The Constitution Project and Covington & Burling LLP Discussion

Subject: Boumediene's Legacy and the Fate of Guantanamo Detainees

Participants: Brian Foster, Associate, Covington & Burling LLP; James Robertson, Neutral Arbitrator and Mediator, JAMS, Former U.S. District Judge for the District of Columbia; Stephen Vladeck, Professor, American University Washington College of Law

Moderator: Scott Roehm, Counsel, Rule of Law Program, The Constitution Project

Location: Covington & Burling LLP, Washington, D.C.

Time: 12:08 p.m. EDT, Date: Tuesday, July 17, 2012

SCOTT ROEHM: If I could have everybody's attention, we're going to -- we're going to get under way.

Thanks very much to all of you for braving the heat and for joining us today. And special thanks to Covington and Burling for hosting us and for the generous support of this program. Covington's a valued longtime partner of ours, and we very much support continuing to work with them.

Just a few logistics before we get starting -- started. We are recording the event today, so please silence your phones, if you don't mind. The recording will be available on Constitution Project's website in the next few days. And there is obviously plenty of food and drinks to go around, so please do help yourselves.

I'm Scott Roehm. I'm counsel at The Constitution Project in our Rule of Law Program. For those who aren't familiar with The Constitution Project, we bring together experts and practitioners from across the political spectrum to reach consensus-based policy recommendations on a variety of constitutional issues. Our -- much of our work in the Rule of Law Program is done through our Liberty and Security Committee, which was established in the aftermath of September 11th to help ensure that efforts to enhance our safety don't sacrifice our civil liberties.

Now, the bios for each of our outstanding panelists are available in the program, but just by way of very brief introductions, to my immediate left is Steve Vladeck. Steve is a professor and associate dean for scholarship at American University Washington College of Law, and a nationally recognized expert on

constitution law, federal courts and national security law. To his left is The Honorable James Robertson, who served on the U.S. District Court for the District of Columbia from 1994 to 2010 and on the Foreign Intelligence Surveillance Court from 2002 to 2005. And to my far left is Brian Foster, who's an associate here in Covington and who represents 13 Yemeni men currently detained at Guantanamo.

I also want to note that we made our best efforts to include a panelist from the government today to represent the government's position and views on these issues. Unfortunately, we weren't able to find anyone who was available.

And we're going to use the traditional panel format. Each of the panelists will say a few brief opening remarks, but we'll reserve the bulk of time for questions and what I hope will be a lively discussion.

I'm going to start things off with a very quick overview of the current detainee population, and then I'll turn it over to the panelists -- starting with Steve, to whom we've delegated the unenviable task of summarizing four-plus years of post-Boumediene -- (inaudible) -- jurisprudence in less than 15 minutes.

STEPHEN VLADECK: I can start in 2008.

MR. ROEHM: (Chuckles.) Change that.

The first detainees arrived at Guantanamo on January 11th, 2002. In the decade since then, 779 men have been sent there. Those include men from 48 different countries, the majority from Afghanistan, Saudi Arabia and Yemen. They reportedly range in age from 13 to 98, and eight have died while in custody.

When President Obama took office, there were 242 detainees still at Guantanamo. Seventy-one have since been transferred to other countries, including Ahmed Ghailani to the U.S., for prosecution for his role in the bombings in the United States embassies in Kenya and Tanzania, and most recently, Ibrahim al-Qosi to Sudan pursuant to a military commission plea agreement. Three detainees have died during the Obama administration.

That leaves 168 detainees who remain at Guantanamo today. Fifty- seven of them have been cleared for release by President Obama's interagency Guantanamo Review Task Force. Another 30 Yemeni men were designated by the task force for something called conditional detention, meaning that they too could be transferred out of Guantanamo, but only if the security situation in Yemen improved and a perfect rehabilitation program became available or an appropriate third-country resettlement option became available.

As a practical matter, there's little difference between the Yemeni men who have been cleared for release and those subject to conditional detention because of the moratorium on transfers to Yemen that's been in place since shortly after Umar Farouk Abdulmutallab tried and failed to detonate a bomb on a flight to the U.S. on Christmas Day, 2009.

Of those who haven't been approved for transfer or conditional detention, 35 were referred for prosecution. Three of those have since been convicted of certain sentences.

That leave 46 detainees who haven't been charged. And the government claims that they can't leave either due to evidentiary problems or jurisdictional limitations, yet the government continues to hold them on the claim that they're simply too dangerous to release.

I'll now turn over to Steve.

MR. VLADECK: OK. Thanks. So I'm going to assume some basic familiarity at least with American constitutional law. Of course, if you had me, that's probably an assumption I shouldn't make -- (laughter) -- before I sort of give you a brief overview of the last four years.

To make a long story short, the first Guantanamo habeas petition were filed actually in January of 2002, shortly after detention at Guantanamo began. But the better part of the first six years were spent wrangling over two different jurisdictional questions. First, do the federal courts have the power as a matter of statute to hear habeas petitions coming out of Guantanamo? In 2004, in the Rasul decision, the Supreme Court said yes, by a vote of 6-to-3. And then after that, if Congress tries to take away that jurisdiction, as it unsuccessfully did in the Detainee Treatment Act of 2005, and as it very successfully did in the Military Commissions Act of 2006, is that constitutional?

And so it wasn't until the Supreme Court's 2008 decision in Boumediene v. Bush that the jurisdictional issue was finally settled, that the power of the federal courts to adjudicate habeas petitions by noncitizens held at Guantanamo was finally cemented without further interruption.

So what happened after Boumediene was the beginning of this massive body of habeas petitions. I think depending on how you count -- I think there have been 61 different detainees who at some point have brought a habeas petition in the D.C. courts since the Boumediene decision. And one way to breakdown the numbers -- there are lots of ways to break down the number; I'm going to give you one. If you don't count the 17 Uighurs, which I'm sure we'll talk about at some point on this panel, that leaves 44, right, 44 sort of pure merits cases.

Going into Boumediene, right -- Scott mentioned that at one point, the population at Guantanamo was as high as 779. By the time of Boumediene, I think it was down in the high 200s, right? And so you would have expected that most of the people who had been released by that point were they against whom the government had the least evidence, that the folks who are -- (inaudible) -- population were they over whom there was the strongest cases. So you probably would have expected a relatively high success rate for the government once these cases finally got to the merits.

In fact, even if you discount the Uighurs, which I think is a difficult proposition, it works out to be about half and half of the post-Boumediene habeas petitions where the government lost versus the government won, right? So in 21 of the 44 other cases, the federal District Court in Washington granted habeas relief, and in 23 it denied habeas relief.

And in those 44 decisions is a massive body of law that I'm going to get into in a minute detailing who can be detained, detailing what the burden of proof is, detailing what kinds of evidence can come in, the role of international law, the right of the detainees to have access to counsel -- basically an entire body of common law, because there are no statutes governing these cases, dictating how these cases would be adjudicated.

All right. Now where things really start to get interesting, though, is when these cases start getting into the D.C. Circuit. And to understand the fate of the Guantanamo detainees after Boumediene, I think we have to understand the role of the D.C. Circuit in these cases for better or for worse.

So the -- let me just start with a couple of statistics. There have been 20 appeals so far from District Court decisions to the D.C. Circuit in these habeas cases on the merits. In six of those 20 cases, right, in six of the 20 cases that have produced decisions from the D.C. Circuit, the Court of Appeals reversed the District Court's grant of habeas relief, right, so you had a case where the District Court said the government has not met its burden, this individual cannot be detained and the Court of Appeals is reversed.

