and Associate Justices William O. Douglas, Byron

2. *Haynes v. Washington*, 373 U.S. 503, 514 (1963).

White, Harry Blackmun, Potter Stewart, William Brennan, and Thurgood Marshall.³ I was not even through the obligatory introduction required of all advocates as they begin their Supreme Court argument (“Mr. Chief Justice, and may it please the Court”), when Chief Justice Burger unexpectedly interrupted me to ask: “Do you see much distinction between the first part of the oath . . . and the oath that you took . . . when you were admitted to the bar of this court? I think the language almost tracks the oath here, doesn’t it . . . ?” I replied: “I must confess [to] some slight embarrassment since I am appearing pro hac vice, being three days short of eligibility for admission to the bar of the court, [and] I have not yet taken that oath.” The Chief Justice crisply responded, “Then, let’s pose that in terms of the oath that you will take three days hence or thereafter. You have here the oath in this courtroom . . .” He read it; I paused, and then did my best to distinguish an oath I had five seconds to consider. With that, the Court and I were off on an exhilarating Nantucket sleigh ride of twenty minutes of virtually unbroken questions and answers.⁴

While the Court decided against my client, Mrs. Richardson, by one vote—four to three—the controversy surrounding the case later led the Massachusetts Legislature to repeal the state Loyalty Oath. That was when I learned that there are often multiple routes to success for a pro bono advocate and that the advocate who wants to change the law needs to consider and pursue as many avenues as possible simultaneously.

I had interned at a legal services project for the poor while in law school in New York City. Working there, it was impossible to miss how much basic civil legal services meant to poor people who had no clout in dealing with overreaching landlords, merchants, or government agencies. When I began practicing law, I volunteered once a month at a local legal services’ office. Learning of this, a partner asked me to serve on the board of that program as Hale and Dorr’s representative. This began my forty-year plus involvement in Massachusetts legal services for the poor. I stayed consistently involved because I saw immediately just how critical the connection is between private practitioners and legal services lawyers in the unending struggle to provide some measure of equal justice for the poor. Similar motivations decades later led to my present role as Board Chair of the international NGO, Pact, which oversees \$200 million of sustainable development programs in fifty-five poor countries around the world.

Given this long term involvement in pro bono and public service, when I noticed a firm-wide e-mail in late June 2004 inquiring about interest in the representation of six men detained in Guantanamo for almost three years, I pressed “Reply” and typed “yes” as soon as my equally committed partner, Rob Kirsch, agreed this was going to be a two-partner case. A mere thirty-six hours later, WilmerHale had formally agreed to take on what became a historic representation. That representation has involved not two, but at times, up to ten WilmerHale partners, over twenty-five younger attorneys, and a progression of courts, events, and challenges beyond anything we imagined in 2004. In our Habeas case,

3. *Cole v. Richardson*, 405 U.S. 676, 677 (1972).

4. A full audio recording of the argument is available at http://www.oyez.org/sites/default/files/audio/cases/1971/70-14_19711116-argument.mp3 (last visited, Apr. 30, 2011).

Boumediene v. Bush,⁵ we have had three Court of Appeals arguments in two separate appeals, a United States Supreme Court argument, extensive lobbying of and testimony before Congress, the first Guantanamo Habeas trial in November 2008, a federal FOIA suit, a European Court of Human Rights suit, and an unending array of diplomatic initiatives in the European Union, Council of Europe, and the United Nations, as well as discussions with numerous foreign governments about their willingness to offer resettlement to our clients. Along the way, I have visited what is perhaps the world's most notorious prison twenty times to counsel our clients. Our work is not yet complete. One of the six clients remains in Guantanamo.

In his introduction, Bill Kayatta quoted from Mustafa Aid Idir's April 2007 letter to me, in which Mustafa predicted we would lose his case because federal judges are appointed by the President, who was the principal defendant in our Habeas suit. I have often reflected back on Mustafa's letter, especially on November 20, 2008 when the federal judge before whom we had just tried our six Habeas cases—a judge who was an appointee of President George Bush—read out in a silent, expectant courtroom his decision granting Habeas relief to Mustafa and four of our other five clients—while they listened on an open phone line in a prison room in Guantanamo. The judge ended with an extemporaneous and remarkable plea to senior officials of the United States Government not to appeal his decision and to “take a hard look at the evidence, both presented and lacking, as to these five detainees. Seven years of waiting for our legal system to give them an answer to a question so important, in my judgment, is more than plenty.”⁶ There was no appeal, and the five men were all released.