Now, that may not seem like a particularly high number, six out of 20, except that you need to keep in mind two things. First, most of these reversals are happening on factual grounds, right? In most of these cases, the Court of Appeals is concluding that the District Court's consideration of the facts was incorrect.

Now, if you guys aren't intimately versed in appellate procedure, that may not seem like a big deal -- except that usually, appellate courts review trial courts for factual determinations under the so- called clear error standard, right? So it's not just whether the trial court is right or wrong, it's, was the trial court really wrong? And in at least most, I think, of these six cases, the D.C. Circuit basically said, yeah, trial court was really wrong.

So that's six of the 20.

In another 13, the D.C. Circuit has affirmed the district court's denial of habeas relief.

And then there's this one weird outlier case, Basardh, in which the Court of Appeals vacated a district court's denial of habeas relief and remanded it for further proceedings.

In other words, there has not yet been to date a single Guantanamo habeas petition that the D.C. Circuit thought was meritorious. And I think that's an important sort of starting-off proposition to understand the body of law that they've emerged.

Now part of why we're here today, part of why this conversation is relevant here in 2012, is because there had been a fairly concerted effort to get the Supreme Court to step back in, right? There's been an argument that the D.C. Circuit has been undermining the court's decision in Boumediene, and so the justices should reassert themselves. And to date there have been 11 cert denials in post- Boumediene

Guantanamo habeas cases, culminating with seven, including a couple of very high-profile cert denials last month on June 11th. So that's sort of part of the genesis of today's panel.

All right. So that's the data. Now let me say a bit about the law. I think it's important -- thanks. I think it's important to break down what D.C. Circuit has done into a couple of different pieces.

First, the substantive detention standard, who can be detained, right? Here the most important decision is actually the D.C. Circuit's first post-Boumediene decision, a case called Al-Bihani. There will be a quiz. (Laughter.) In Al-Bihani the court of appeals held that in order to be detained or detainable under the AUMF, under the 2001 Authorization for the Use of Military Force, the government need only prove that a detainee is part of or has materially supported al-Qaida or its affiliate groups, right? So in other words, the government does not have to show an act of belligerency by the detainee. The government only has to show membership or support. And that's actually a fairly broad standard.

Now the support standard raises a whole lot of issues, especially the more we think about international law principles. It hasn't yet mattered in the case, right. Because the D.C. Circuit has said merely being part of al-Qaida is sufficient, all the cases thus far have rested on the government showing that someone was in fact part of al- Qaida. So that's the -- sort of the substantive detention standard.

In the same case, in Al-Bihani, the D.C. Circuit also held that international law, specifically the laws of war, had no bearing on the scope of the government's detention authority at Guantanamo. Now that's a particularly interesting holding, given language in both Hamdi and Hamdan, these two earlier Supreme Court decisions seemingly to the contrary.

More important, it was actually -- if you'll forgive the word, dicta-ized when the en banc D.C. Circuit basically said, we don't have to revisit that because it was dicta; doesn't matter, we don't care. Right? So a sort of a controversial decision that the rest of the D.C. Circuit responded to by effectively mooting the significance of.

But more important than the substantive detention standard, I think a lot of the work in these cases has taken place on the sort of procedural evidentiary side. Right? So Al-Bihani also said that the government's burden of proof need only be a preponderance of the evidence, right? So preponderance of the evidence means more than half. If you can count evidence, right, 50.1 percent of the evidence is a preponderance, even though the detainees had been arguing for a clear and convincing standard.

More to the point, though, right, just to show some of the D.C. Circuit's hostility, the court of appeals repeatedly criticized the government for not arguing for less, right? So there are actually three different opinions where the D.C. Circuit says, OK, the government says the relevant standard is preponderance. We don't think that's necessarily compelled, but since they're not saying it's lower than that, we're stuck.

In other words, the D.C. Circuit thinks the standard should be some evidence, which is more than no evidence, which is exactly what the Supreme Court in Hamdi said was insufficient, right, to justify the long-term detention of an enemy combatant.

All right. Last point about Al-Bihani: The fourth big holding from that case was that hearsay will generally be admissible so long as it's relevant. Right? So as opposed to the much tighter rules governing the admission of hearsay in criminal cases, Al-Bihani sort of affirms that there's much softer rules for the admissibility of hearsay in these cases.

So Al-Bihani's the first really important D.C. Circuit decision.

The second really important decision on the merits is a case called Al-Adahi, which was decided in June of 2010. And in Al-Adahi the D.C. Circuit actually chastised the district court for being way too -- I'm not sure what the right word is -- loose with the facts in these cases. So Judge Randolph, writing for the panel, basically said that the problem that the courts have -- have made in these cases, the errors the district courts have repeatedly made, is not appreciating what Randolph calls conditional probability analysis, right? That is to say the fact that two different things happening are not independent of each other. They relate to each other. They magnify each other. They have a baby. It's awesome. (Laughter.)

There's nothing wrong in the abstract, right, with Judge Randolph's dissertation on elementary logic. The problem is that two pieces of circumstantial evidence don't become more convincing when you add them together, right? They're still circumstantial. Indeed, in many of these cases there are two pieces of circumstantial evidence coming from the same source, right? And so the fact that there are two of them doesn't make that source more reliable if it's the same source.

Now there might be still be something, you know, to commend the conditional probability analysis, but here's what's happened on the ground. Since the Al-Adahi decision, there's been exactly one grant of a habeas petition in a Guantanamo case. And that was the Latif decision, which the D.C. Circuit subsequently reversed, right?

So whereas as before Al-Adahi, the cases had actually been coming out half and half, right -- half the time there's enough evidence; half the time there's not enough evidence -- Al-Adahi really shifted the burden back toward the detainees, as a practical matter if not as a formal legal matter.

All right. Finally, the last big case on the merits is this Latif decision. Latif has gotten publicity, and I think Judge Robertson may be saying a little bit about it. In short, Latif is actually the first time you see any of the judges on the D.C. Circuit dissenting on the merits of a Guantanamo habeas case. The question in Latif was whether you should give government intelligence reports a presumption of regularity, right? That's -- that should you assume that a government intelligence report is accurate, at least in the context in which it's made, so that the burden is on the detainee to rebut it. And the government had argued for this kind of presumption throughout the habeas litigation. It had never successfully gotten the court to accept it until Latif. And in Latif, a divided panel, the D.C. Circuit, says, we can have this presumption of regularity going forward, and Judge David Tatel writes a very long, albeit heavily redacted, dissent.

So the net effect of these decisions is to create a body of substantive and procedural law that for better or worse is very, very friendly to the government, right? And I think reasonable people can disagree about what the -- which way it should lead. The government does not have to show as much evidence as we might have thought. The government can use conditional probability to rely on different sort of unamalgamated facts in these cases.

And most importantly, right, government intelligence reports are presumed to be authentic, which is actually a pretty big deal, as Brian may hopefully clean up for me.

All right. So that's the merits cases, right, and that's why we've seen so little sort of movement on this front. That's why I think you've seen the D.C. Circuit record look the way it is.

The last point I want to make before turning it over to Judge Robertson is, we also -- I think we'd do well to not just focus on the merits cases but we might also call the remedies cases. Right? So the remedies

cases are cases in which you have a detainee who either has already been cleared for release or has in fact been released and is suing for some other kind of remedy, right?

So in the Uighur cases, the remedy they were seeking was to actually be let away from Guantanamo, right? There's a case called Rasul, same petitioner as the original Supreme Court case, where former Guantanamo detainees sought damages based on their allegedly unlawful prior to detention at Guantanamo.

And then there's another set of cases called Gal (sp), where detainees tried to continue prosecuting their habeas petitions after they had been released to finally adjudicate whether they were lawfully held in the first place.

And in all of these cases we've seen a very sort of broad skepticism toward entitlement to relief. So in the Uighur cases, for example, the D.C. Circuit initially held that individuals who had been cleared for release have no right to be admitted into the United States, right, and then those cases were ultimately subsequently mooted when the government made resettlement offers to the Uighurs.

In another case involving the Uighurs, the D.C. Circuit held that there's no right to a hearing or notice before transfer to a third- party country. This actually could have consequences outside of Guantanamo in the deportation and extradition contexts.

In Gal (sp), the D.C. Circuit said, your release from Guantanamo moots your habeas petition, even though there might be collateral consequences from the fact that you were once held at Guantanamo, right?

And in Rasul the court of appeals held that there's no entitlement to a Bivens remedy, to a constitutional damages remedy, because it just wasn't -- it's inconsistent with the idea behind Bivens to have courts fashioning judge-made remedies to protect constitutional rights of individuals who don't clearly have constitutional rights to begin with.

So in other words, there's a -- there's a lot of cases here -- I'm oversimplifying way too many of them. I'm sure some of you can pick fights with me about them in the Q-and-A. But I think there's a very broad theme here, which is that the courts have shown fairly sweeping disinterest in continuing to sort of

expand the scope of Guantanamo litigation, right; that from the courts' perspective, this is a legacy problem and one that is not solved by more and more judicial intervention, right; that increasingly this is one that should be solved by the political branches, not by the courts. And I think that's, you know, for better or for worse, where we are.

Now, I'll just give you two quick anecdotes to try to set the table for what's next, right? There are still a few cases pending in the district court and in the Court of Appeals, right, so we could add to our running tally of cases over the next couple weeks and months. But, right, there are now two other issues brewing. One is the government has now taken the position that counsel no longer have access to detainees once they've lost their habeas petition, right, and this is going to be a very big fight going forward about whether that's true, right, whether detainees can continue to try to relitigate their continuing immunibility detention.

Second, right, there are the military commissions. And we aren't really going to talk about the commissions today, but there's still a chance that those will produce significant decisions from the D.C. circuit, perhaps even the Supreme Court, on some of the questions lurking behind these decisions.

And just sort of one point to close: There was a motion filed earlier this week on the military commissions that shows you how 10 years after these cases started, we still haven't gotten anywhere. And the motion was by the defendant in the KSM trial, and it was a request to have the government take a position on whether the Constitution does in fact apply at Guantanamo. I would have thought, you know, 10 years in, we might have wanted to answer that question by now.

Anyway, so that's my very, very, very hyperovergeneralized summary of -- (inaudible) -- case law. And I guess I'll stop there so Judge Robertson can actually, you know, make things right. (Laughter.)

JAMES ROBERTSON: Well, as a former district judge, I obviously have not made things right. (Laughter.) That's the -- that seems to be the basic problem.

Look, I want to begin by thanking a couple of people, first this guy on my right, Steve Vladeck, for belling the cat. His law review article analyzing the circuit cases in Guantanamo cases is must- reading for anybody who wants to understand what has been happening in the court of appeals, and he -- and I call it "belling the cat," or maybe "exposing" is a better word, what appears to be very deep-seated disregard by several judges on that court of the Boumediene decision and even defiance of that -- of

that decision. And Steve has been a very, very important part of this dialogue, and I -- and I -- and obviously continues to be.

Second, I want to thank Brian and his law firm. Covington has been a leader in representing Gitmo detainees. They've filed a petition on behalf of the -- of Latif in the Supreme Court, which I'm going to crib from heavily in a few minutes. And they have been working on behalf of Gitmo detainees and providing leadership to the private bar for a long time on this subject, and they deserve everybody's thanks.

I'm not here because I'm a scholar about the Gitmo cases or an advocate, but because I've seen them from the bench, and because I am a retired judge, I can talk about them. I mean, that's -- and there are very few of us. And so I get a lot of calls to talk about Guantanamo Bay. (Laughter.)

David Remes wrote a significant piece a few years ago about habeas law and criticizing the development of habeas law. And he -- it was all over the place. Believe it or not, different judges were coming different -- to different decisions, and we needed to have some order brought out of this chaos, and maybe Congress needed to do it. I dismissed that argument at the time. I said, well, that's how law is made; judges make different decisions, and the court of appeals sorts it out, and that's how the common law is made, case by case, a case at a time, and what's he talking about? Well, several years later I now think Remes may have been right, not exactly for the reasons he articulated, but because all Gitmo cases only go to one court of appeals. What does that mean? It means you'll never have a split in the circuits about Gitmo, which is -- which is one of the preferred ways of getting a case to the Supreme Court.

And that court appears to be hostile, if not defiant, to the Supreme Court's directive in Boumediene that Gitmo detainees are entitled to meaningful habeas corpus review of their detention. And as Steve has pointed out, the Supreme Court seems, for whatever reason -- maybe it's the new buzzword about the Supreme Court; maybe it's institutionalism, but the Supreme Court seems to have washed its hands of this problem, which is incomprehensible to me, and we'll talk a little bit more about it later.

I have some familiarity with three of these 46 cases that Steve talked about. The first is Awad, which -- on which I sat and denied an application for habeas review -- for habeas corpus. I won't delve deeply into the -- into the facts of Awad, but Awad was a Yemeni who traveled to Afghanistan in mid-September of 2001. He wanted to fight. His story was he never got to fight. He was injured in a -- in a -- in a -- in an airstrike on an airfield near one of the -- I've forgotten what city, and he was handed over.

And he was put in a hospital. And the hospital then came under attack, and he was handed out of the hospital by some al-Qaida people and sort of handed over to safety, and then he was taken into custody, and he's been there ever since.

I decided on the basis of a number of disputed documents, and I went through carefully the road map that had been laid out by al- Bahani: Was he part of al-Qaida; had he provided material support; was there are a preponderance of the evidence; could I use hearsay; yes, I could, and I understood the preponderance standard. I decided on the basis of the law that had been handed down to that point and on the basis of the record of that case that he was not -- that he had indeed been part of al-Qaida, and the Court of Appeals was happy to affirm me. I had been a good boy. I had done -- (laughter) -- I had done preponderance correctly; I had done the burden of -- you know, burden of proof; I'd analyzed it correctly. And I think it was Awad -- maybe it was Salahi, but talking about lawyers putting in thousands of hours, there was a lawyer in that case from Hawaii who had flown to Guantanamo from Hawaii something like 11 times to meet with his client down there, and nobody paid him a nickel to do it. That was really remarkable.

That was Awad. Salahi was a different case. Salahi was a Mauritanian. He traveled to Afghanistan to fight Jihad in 1990, 11 years before -- well, 11 years before 9/11. And he thought he was going there to fight against the Russians. Now, there was a little bit of softness in the record there, because the Russians, I think, were out of Afghanistan in 1989, and he went in 1990. It was undisputed that he had sworn byad (ph), which is sort of an oath of fealty, to someone in al-Qaida, the government thought Osama bin Laden himself.

And the facts of Salahi were pretty difficult, really. Salahi, the government offered to prove, was -- had provided overnight housing when he lived in Germany to jihadist recruits, two of whom went on to be part of the 9/11 bombers, and one was a sort of an overseer of that project. He also had moved to Montreal for a while, where he lived with some very dodgy al-Qaida-type people. He had an uncle who was close to Osama bin Laden. He had provided some help to somebody associated with al-Qaida in getting telecommunications equipment set up in Africa. He may have steered a recruit or two to al-Qaida.