The record as of today in the Guantanamo Habeas litigation is that thirty-seven of fifty-six (66%) of the petitions tried have been granted by federal trial judges.⁷ That is an encouraging result reached by a number of D.C. federal trial judges ruling for a group of detainees Vice President Dick Cheney often labeled “the worst of the worst” before the Bush Administration itself quietly released hundreds of them from Guantanamo.

III. NATIONAL SECURITY LAW AND INDIVIDUAL RIGHTS

A. Overview

I want to now discuss briefly some of the still-evolving and highly contentious legal issues of the past nine years in the area of national security law: torture and so-called enhanced interrogation; extralegal renditions; the breadth of habeas corpus for enemy combatant detainees held by the United States at foreign locations other than Guantanamo Bay; whether it matters if alleged terrorists are

5. 553 U.S. 723 (2008).

6. See Transcript of Record, *Boumediene v. Bush*, United States District Court for the District of Columbia (2008) (No. CV-04-1166) available at http://www.wilmerhale.com/files/upload/boumediene_leon_decision.pdf (last visited Apr. 30, 2011).

7. GUANTANAMO HABEAS SCORECARD, CENTER FOR CONSTITUTIONAL RIGHTS (Jan. 12, 2011), available at <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last visited, Apr. 30, 2011).

tried in federal courts instead of before Military Commissions; indefinite detention; and the targeted assassination by our government—outside of acknowledged war zones—of alleged terrorists who cannot easily be seized. While the disputes over these issues are often framed in the press and by politicians as a battle between “conservatives” and “liberals,” I suggest that a more thoughtful division is between those who believe in the established rule of law and its orderly application on the one hand, and on the other, those who argue it is necessary to set aside previously accepted substance and process in light of what they insist must be done to respond to grave new threats to our national security.

The starting point for this discussion has to be acknowledgment that the pre 9/11 domestic and international laws were initially structurally—and to some extent conceptually—ill-equipped to deal effectively with a new, more widespread, and more effective form of international terrorism—a terrorism with features that differed markedly from the battlefield military experiences of the United States in the conventional warfare between uniformed forces in World Wars I and II, Korea, and to some extent even in Vietnam. The terrible events of 9/11, aggressively seized upon by a new administration eager to show a traumatized country its muscular national security chops, resulted in an assault on our legal system for which that system was ill-prepared. While the system has recovered some of its balance and spine in the intervening eight years, any new significant terrorist attack on the United States at home or on our citizens overseas will, I believe, continue to strain both legal process and the Constitution as issues of national security butt up against important claims of individual rights and due process.

B. Torture and Other Degrading Treatment

No one now seriously denies that the United States Government tortured certain prisoners after 9/11, as well as facilitating the torture of others by cooperating governments. Our Government also treated many others in cruel, inhuman, and degrading ways. Former Assistant Attorney General Jay Bybee, Deputy Assistant Attorney General John Yoo, and others, drafted the now infamous “torture memos” delineating what forms of torture could be considered lawful in various contexts.⁸ Torture was, to many, no less offensive to the then accepted rule of law than it was when it was dressed up with such euphemistic labels as “enhanced interrogation” and sanctioned by elaborate memos written by very talented Justice Department lawyers.⁹ The most egregious examples of torture that have come to light include the extensive water boardings of Khalid Sheik

8. See, e.g., Mem. from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legal Counsel, to Alberto Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Memo from Bybee to Gonzalez], available at http://www.washingtonpost.com/wp-srv/politics/documents/chene/torture_memo_aug2002.pdf (last visited May 18, 2011); Mem. from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Defense (Mar. 14, 2003), available at http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (last visited May 18, 2011).