But the standard was whether he had been part of al-Qaida at the time of hostilities, or from 9/11 forward. And his position was he was out of al-Qaida. He -- and I wrote a long opinion about this case in which I said, look, this guy may have been a -- thank you -- may have been a fellow traveler of al-Qaida; he may have been a supporter of al-Qaida, but was he part of al-Qaida? I couldn't find that he had been.

And I said a few other things. I said -- (chuckles) -- I -- this probably was what irritated the Court of Appeals most of all. I said, you know, a guy who is locked up in Gitmo doesn't have access to anything. You're asking him to prove his case. You're asking him to rebut the presumptions against him; at the very least, the government's -- the government's evidence against him should be viewed with, I said, something like skepticism.

Well, that was obviously the wrong flag to raise before the Court of Appeals. (Laughter.) But the Court of Appeals, in, frankly, a rather gentle opinion, said Robertson hasn't read al-Adahi, which came down after Salahi -- after he decided Salahi. And let's see if I can find some of their choice language here.

I've already got a flag up on time, so I'm not going to -- they said -- but here's the goal posts starting to shift: These decisions make clear that the determination whether an individual is part of al- Qaida must be made on a case-by-case basis using a functional rather than formal rapproche (ph) -- whatever that means; and by focusing on the actions of the individual in relation to the organization, there may be other indicia that the individual was sufficiently involved to be deemed part of it.

And then they go on to list a whole bunch of factual questions the Court of Appeals has. Well, everybody had those questions, but they weren't in the record. I had to deal with the record that was before me. But the Court of Appeals reversed and said, we're sending this back for more proceedings. And I think it's now back before Judge Sullivan and I don't think he's ruled on it yet.

Latif was not my case. Latif was decided by Judge Kennedy. Judge Kennedy found Latif's story -- and it was similar to these other stories -- went for medical help, didn't go to fight -- found it to be plausible. And this is the case in which Judge Brown invented this so-called presumption of regularity. The two great inventions of the Court of Appeals are Judge Randolph's conditional probability analysis, which nobody ever heard of -- it wasn't in business school -- and presumption of regularity, which is Judge Brown's invention. And Judge Tatel -- talk about belling the cat, Judge Tatel's dissent in that case is also absolutely required reading.

Now, Covington filed this masterful cert petition in the Latif case, which I hope they have copies of somewhere for you to read, because I've already been given the one-minute flag. But the Supreme -- oh, and by the way, I signed on to an amicus brief in that case, signed by 15 or so retired federal judges who don't understand this presumption of regularity thing. It completely blows away fact- finding in the District Court. Another amicus brief was filed by a bunch of intelligence officers, who said: Presumption of regularity for intelligence reports? You've got to be kidding. Intelligence reports are, as Judge Tatel's

pointed out in his dissent, created in the fog of war, using methods we don't even understand, so how could they be presumed to be regular?

The critical question here is why the Supreme Court continues to deny cert. And of course the answer is, Guantanamo detainees have no constituency. Nobody except Covington and other great lawyers are up there fighting for them. But it begs the question that is really at the bottom of this whole gathering today: What is the fate of these people? Can we really continue to hold people who cannot be charged because the evidence is too classified or because they've been beaten up, the way Salahi was? Can we really hold these people for the rest of their lives, even though they can't be charged? I don't think so.

And I just want to add one footnote at the end. Brian's going to talk about ongoing habeas petitions. I did a lecture at the University of Buffalo a few years ago that was -- it was not a milestone of habeas scholarship, to be sure, but it was published in the University of Buffalo Law Review, if you want to read it. It was called "Quo Vadis, Habeas Corpus?"

But in researching that, I discovered one thing that hadn't occurred to me before, and that is that in old common law, there is no such thing as res judicata in habeas cases. You can keep filing habeas cases again and again and again, and go to a different judge, forum shop, if you will. There is no limitation on how many habeas cases someone can file. And ultimately, some court somewhere is going to have to decided that enough is enough, we can't keep holding people who can't be charged for the rest of their lives.

BRIAN FOSTER: Thank you, Your Honor, and thank you, Professor Vladeck, for everything you've done on behalf of our clients. Of course, I'm here because I am an advocate, and I'll just talk a little bit about the cases we have and where they stand now and what we are doing on their behalf in light of the D.C. Circuit jurisprudence and the Supreme Court's cert denials.

First, just to amplify a couple of the points that Professor Vladeck made, not only were detainees winning about half of their cases, setting aside the Uighurs, it's actually even more stark when you look at it before and after the al-Adahi decision that Professor Vladeck described. It was around 60 to 63 percent of the cases, not counting the Uighurs, nearly 75 percent, including the Uighurs, until the Adahi decision came out, and then after that, as Professor Vladeck mentioned, Latif has been the only victory in District court. There have been 11 other denials.

But to put it even more starkly, after the D.C. Circuit's opinion in Latif came out last October, there have been zero decisions in the District Court on Gitmo habeas petitions. That may tell you all you need to know about the effect Latif has had on these cases in the aggregate.

But nonetheless, we do still have 13 clients at the base. Some have had their hearings. Some have gone to the Supreme Court. Some have not had hearings. And those cases are moving along at various paces. Two of our cases were among those that the D.C. Circuit reversed and sent back to the District Court after we had one on behalf of our clients the first time. Latif is one of those. It does go back to the District Court. It does not go back to Judge Kennedy. He has retired. It has been reassigned to Judge Roberts, who, understandably, has no familiarity with the case at all. He's not (head of ?) the court. So we are in every sense of the word starting over on behalf of Latif, and it remains to be seen where that will go.

Another case we had that we won before Judge Rabina (sp) was reversed and remanded. Judge Rabina (sp) has retired. That case is now before Judge Lamberth, who has no familiarity with that case, and we will be starting over for that case.

We actually had one of the few cases that comes as close as one apparently can get to winning in the D.C. Circuit. We had a case that was heard before Judge Lamberth. The client was serving as a medic in a clinic in Afghanistan treating the sick and wounded, Taliban fighters and civilians alike. The government argued that he was doing so as a member of the Taliban. Judge Lamberth agreed and found that he was a member of the Taliban, and the D.C. Circuit affirmed that he was a member of the Taliban. But the D.C. Circuit nonetheless remanded because it felt that Judge Lamberth had not sufficiently considered our argument that under the Geneva Conventions, a Taliban medic is not properly subject to detention under the law of war.

We went back to Judge Lamberth. We had another hearing on that issue. And Judge Lamberth held that regardless of that -- of whether that was true under the laws of war, our client was unable to produce a formal identification card from the Taliban designating him as a medic, and therefore he could not take advantage of that provision of international law even if it would otherwise apply. We're now back at the D.C. Circuit and will have argument on that issue in September.

And as I said, we have several other clients who haven't had their merits hearings yet. We took seven cases to hearing. We won five of the seven. One of those, just one, has been released, a Yemeni who actually was sent to Yemen notwithstanding the moratorium on transfers to Yemen in wake of the

underwear bomber. That was a case that Judge Kennedy had heard and, in short order, just devastated the government's case. The opinion was 28, 30 pages long, and just page after page shot down every conceivable argument the government had made, and was strong enough that the government chose not to appeal and they sent him home to Yemen as a one-time exception to the ban.