9. Memo from Bybee to Gonzalez, *supra* note 8 (writing that an act only constitutes torture if it inflicts pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death”). Additionally, any physical torture inflicted could not be so great as to leave effects “for months or even years.” *Id.*

Mohammed and Abu Zubaydah, before they were “rendered” to Guantanamo.¹⁰ Zubaydah was interrogated over 100 times in one year.¹¹ Later, *after* his interrogations, it was reportedly determined that he suffered from split personality disorder.¹²

Other forms and varieties of torture and degrading treatment beyond water boarding were employed by our Government in Guantanamo and elsewhere, such as inflicting long hours of ear-splitting rock music on restrained prisoners, or extensive confinement and questioning of men kept standing for hours or even days in cells both freezing and sauna-like.¹³

The willingness of the United States to consider and sanction the use of techniques previously considered to be torture, and as such unlawful, changed following 9/11. The United States had ratified the United Nation’s Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 1994, which codified accepted domestic and international norms, making torture and other degrading treatment of either civilian or military prisoners unlawful.¹⁴ This proscription applied whether the prisoners were accused terrorists held in our civilian criminal justice system or those captured and held by military forces.¹⁵ The bar on torture and related mistreatment as an instrument of government appears to have been generally accepted by both our intelligence agencies and our military in their actions abroad.¹⁶ Internationally, the Geneva Conventions prescribed the basis for dealing with captured enemy soldiers in conventional warfare in accord with civilized norms of behavior by treating them as POWs.¹⁷ The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1988 (the CAT) forbade torture and the other enumerated acts.¹⁸ The United States was a signatory to both pacts and overwhelmingly adhered to them, both as a matter of legal principle and from the more pragmatic perspective of reciprocity: “Do unto the enemy as you would have it do unto our soldiers and citizens in their hands.” Moreover, many in the military and in intelligence services believed that torture was also ineffective because it did

10. See, e.g., Mem. from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency 3-4 (Aug. 1, 2002), available at http://luxmedia.com.edgesuite.net/aclu/olc_08012002_bybee.pdf (last visited May 18, 2011).

11. Andy Worthington, *Abu Zubaydah: Tortured for Nothing*, THE FUTURE OF FREEDOM FOUNDATION, April 2010, available at <http://www.fff.org/comment/com1004b.pdf> (last visited May 18, 2011).

12. *Id.*

13. WilmerHale Interviews with Clients, in Guantanamo Bay, Cuba (2004-2007). See also DARIUS REJALI, TORTURE AND DEMOCRACY 505-06 (2007).

14. U. N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. TREATY Doc. No. 100-20 (signed by the United States on Apr. 18, 1988) [hereinafter CAT].

15. *Id.*

16. 18 U.S.C. § 2340A et. seq.

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

18. CAT, *supra* note 14.

not result in reliable, actionable intelligence.¹⁹ For example, the reputed head of Al-Qaeda's Khalden training camp in Afghanistan, Ibn al-Sheik al-Libi, was reported to have "confessed" while being tortured that Iraq was providing chemical and biological training to Al-Qaeda operatives.²⁰ That information was then provided to Colin Powell, who used it before the United Nations General Assembly to advocate for international support for military action against Iraq.²¹

Notably, however, the United States Senate had approved the CAT in 1994 with two significant reservations (Senate Reservations): First, the bar on "cruel, unusual or degrading treatment" was to be interpreted under the United States Constitution, not under the broader protective definition found in the CAT; second, the prohibition against torture would apply only to those in the custody or physical control of the United States, while the parallel prohibition against rendition to a country "where there are substantial grounds for believing that [the prisoner] would be in danger of being subjected to torture" (per the CAT) would be interpreted to mean that the Government would need to consider only whether "it is more likely than not that he would be tortured" in the second country.²²

The State Department's analysis of the CAT, which was used by President Reagan in his request to Congress for its approval, stated that the CAT's definition of torture was intended to be interpreted in a "relatively limited fashion, corresponding to the common understanding of torture as an *extreme* practice which is universally condemned."²³ The State Department analysis concluded that treatment which, in the United States, would be considered police brutality, was not "torture" for the purposes of the CAT, which is "defined as "extreme, deliberate, and unusually cruel practice . . . [such as] sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain."²⁴