But other clients who haven't had hearings at all yet, some are stayed for various reasons, others are in the discovery process, and it remains to be seen now whether and how those cases will proceed in light of the Supreme Court's choice last month to remain on the sidelines. But there's more than just the habeas cases that we filed in 2004 and that we keep litigating and relitigating and getting sent back for do-overs and what have you. We also have, as Judge Robertson mentioned -- there's this option where even a petitioner such as some of our other clients, Uthman or Almerfedi (sp) or Esmail, who have had their petitions come to a close because of a cert denial or because the D.C. Circuit has affirmed their denial -- even though the appeals are exhausted, that doesn't mean the case is over.

There are new petitions to be filed; there are new tracks that emerge from our -- the clients themselves, from other detainees, from the government itself, which has a habit of belatedly complying with its discovery obligations months or even years after the cases have been decided.

And even the question of the mere duration of detention, as Judge Robertson suggested, arguably should be relevant already and certainly should be becoming even more of a focus in these cases. You could go back to the Hamdi decision in 2004. A plurality of the Supreme Court wrote, quoting here, that: "We understand Congress' grant of authority for the use of necessary and appropriate force to include the authority to detain for the duration of the relevant conflict, and this understanding is based on long-standing law of war principles. If the practical circumstances of the conflict are unlike those of the conflicts that informed the development of the law of war, then that understanding may unravel, but that's not the situation we face as of this date," eight years ago.

In Boumediene, four years ago, Justice Kennedy's majority opinion noted that this war -- war on terror, global conflict, whatever you call it -- was already, at that time, among the longest wars in American history. And that opinion repeatedly emphasized that the detainees had already waited long enough for the right to challenge the legality of their detention.

Well, today, yet another four years later, eight years after Hamdi, 11 years since this war began, one might think that the Hamdi plurality's understanding has unraveled and that it's no longer clear that the duration of hostilities has any relevant meaning with respect to the government's detention authority,

especially given that the majority of detainees that are being held today took no part in any hostilities, let alone the hostilities that are going on today, more than a decade later.

But before we could even get to these new arguments or petitions, as Professor Vladeck mentioned, we've got a new challenge now, which is the ability to continue representing our clients. For the past eight years attorney-client communications and meetings have been governed by a series of protective orders issued by federal judges on the district court in D.C. Their orders are, you know, by no means perfect from either our perspective or the government's, but they have established a regime that has existed and has worked for years without incident. But now the government is taking the position that once a detainee does not have a presently active habeas case, whether because, you know, the time for appeal has run out or the cert petition was denied or the petitioner just wants to dismiss the case but continue meeting with lawyers and discussing options, the government says the detainee has no inherent right to counsel; his lawyers no longer have the right to travel to Guantanamo to meet with him, to send privileged written communications with him or even to continue having access to their own classified work product on his behalf.

We're actually planning a trip to meet with clients next month, and we've been denied the request to meet with three of our clients, although to be clear, the government isn't telling us that we simply can't meet with the clients at all. They're happy to continue to allows us to meet with them, but only on their terms. There's a proposed memorandum of understanding, or MOU, that the government has drafted and -- (inaudible) -- around, saying that we can only continue to meet with our clients if we -- if we sign this document, which differs from the protective order regime we've been working under in several material respects. I mean, for example, unlike now, we would be prohibited from sharing any information that we learn from our clients with counsel for other prisoners. That's been a key tool in our collective ability to represent clients. You know, the government knows what the government knows, but we only know what they tell us, and we have to tell each other what we've learned in order to put the bigger picture together. This MOU would put a stop to that.

We would be prohibited from using information that we learn from our clients for any purpose other than the narrow purposes that are provided in the government's MOU. We couldn't make those strategic decisions and recommendations to our clients that are fundamental to a proper attorney-client relationship.

And as I mentioned, we would even be prohibited from accessing our own files of classified information and documents at the secure facility in the undisclosed location where we do all this work as it pertains to these clients, including even the motions and the briefs and the cert petitions that we'd have written

and filed on their behalf, unless we obtain special permission from the Department of Defense to access those files.

So in short, this MOU for continued access for these cases that have supposedly been terminated -- notwithstanding Judge Robertson's salient point about refiling petitions and other avenues that continue to be available to us, this MOU would impose these onerous and these unnecessary restrictions on our ability to meet and communicate with our clients that -- for which there is no possible justification given the system that's been in place for the past eight years. Now, I'd leave it to -- well, primarily to Judge Robertson and Professor Vladeck in the Q-and-A to further discuss the impact of the cert denials and the jurisprudence on the Supreme Court's credibility, but I would certainly note in closing that there is a -- there's a real disconnect on the policy level that has resulted.

As Scott mentioned in the introduction, there are currently 87 men in the prison who have been cleared unanimously through the task force set up by the Obama administration, which required the agreement of the DOJ, DOD, FBI, NSC, other intelligence agencies. Yet they're there because we either can't find a country who's willing to take them or because we cannot or will not send them to the countries that are willing to take them, such as Yemen. Because they're in Yemen, they continue to sit even though they -- 57 of them -- even though they have been unanimously approved for transfer. And there's nothing special about the fact that they're from Yemen. Of the hundred-plus Saudis who have been in Guantanamo, 90 percent have gone. Of the hundred-plus Yemenis who are at Guantanamo, 80 percent remain.

Meanwhile, as Scott also mentioned -- and without expressing a view one way or the other as to whether the military commissions or their convictions or their pleas were legitimate, we have convicted war criminals being sent home to Sudan, to Yemen, presumably soon to Canada if Omar Khadr prevails on his attempt to enforce his plea agreement. So it's this, you know, very upside-down situation where the -- even accepting the government's allegations as true, the mere foot soldiers, the cannon fodder, the nobodies, if you will, that everybody agrees are not a threat and can be sent home, stay while the close associates of bin Laden who have, you know, admitted and been convicted in the military commissions, strike pleas and go home. That's not an easy message to convey to our clients.

MR. ROEHM: Terrific. Thanks, Brian. Thanks, Judge Roberts and Steve as well.

We're going to open it up to questions now, but I'm going to exercise the moderator's prerogative and ask the first one.

The inspector general of DOD recently released a report culminating its investigation into mind-altering -- the use of mind- altering drugs to facilitate interrogations of DOD detainees. The report found that several detainees were medicated, including sometimes involuntarily, though with the purpose, reportedly, of treating them or helping to control very severe mental illnesses. Can you talk -- and those detainees were then subject to additional interrogation. So -- and this is a question for each or any of you. Can you talk about how detainee statements are used in the habeas litigation, and particularly by the government, whether it's the statement of a petitioner himself or of other detainees, and sort of the implications that the DOD findings raise for the kind of presumptions that the D.C. circuit has said need apply?

MR. FOSTER: Well, I think I can go fist on that. That would be the very definition of a changed factual circumstance justifying the filing of a new petition. This is information that should have been produced to us long ago under Judge Hogan's case management order. The government is under -- or should be under obligation to produce exculpatory material, which is basically anything that would materially undermine their case, and any evidence suggesting that the detainees on whose statements they rely had been administered mind- altering drugs at any time, but certainly within the time of the statements on which the government relies, certainly should have been handed over to us.

I -- sitting here today, I can't say for certain that it never was, but it certainly was not regularly provided. And so that's certainly one of the issues that we're looking at.

More generally on how the government relies on detainees' statements, again, speaking in generalities and based on the unclassified opinions from the district and circuit court level, I think it's clear that that's pretty much all the government relies on in the vast majority of these cases, either the statements that the detainee petitioner himself has given through a series of interrogations at Guantanamo or elsewhere and quite often statements of other detainees about the detainee petitioner. And even before Latif, challenging and rebutting those statements and providing context was a challenge.