The George W. Bush Administration expressly put aside the protections of the Geneva Conventions by an executive order in November 2001 that placed any non-citizen the United States seized anywhere in military custody if the president determined in writing that there was reason to believe the person was a member of Al-Qaeda or was involved in terrorism against the United States.²⁵ These men were also denied the right to seek any judicial remedy or bring any suit in any court anywhere, despite the fact that Article 14 of the CAT obligates States to make civil

19. There is even historical evidence that medieval torturers declined to use sleep deprivation as a torture method because it produced such unreliable results. However, sleep deprivation was used frequently by witch hunters to prove pacts with the Devil. See REJALI, *supra* note 13, at 511.

20. Frontline, *The Torture Question: Frequently Asked Questions*, PUBLIC BROADCASTING SERVICE (Oct. 18, 2005), <http://www.pbs.org/wgbh/pages/frontline/torture/etc/faqs.html> (last visited Apr. 4, 2011).

21. *Id.*

22. SEN. EXEC. DOC. NO. 101-30 at 29-30 (1990) (Comm. Rep.).

23. President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. TREATY DOC. NO. 100-20, reprinted in 13857 U.S. Cong. Serial Set at 3 (1990) (emphasis added).

24. *Id.* at 4.

25. Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002).

redress available for victims of torture.²⁶ Instead, when they were tried, rather than “merely” indefinitely detained, it was to be only in military tribunals presided over by military officers with military juries, operating under more relaxed rules of evidence than in federal courts. When adopting the CAT, the Senate’s advice and consent was based on the understanding that a State was only obligated to provide a private right of action for “acts of torture committed in territory under [a signatory State’s] jurisdiction,” and that, while this qualification was not in the CAT, it was assumed to have been “deleted by mistake.”²⁷

The Bush Administration, through its executive order and its secret legal interpretations by Justice Department lawyers, loosened the absolute bar on torture in the CAT that expressly provided “no exceptional circumstances whatsoever [including] a state of war or a threat of war . . . may be invoked as a justification of torture.”²⁸

Even though the Bush Administration had, for various reasons, largely retreated from its most extreme practices by its second term, and Barack Obama was elected with a commitment to stop them, there has been no real reckoning or punishment for the torture and other degrading mistreatment committed and sanctioned by the United States Government after 9/11 under color of law.²⁹ Virtually no one has been held legally, or even politically, accountable, and it appears unlikely to me that they ever will be.³⁰ While judges in future trials—in federal court (certainly) and in military commission trials (possibly)—will exclude evidence procured by torture, such exclusions may not be viewed as a fundamental disincentive to future recourse to torture. Moreover, Congress has expressly legislated in an attempt to bar any suits against the United States or its agents by any alien detained by the United States “determined by the United States to have been properly detained as an enemy combatant or [who] is awaiting such determination, . . . relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement.”³¹ The Military Commissions Act of 2006 essentially reaffirmed the existing United States interpretation of the CAT set out in the Senate Reservations discussed above. This would appear to leave the door ajar for the United States Government in the future to revert to torture and other degrading mistreatment of alleged terrorists in response to provocations less serious than the grievous events of 9/11.

26. *Id.* at 57835(7)(b)(2); CAT, *supra* note 14, art. 14 at 22.

27. SEN EXEC. DOC. NO. 101-30, *supra* note 23, at 24, 30. *See also* State Dept. Summary, footnote 4, at 5, and 13-14.

28. CAT, *supra* note 14, art. 2, ¶ 2 at 20.

29. One of President Obama’s first executive orders, intended to end many of the practices implemented after 9/11, explicitly allowed the practice of rendition of prisoners in other countries to continue. *See* Exec. Order No. 13,491, 3 C.F.R. 199 (2010).

30. The twelve soldiers connected with the graphic mistreatment of prisoners at Abu Ghraib were tried and found guilty of charges stemming from leaked photographs depicting the abuse they committed on Iraqi prisoners. However, absent the photographic evidence, it is unclear whether these soldiers would have been found guilty. *See* Frontline, *supra* note 20.

31. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (codified at 28 U.S.C. § 2241(e) (2006)).

C. Extraordinary Rendition

Extraordinary renditions involve the seizure and transportation of prisoners from point A—which may be anywhere in the world remote from a conventional battlefield—to point B: a prison operated by the United States or any cooperating government, but outside the relevant domestic legal system. Such renditions typically occur without formal legal process.³² Notable examples of prisons to which hundreds were rendered include Guantanamo, prisons in Afghanistan, Egypt, Jordan, Iraq, Diego Garcia, and elsewhere in the Middle East, and the now notorious Black Hole prisons operated by the CIA in Eastern Europe (and apparently elsewhere).³³ This practice should have been limited by the CAT where, if it is considered more likely than not that torture may occur as a result, rendition should not occur. However, an aggressive interpretation of the Senate Reservations opened the door wide for United States renditions to foreign countries and to Guantanamo after 9/11.³⁴ While the seizure of enemy soldiers on any battlefield as lawful combatants and their subsequent detention for the duration of hostilities is a recognized and legally sanctioned incident of warfare,³⁵ the United States practice of renditions of “enemy combatants” following 9/11 was different in kind and effect. President Clinton provided the initial legal cover for expansion of this practice in Presidential Decision Directive 39 in 1995, which, building on a classified directive from President George H. W. Bush, granted authority to render indicted terrorists, by force and without process, where legal process was unavailing.³⁶ The result of these developments was that by late 2001, men like Wilmer Hale’s six Algerian born clients, who were living with their families and working peacefully in Bosnia in the fall of 2001, 1,500 miles from any conventional battlefield, could be seized by our military and sent to Guantanamo without benefit of a criminal indictment or arrest warrant issued and processed under international or domestic law. Such “extraordinary renditions” were advanced by the Bush Administration as both necessary and lawful in a post 9/11 new international order, where the entire world was effectively considered a battlefield and any non-uniformed combatant to be an unlawful enemy combatant for whom new, ad hoc rules governing seizure, transport and indefinite detention without charge or trial were both justified and justifiable. Whether the Obama Administration’s public disavowal of this practice will continue, much less be sustained by future presidents, remains to be seen.³⁷

32. Facsimile Communication from the Cent. Intelligence Agency to Dan Levin, Acting Assistant Attorney Gen., U.S. Dep’t of Justice Office of Legal Counsel (Dec. 30, 2004), *available at* <http://aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf>.

33. *Fact Sheet: Extraordinary Rendition*, AMERICAN CIVIL LIBERTIES UNION (Dec. 6, 2005), <http://www.aclu.org/national-security/fact-sheet-extraordinary-rendition> (last visited Apr. 3, 2011).

34. *See Moshud v. Blackman*, 68 Fed. App’x 328, 335 (3d Cir. 2003) (denying alien’s claim to reopen removal proceedings to assert a CAT claim based on her fear of female genital mutilation in Ghana, reasoning that although the practice was widespread, the Ghanaian government had not acquiesced to the practice because it had been made illegal and public officials had condemned the practice).

35. Geneva Convention, *supra* note 17, art. 3.

36. U.S. Policy on Counterterrorism, Presidential Decision Directive/NCS-39 (June 21, 1995), *available at* <http://www.fas.org/irp/offdocs/pdd39.htm> (last visited May 18, 2011).

37. *See* Exec. Order No. 13,491, *supra* note 29.

D. Habeas Corpus

How strong and robust has the bedrock constitutional guarantee of habeas corpus proven to be? My assessment is that it has been just barely strong enough to be held applicable to Guantanamo prisoners. It ultimately withstood, by only one vote in the United States Supreme Court, massive assault for six years by the executive branch and Congress.³⁸ Sixty-six percent of the Guantanamo detainees afforded habeas review have been ordered released.³⁹ Now, almost three years after the 2008 *Boumediene* decision, the lower courts—especially the United States Court of Appeals for the District of Columbia (D.C. Circuit)—continue to wrestle with a variety of habeas issues not resolved by the Supreme Court in *Boumediene*. Virtually all of these issues have been resolved in favor of the Government and against the detainee. The two principal habeas issues addressed have been: (1) the scope of federal trial courts' authority to order the effective release of Guantanamo detainees found entitled to habeas relief; and, (2) the reach of habeas outside of the special circumstances the Supreme Court identified as distinguishing Guantanamo prisoners from unsuccessful habeas petitions filed by prisoners of war in United States' military prisons overseas during World War II. In both instances, the D.C. Circuit has sharply limited the authority of federal courts to move beyond *Boumediene*'s central holding: that detainees in Guantanamo are entitled to seek habeas relief.