MR. VLADECK: I will just add, I mean, just so -- just so it's clear how this actually looks on the ground, the model that has been employed in Guantanamo cases is a variation on something called the cleared counsel model. And what this means in practice is that the detainees are entitled to representation by security-cleared counsel, the theory being that the security-cleared counsel should have access to every bit of classified information -- I think what the CMO says -- that they have a need to know, right? That's the standard. So it's not just stuff that the government is using to make its case in chief; it's anything that could reasonably be within the need-to-know of the detainee's counsel.

This is actually a bit of a contrast with how, for example, Canada and the U.K. do security detention. In those contexts, there are two lawyers. There's the special advocate, who's actually not representing the detainee, but who does have access to the classified information, and then there is the open counsel, who does represent the detainee, and they argue separately, one based off the classified information, one based off the public information. The virtue of the Guantanamo system, if I can say that, is that it's one lawyer who has the ordinary ethical obligations who has access to all the information.

The downside is that the detainee is not entitled to access to classified information. And although some of you may be thinking that that's inconsistent with the Constitution's confrontation clause, right, which allows individuals to confront the evidence against them, the confrontation clause only applies to criminal proceedings, and the Guantanamo habeas litigation, whatever else it is, is not technically criminal for constitutional purposes. So you have the situation where detainees' counsel have access to these statements, but not the detainee themselves.

The reason why this has a bit of a "Kafkaesque" quality sometimes is because, as Brian suggests, some of those statements are statements made by the detainee, right, and so a detainee does not have access to a government filing that merely recounts what the detainee told the interrogator. And that itself has provoked, what, four years of litigation over the appropriate standard in those cases? So, you know, I think leaving aside -- reasonable people, I think, can disagree on what the right answers are on the merits of these cases, but part of why it's taken 10 years to get here is because are those are some of the things that have had to be litigated piecemeal in the District Court.

MR. ROEHM: Do you want to add anything, Judge, or --

MR. ROBERTSON: No, I'm fine.

MR. ROEHM: So we'll take questions now from the audience. If you have a question, please raise your hand, and one of our staff will bring you the mic. Please also give us your name and affiliation. And there's a lot of folks here. I'm sure there are a lot of questions. So if you can, please, do keep it brief.

Q: Hi. I'm Ron Halol (ph) with Human Rights First. I wanted to ask about another aspect of the Boumediene legacy that didn't come up in the panel today.

Yesterday in the -- in the District Court in D.C., the -- Judge Bates addressed the issue of whether habeas could attach at Bagram in -- the Bagram internment facility in Afghanistan, where four petitioners were arguing that, you know, circumstances may have changed, and that despite what the D.C. District -- the D.C. Circuit Court said, they now are entitled to habeas at Bagram.

I know that's a different subject, but there was a really interesting exchange that I wanted to highlight and just get your reactions to between Judge Bates and the government lawyer in that case, where basically, Judge Bates asked whether, you know, under this hypothetical where the United States withdraws from Afghanistan and ends combat operations, whether that would substantially change the Boumediene analysis such that habeas should attach.

And the government lawyer basically responded -- and I'm paraphrasing here -- that there would need to be a government declaration of sorts that the armed conflict against al-Qaida and associated forces ended. And Judge Bates responded by saying, well, that's not going to happen. So really, aren't we looking at the facts on the ground -- something akin to what, you know, what O'Connor said in Hamdi -- isn't that the relevant determination?

So it's a different context. We're talking about whether habeas attaches at all in the first instance. But I'm wondering if you can comment on whether there is some meaningful opportunity to revisit the issue of the end of hostilities and the idea that detention is only valid during ongoing hostilities.

MR. VLADECK: So I'll take a shot at that.

I mean, I think -- I think -- I think the answer is, "yes, but," right? And what I mean by that is, you know, there is certainly language in Justice O'Connor's plurality opinion in Hamdi that suggests that the presence of ground troops, you know, on the ground in Afghanistan was actually relevant to the scope of the government's detention authority.

There's also language in Justice Kennedy's opinion in Boumediene, right, suggesting that practical difficulties are relevant to the question of where the suspension clause applies, right, difficulties that might be particularly pronounced when you have habeas literally on the battlefield, which is part of what the D.C. Circuit said in the Bagram decision.

My skepticism has nothing to do with that. My skepticism has to do with the last time the Supreme Court talked about this specific question. And it's a case called Ludecke versus Watkins from 1948. And in Ludecke, the question was, was the war with Germany over? So let me just say that again. 1948 -- how many American history people, world history, movie watchers know anything? Was the war over by '48?

AUDIENCE MEMBERS: Yes.

MR. VLADECK: For constitutional purposes? No. Right?

So in Ludecke, a 5-4 court said the Alien Enemy Act, right, which authorizes the detention of citizens, natives, denizens or subjects of a country with whom we're at war can be detained until the end of hostilities. The court says hostilities aren't over until the president says they are, right? So it's like "Animal House"; nothing is over until we say it is. (Laughter.)

Now my -- just think about that for a second. In 1948, right, the Supreme Court held that we could continue to detain German nationals who had sworn allegiance to Nazi Germany, never mind that Nazi Germany was three years in the past, right?

So I think there's a lot in O'Connor's opinion and in Kennedy's opinion to suggest that there is some movement here. But, you know, you're going to have to explain why Ludecke isn't still good law for the proposition that the war isn't over until the political branches say it is, no matter what's true on the ground. And I think that could very well be, if not the next, then the next next line of litigation we're going to have to fight in these cases.

MR. ROBERTSON: And it's not clear in any of those opinions that the hostilities they're talking about are necessarily in Afghanistan. They're all over the world.

MR. VLADECK: For the record, World War II ended April 28th, 1952, for constitutional law purposes. (Scattered laughter.)

MR. ROBERTSON: Korea had already begun by then.

MR. VLADECK: Well, Korea is still not over.

MR. ROBERTSON: Oh. (Laughter.)

Q: Thank you. Mark Sherman with the Associated Press. I had two quick questions. First is, does the passage of time make efforts at declassifying any of this information potentially more fruitful, and with that, in turn help your line of attack?

And secondly -- I'm embarrassed not to know this, but does the requirement that everything go through the D.C. Circuit apply to detainees anywhere, or is it just at Gitmo? And if it's the case that it's anywhere, why aren't we seeing, you know, efforts on behalf of, say, people at Bagram elsewhere in the country?

MR. ROEHM: You want to take the first part?

MR. FOSTER: Yeah, sure. On the first part, I think the short answer is no. I don't think the passage of time has made much difference. I mean, it's already been more than 10 years. And again, without being able to discuss specifics, I mean, a lot of this information is a decade old or more, and it's difficult to see what strategic value there may be in continuing to keep it classified, but it remains so.

Nonetheless, that's -- we haven't -- at least at Covington, we haven't made much of an effort to seek declassification. We simply have too many other things to fight about.

MR. VLADECK: On the question of D.C., so I actually -- I think this is actually not an obvious question, right? Why are all these cases brought in D.C.? In fact, some of the first Guantanamo habeas petitions were filed in California, right, in the Central District of California, in LA. So the answer, Mark, I think, is actually the Supreme Court's fault.

So the day after Rasool was decided in 2004, the court issued what's called a GVR, a grant, vacate and remand order, in the 9th Circuit case, and basically sent it back to the 9th Circuit to reconsider its original holding, which was consistent with Rasool, that there was jurisdiction in light of the court's decision in Padilla, right? Now, the reason why that's telling and important and interesting, for those who aren't, like, intimately versed in every single second of this litigation is because what the court had said in Padilla was that Padilla had filed in the wrong court, right, that Padilla had filed in the wrong forum. So the 9th Circuit understood that order as a not-so-subtle hint that it shouldn't hold onto those cases, right, that it should send them to D.C.

There's no (statute ?) that requires these cases to be brought in D.C. There's no case law that requires this case to be brought in D.C. There's just a general background proposition that extraterritorial detention should be challenged in the District Court for the District of Columbia. And in Boumediene, Justice Kennedy actually says, citing to no authority whatsoever, that D.C. is the appropriate venue for these cases. That's just not true as a matter of statutory law; it's purely a matter of Supreme Court-influenced lower court practice.

The Hamdan case, right, which Judge Robertson ended up with in 2004 -- that was filed in Seattle, entirely to avoid the D.C. courts. I think it's not a secret that it was filed in Seattle to -- and it was only after that GVR order in Greten (ph) that Judge -- oh, gosh, Lasnik, I think, transfered the case to my colleague here on the left. So, you know, I think it's the Supreme Court's very deliberate movements that have channeled all this litigation into the D.C. courts. And I think that's actually part of why I would argue there's a special responsibility on the court's part to oversee this litigation, because it is responsible for the lack of a circuit split.

(Off-mic exchange.)

Q: Thank you. I'm Lyle Denniston from SCOTUSblog. Steve, I think part of the answer on the authority of the (D.C. District Court ?) is the location of the custodian. And all of these cases are considered to be challenges to the secretary of defense. And that's why the -- most of the original cases were against Rumsfeld. And I think there is case law that suggests that if the custodian is in a given place, that's where -- that's where habeas jurisdiction is done.

MR. VLADECK: But that's ironic, right, because that would then suggest that the Eastern District of Virginia is the proper forum for all these cases, and not D.C.

Q: Right, and -- (off mic) --

MR. VLADECK: Sorry. (Laughter.)

Q: So I am puzzled why institutionally, the Supreme Court of the United States does not in any way feel a need to respond to repeated contumacious conduct by Judges Randolph and -- (inaudible) -- on the D.C. circuit. Can any of you in any way conjecture why it is the Supreme Court feels no need whatever to protect Boumediene?

MR. VLADECK: I had a theory, but it's only a theory. So I'll go first. Everyone else can criticize me. (Laughter.) It's the virtue of tenure. The -- Lyle, the best estimation I have is a combination of realpolitik and sort of institutionalism, right? And so the realpolitik is this isn't about the court; it's about the middle of the court, right? And it's a question of whether -- you know, it's a political calculation by the more progressive justices about whether Justice Kennedy is ever going to be on their side in any of these cases, and failing that, they're just not going to say anything.

Then the question becomes why isn't Justice Kennedy inclined to step back in, notwithstanding -- whether you view it as contumacious or not, notwithstanding the very public criticism that has been leveled at the D.C. circuit from various sides, from various forums in these cases. And I think the best answer is not a completely satisfying one, which is that I think from Justice Kennedy's perspective, the point of these cases was to assert that the federal courts had a role in supervising detention at Guantanamo without actually taking that much of a concern about what that role would look like, right? That is to say, from Kennedy's perspective, the assertion of jurisdiction was an end unto itself, right, so that it would be up to the courts to make the rules, the courts to set the law, the specific content of those rules no doubt -- (inaudible) -- something he's less concerned with than the idea that it's ultimately judge-made law, as opposed to the unilateral discretion of the executive branch.

I actually think that's a disturbing view of the role of the Supreme Court and of the role of the federal courts that judicial power exists only to serve itself, but that's -- you know, I think that's the best estimation for why he wouldn't care about any case where the judicial power in general wasn't undermined. The only evidence I have of this -- so here's the one last sort of statistic I have for the day -- there actually has been one cert grant, right, in a post-Boumediene Guantanamo case, and it was in Kiyemba 1, right? So Kiyemba 1 was the Uighurs. That was a decision about whether they have a right to

be released into the United States. And Judge Randolph's opinion for the D.C. circuit was so sweeping that I think it provoked the justices into action, right? So the court granted cert in Kiyemba 1 and then granted cert, ostensibly to decide whether Boumediene required that the federal courts have the power to order the release of a detainee into the United States.

What ultimately happened was the Obama administration came along and made resettlement offers to the detainees, and then the Supreme Court ultimately ducks the case on the ground that these resettlement offers change the facts, right; this was no longer a case where it was, you know, no release. This was a case where the detainees had chosen their fate. But the court actually did decide to intervene when it looked like their power, right, might actually be undermined by a lower court decision. The problem is that whatever else we might say about Al-Bihani, Al-Adahi, Latif, those cases aren't about judicial power in general, but about how that power is applied. And I think that's why they haven't attracted Justice Kennedy's attention.

Q: I want to ask you another question. Could I ask any one of you to comment on the growth in importance of the Munaf decision decided the same day? I noticed that the 9th Circuit has recently used Munaf in the extradition context, and of course Munaf was the predicate on which the wild judge on the D.C. circuit, Judge Robertson -- or not Judge Robertson, Judge Randolph, based his criticism of the Supreme Court. Some comment on growth of the impact of Munaf, which now seems to have about stripped Boumediene?

MR. ROBERTSON: (Inaudible) -- I don't even know Munaf. (Laughter.) You're on, Steve.

MR. VLADECK: Here's the quick and dirty version. So Munaf is decided the -- the issue -- Munaf -- there were these two U.S. citizens who were being held in Iraq by the multinational force in Iraq. One had been convicted by an Iraqi criminal court. One was pending transfer to the Iraqi courts. And they basically brought a habeas petition saying they credibly feared being tortured in Iraqi custody, and they had a right, since their custodians were technically Americans, to habeas review from the federal courts.

The Supreme Court unanimously held that the federal courts do have jurisdiction over those claims, and then, in a very, very strange, narrow opinion, the chief justice rejected those claims on the merits even though they hadn't been reached in the lower courts, basically saying that because the executive branch says that these guys won't be tortured if they are transfered to Iraqi custody, there is nothing for us to do.

Now, there were like 14 caveats to the chief's opinion, including that certain claims hadn't been pled with specificity, that there was no allegation that the executive branch had evidence to the contrary about the Iraqi criminal justice system and so on and so forth. I don't want to get into the real sort of details.

But I think Lyle's point is right, right, that is to say, we can dismiss a lot of the Guantanamo jurisprudence, despite its very real effect on very real people at Guantanamo, as not having a long-term systemic effect on other bodies of case law, because there aren't going to be that many other contexts where who is detainable under the AUMF is actually going to be the question.

But Munaf matters because there, the question is when any individual, no matter what they're accused of, no matter what their situation is, is being transfered to another country -- right, and this can happen in three different ways. You can be deported, right; you can be extradited; or you can simply just be transfered, right, which happened in some of the Guantanamo cases. Munaf seems to suggest that there's no role for the courts to play in second-guessing the executive branch's assurances that the individual won't be tortured.

Now, that played out since Munaf in two different sets of cases. One was a Guantanamo case, the other Uighur case, Kiyemba 2, if you're scoring at home, right, and this was the Uighur's attempt to obtain access to notice and/or a hearing before they were transfered to a third-party country. And a D.C. circuit panel said -- a divided panel said no, under Munaf, you have no right to such notice or a hearing. The critical factual distinction is in Munaf, the federal government has specifically said Iraq does not torture, right? In Kiyemba 2, the federal disposition was whatever country these guys might be transfered to, we're sure they don't torture, right? Now, I think that's actually a relevant distinction, right?