On the first issue—the federal trial courts' power to effectuate the release of those granted habeas relief—the D.C. Circuit has held that such an action is beyond the reach of federal courts.⁴⁰ It is only the executive branch, which is authorized by the Constitution to conduct foreign affairs, that can negotiate the release and resettlement in other countries of detainees freed on habeas.⁴¹ The D.C. Circuit thus reversed a federal district court judge who had ordered seventeen Guantanamo Uigher (Chinese Muslim) detainees released in the United States following the executive branch's then inability to find any other refuge for them.⁴² This result was reached even though reportedly the executive branch itself had determined that there were no grounds for continued detention.⁴³ This decision has produced an unjust result: about half of the 172 men left in Guantanamo are in a legal limbo, indefinitely detained notwithstanding their clearance for release either through a favorable habeas ruling or by the Obama Administration's own Administrative Task Force screening and release determinations in 2010.⁴⁴ In a related development, Congress has repeatedly refused to appropriate any money for

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

39. GUANTANAMO HABEAS SCORECARD, *supra* note 7.

40. *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022, 1024, 1028-29 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam).

41. *Kiyemba I*, 555 F.3d at 1028-29.

42. *Id.* at 1023-24, 1035.

43. In *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 514, 516 (D.C. Cir. 2009), the Court of Appeals held that the political branches should determine where is an appropriate resettlement location. See also *Kiyemba v. Bush*, 581 F. Supp. 2d 33, 34 (D.D.C. 2008), *rev'd*, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir.), *cert. granted*, 559 U.S. ___ (2009), *vacated and remanded*, 559 U.S. ___ (2010).

44. *The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last updated Mar. 24, 2011).

acquisition of a United States prison facility, so the detention facility at Guantanamo remains open as it reaches its tenth anniversary.⁴⁵

On the second major habeas question left open after *Boumediene*—the jurisdiction of United States courts to entertain habeas petitions filed by United States detainees in foreign locations, especially Bagram Prison in Afghanistan—the D.C. Circuit has similarly circumscribed the scope of habeas.⁴⁶ Essentially, the Circuit has confined *Boumediene*'s application to the objective factors and special circumstances the Supreme Court identified at Guantanamo: exclusive United States jurisdiction and control over the Guantanamo base area under a lease of indefinite duration existing for over 100 years and cancellable solely by the United States; that the Guantanamo prisoners had no other effective remedy than habeas corpus; and that habeas proceedings for Guantanamo prisoners could proceed without undue interference with active military operations.⁴⁷ In broad practical and legal terms, the Supreme Court majority apparently concluded that Guantanamo Naval Base (where Guantanamo Prison sits) could be fairly viewed for habeas jurisdiction purposes as exclusively a United States military base as, say, Fort Riley in Kansas. Moreover, in constitutional separation of powers terms, *Boumediene* was the Court's sharp reminder to the other two branches that it, and not Congress or the executive branch, has the last word about the sweep and application of the core constitutional protection of habeas corpus.

One effect of these recent habeas decisions is the resulting indefinite detention without trial for those denied habeas and considered "unlawful enemy combatants." This side effect of the judiciary's action has not escaped congressional attention. Senator Lindsey Graham quietly introduced a bill in August 2010 that would codify indefinite detention for "unlawful enemy combatants."⁴⁸ While critics of his bill argue that congressional sanctioning of indefinite detention for the first time would be unconstitutional, Senator Graham rejoins that his bill would "change our laws [and] come up with better guidance" for the judiciary.⁴⁹

Finally, the D.C. Circuit has increasingly narrowly defined the factual and legal basis warranting the grant of habeas relief to Guantanamo detainees, resulting in a series of reversals of District Court habeas grants.⁵⁰

E. Trials of Alleged Terrorists in Federal Court or Before Military Commissions

Why does it matter where an alleged terrorist is tried? Is that not all a matter of lawyers and politicians debating procedural niceties? Many believe that this distinction does matter, and that it is over more than procedural nits to be picked between the two modes of trial. First, the procedural differences—such as relying

45. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009).

46. See *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

47. *Id.* at 95-98.

48. See Dina Temple-Raston, *Obama Administration Weighs Indefinite Detention*, NPR (Nov. 24, 2010), <http://www.npr.org/2010/11/24/131574360/obama-administration-weighs-indefinite-detention> (last visited Apr. 30, 2011).

49. Josh Gerstein, *Lindsey Graham: White House Mulling Indefinite Detention*, POLITICO (Feb. 15, 2010, 5:32 PM), <http://www.politico.com/news/stories/0210/32998.html> (last visited Apr. 30, 2011).

50. See, e.g., *Esmail v. Obama*, No. 10-5282 (Apr. 8, 2011).

on the Uniform Code of Military Justice instead of the Federal Rules of Criminal Procedure—are real and material. Second, since 9/11, the military commission system has proven, thus far, generally inadequate in providing anything approaching speedy, fair, and dispositive justice, despite recent congressional modifications. Third, the certainty of outcome in a federal court criminal trial, the relative openness of the federal appeals process, and the public access and transparency these trials provide, encourage domestic and international acceptance of the results. Fourth, reliance on federal court criminal trials—where evidence procured by torture is routinely excluded—discourages recourse to torture and encourages interrogation aimed at cooperation and confession. Finally, importantly, is the question of how we as a country want to establish principled accountability for terrorist acts not occurring anywhere approaching a conventional battlefield—such as, the bombing of the World Trade Center in Manhattan in 1993, or of the United States Embassies in East Africa in 1997. As United States District Court Judge William Young of Boston said at the January 30, 2003 sentencing of British shoe bomber, Richard Reid, following his criminal trial:

We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect. Here in this court, where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice, you are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist So war talk is way out of line in this court. You are a big fellow. But you are not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders The very President of the United States through his officers will have to come into courtrooms and lay out evidence on which specific matters can be judged, and juries of citizens will gather to sit and judge that evidence democratically, to mold and shape and refine our sense of justice.⁵¹

In response to the debate over where and how to try Khalid Sheik Mohammed and other alleged, notorious terrorists, Congress has legislated to constrain the executive branch's exclusive authority to make such tactical trial decisions in the case of Guantanamo detainees.⁵²

F. Targeting Terrorists for Summary Death When They Cannot be Seized

Finally, I would like to touch on a relatively little discussed, emerging aspect of our national security practices: the targeting of aliens and even American citizens for State sanctioned killings, where seizure is impractical. This is occurring—primarily through the employment of pilotless drones directed from secure sites in the United States—not only in Afghanistan where we are at war, but also in Pakistan and even Yemen, where we are not at war, at least not in any way

51. Transcript of Sentencing Reasons at 5-6, *United States v. Reid*, No. 1:02-cr-10013-WGY-1 (D. Mass. Jan. 31, 2003), ECF No. 189. (D. Mass., Jan. 30, 2003).

52. National Defense Authorization Act §§ 1040-41.

defined in international law.⁵³ There is political, if not well grounded, legal precedent for such actions; one thinks of President Kennedy's covert efforts to assassinate Fidel Castro, even though the United States was not in state of war with Cuba.⁵⁴ There were also the CIA engineered coups and suspected complicity in the assassinations of Prime Minister Mosadeqh of Iran in the 1950s and of President Allende of Chile in the 1980s,⁵⁵ though neither country was at war with this country.⁵⁶

What seems different today is the apparent decision to employ presidentially authorized targeted killings well inside our allies Pakistan (against both Afghanistani and Pakistani Taliban) and Yemen, against militant Islamists and even reportedly against a radical American-born Muslim cleric, Anwar al-Awlaki. Mr. al-Awlaki's virulent sermons and, apparently, his direct communications are said to have incited both Major Nidal Hassan's killing of thirteen fellow soldiers at Ford Hood Texas a year ago and Nigerian Umar Abdulmuttalah's failed Christmas Day 2009 plane bombing en route to Detroit. News reports quote administration intelligence officials as defending such a targeted killing of even an American citizen without process as directly authorized by a secret presidential finding or order.⁵⁷ Not surprisingly, there is no known congressional authorization for such targeted killings.

One major and disturbing difference between past assassinations of foreign officials and what is happening today, is that whereas formerly American presidents went to great lengths to distance themselves from any direct involvement in such actions—"plausible deniability" was the term of choice—today President Obama appears willing to have it publicly known that he (a former professor of constitutional law at one of this country's leading law schools) has personally and directly authorized such extreme actions. Assuming that Mr. al-Awlaki has, through his sermons and internet communications, directly incited the actions of which he stands accused in the press, he might well be convicted in a criminal trial of being an accessory and possibly an accomplice to multiple counts of both murder (with regard to the actions of Major Hassan) and of attempted murder (with regard to the actions of Mr. Abdulmuttalah). His assassination may be the only quick and expedient way to subject him to the most extreme penalty our

53. Letter from Kenneth Roth, Human Rights Watch, to Barack Obama, President, U.S. (Dec. 7, 2010), available at <http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings> (last visited May 18, 2011).

54. Memorandum from Howard J. Osborn, Dir. of Security, to Exec. Sec'y, Cent. Intelligence Agency Mgmt. Comm. (May 16, 1973) available at http://www.foia.cia.gov/docs/DOC_0001451843/0001451843.pdf (last visited May 18, 2011).

55. James Risen, *Secrets of History: The CIA in Iran—A Special Report: How a Plot Convulsed Iran in '53 (and in '79)*, N.Y. TIMES, Apr. 16, 2000, at 1.1.; James Risen, *Word for Word/ABC's of Coups*, N.Y. TIMES, June 18, 2000, <http://partners.nytimes.com/library/review/061800iran-cia-review.html> (last visited Apr. 3, 2011).

56. CENT. INTELLIGENCE AGENCY, CIA ACTIVITIES IN CHILE (2000). This report is known as the "Hinche Report," as it was requested by Congressman Maurice Hinchey (D-NY).

57. See Scott Shane, *A Legal Debate as C.I.A. Stalks a U.S. Jihadist*, N.Y. TIMES, May 14, 2010, at A.1. ("American citizenship doesn't give you carte blanche to wage war against your own country," said a counterterrorism official who discussed the classified program on condition of anonymity. "If you cast your lot with its enemies, you may well share their fate.").

federal law allows for acts of terrorism: the death penalty. But that ultimate penalty under our laws can otherwise only be authorized by statute and imposed after a public trial before a federal judge and civilian jury, with a public sentencing, together with all the attendant due process protections that our legal system provides.⁵⁸

An expedient and effective course is not necessarily lawful, or ultimately even a sound long-term policy. The general lack of outcry by the press about this extraordinary development is disturbing. It is not much of an extension from a president secretly ordering the targeted assassination of an American citizen in remote and largely lawless Yemen to more widespread secret presidential orders in the future directed at United States citizens in other less remote countries where legal recourse to bring them to justice is said to be unavailing.

If we come to accept the view that the world is one large battlefield where we are at war everywhere, and at all times with militant Islam, requiring therefore not only military responses and interventions where appropriate, but also increasingly only military justice as well, then we are increasingly accepting the world view of the radical Islamists who often present their struggle with us in precisely such apocalyptic military terms. We will be dignifying and enhancing their self-image while needlessly diminishing our reliance on a criminal justice system that has long been justly admired throughout much of the world for its well-established procedural protections and generally public, transparent outcomes. I believe that would be a profound mistake.

For the younger lawyers here, I hope that the professional journey I have made as a citizen, attorney, and pro bono advocate will resonate for each of you in ways that suggest paths of pro bono service you find to travel in your own lives. For the non-attorneys here, you “civilians,” as I call my wife, a historian of music, I have tried to leave you as concerned citizens with a better framework and understanding for speaking out on these critical national security issues that will continue to challenge this country and each of you as citizens.

58. Or, in certain cases, by trial before a Military Commission.