One is based on, you know, prior evidence, and one is based on future speculation. So Kiyemba II took one step past Munaf.

Another D.C. Circuit case, called Omar versus McHugh, with Lyle's best friend Judge Kavanaugh writing the majority opinion, held not only that Kiyemba II was a fair reading of Munaf, but that Congress had validly taken away federal habeas jurisdiction in these kinds of cases, which is itself, I think, rather inconsistent with Boumediene.

And then finally, Lyle mentioned the Garcia case. The en banc 9th Circuit, just to show you how this all comes full circle, recently fractured -- I mean, like in seven different directions -- on the question of whether Kiyemba II and Omar, which are not exactly general cases, applied to a perfectly ordinary extradition case. And I think the way one might count those, I think there were more than a majority to say yes, right, that the courts really shouldn't be second-guessing the executive branch in these kinds of decisions.

So, you know, I think the Munaf cases matter not necessarily for the remaining detainees at Guantanamo, but insofar as here is the one most concrete example of cases -- law made in this context actually having an effect outside of this context. That may not be that, like, dramatic and remarkable, but insofar as long-term impact on federal law, I think that could be a very big deal.

And if you got all that, congratulations.

Q: Thank you all for -- thanks for an excellent panel, Lyle. Thanks so much for an excellent panel. I've appreciated all of these perspectives. I wanted to return to something that Professor Vladeck said earlier about Justice Kennedy's opinion in Boumediene. And I wonder if it's actually fair to say that it was utterly without content, because thread that I see in Boumediene is actually one of a persistent emphasis on deference to the political branches, and in particular to the executive branch.

And that leads me to wonder two things. First, shouldn't this be a discussion about the executive branch's role going forward? And I think Mr. Foster alluded to some of the ways in which the executive branch does today bear responsibility for the current -- the status quo. So why isn't that our discussion?

Secondly, is it fair to say, as I've heard a couple of times today that the lower courts have undermined -- or sometimes you hear the phrase "gutted" -- the right that was established in Boumediene. Given what Professor Vladeck has said about the emptiness of that opinion in terms of the substance of the right, isn't the process -- the common law process that came about afterwards exactly what that opinion called for?

MR. ROBERTSON: I'm talking too much. I'm just -- you know. Look, I've got a, kind of, words-of-one-syllable answer to the second part of your question. Boumediene called for a meaningful review, habeas review, and what's happened in the circuit has been to -- first, to take the capital letter off the word

"meaningful," and then take the word "full" -- take the letters "ful" off the end of "meaningful," and then to sort of deprive it of meaning.

I mean, when a petitioner is stuck in Guantanamo and told that he's got to rebut any presumptions that arise against him, and he's got to challenge a presumption of regularity for intelligence reports, he's had it. There's no way he's going to -- if the government wants to keep him there, the government will keep him there with intelligence reports that cannot be meaningfully challenged. To me that guts the meaning of Boumediene, and at least, it seems to me, the Supreme Court ought to be looking at that presumption that was written into the law by Judge Brown and ought to be looking at this concept of Judge Randolph's -- what does he call it, predictable --

MR. : Conditional probability.

MR. ROBERTSON: -- conditional probability analysis?

I mean, that's -- I think I guess -- I guess I think that meaningful review means that the Supreme Court ought to be actively reviewing what the lower courts do with their decisions, and this Supreme Court is not doing it.

Now, I think Steve is probably exactly right and it has something to do with the internal politics of the court. If the progressives can't count five votes, can't count Kennedy, they're not going to vote for cert review of something that's going to turn out the wrong way.

MR. VLADECK: I'll say I think there is more that -- so let me start with -- I agree with the first thing you suggested, which is that the executive branch matters a lot here. And I think that would be true regardless of what had happened in the intervening litigation. The reality is that so much of this is still a question of the executive branch discretion, and, you know, the ratio of detainees who have been released because of executive branch decision-making as opposed to judicial decision-making is enormous.

That said, I think the notion that Boumediene commands deference to the executive branch isn't really something I find in Kennedy's opinion. I mean, so here's one passage, right? He says where a person is detained by executive order rather than, say, after being tried and convicted in a court, the need for

collateral review is most pressing. A criminal conviction, in the usual course, occurs after a hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context, the need for habeas is more urgent. Right?

So I think Kennedy was actually very much in his judicial supremacist hat when writing Boumediene, for better or for worse.

Insofar as what Boumediene actually tells the lower court to do, this is actually -- many of you know Ben Wittes, who I spar with a lot on this question, and Ben routinely criticizes Boumediene for not doing enough; the only person I know who actually thinks Boumediene didn't go far enough. And Ben -- you know, Ben criticized Boumediene for not sort of laying down rules and procedures and standards going forward. And I think that's not a fair criticism.

I think, you know, Boumediene's already criticized as being one of them most activist decisions the Supreme Court has ever handed down, and Kennedy had then said, and here are the rules you will apply -- well, he might have been all by himself. But Judge Robertson's point about the word "meaningful" I think is also reinforced by another part. Remember there are two holdings in Boumediene. The first is that the suspension clause applies at Guantanamo. The second is that the alternative review process created by Congress through the Combatant Status Review Tribunals and the appeals to the D.C. Circuit was an inadequate substitute for habeas.

Well, let's just be logicians for a second, right? If that's an inadequate substitute for habeas, then that tells us what's not enough, right? And that tells us what, at a minimum, meaningful habeas review should require, and it's more than the review that was available between 2005 and 2008 under the DTA. And I think if you put together what was true under the DTA between 2005 and 2008 and what's true today after Latif, I don't think it's obvious that habeas review in the D.C. District Court today is any more meaningful -- right? -- or broader than the review a detainee could have gotten in the D.C. Circuit under the DTA. And I think in many ways it's actually more constrained.

MR. FOSTER: And to your point about the executive role going forward, and speaking of alternative mechanisms for review, more than a year ago the Obama administration issued an executive order purporting to set up what are now called periodic review boards. So we've gone from Combatant Status Review Tribunals to administrative review boards to now periodic review boards, that in theory would

guarantee each detainee an in-person review, a live hearing every three years, and annual reviews of the file in between those live hearings.

And to the administration's credit, there appears to be some role for private counsel to assist the detainee, which would be a first in these executive review mechanisms, although it's not clear exactly how that will play out. As I mentioned, the proposed MOU for post-habeas severely limits our ability to use the information in meetings -- learned in meetings with our client, including an express prohibition on using that information in the periodic review boards if and when they begin. Access for the review boards would be governed under yet another yet-to-be-seen MOU.

So that's out there, that's another role for counsel to play, it's another avenue for detainees to seek redress, although even the scope of these boards is unclear. At one point it was only going to apply to those who were referred for prosecution or who were designated for indefinite detention. Then it was going to also apply to those who were approved for transfer, but there is again the very logical point, once you've already been approved for transfer, what more can they do except transfer you, which they're not doing?

Q: Hi. My name is -- (off mic). I'd like to ask what I hope is an impossibly broad question, which is to say that it seems to me what you've described is a simultaneously hermetic but also very messy process, with results that aren't necessarily predictable or predicted. So the question is, is that a good thing?

MR. VLADECK: Four to two. (Laughter.) Is it a good thing? I'll take a shot. I think it's all a question of perspective, right? I think in the long term the reality is that, you know, 50, 60, 70 years from now, from the perspective of the role of the federal courts as an institution, the last 10 years have been remarkable -- right? -- insofar as the courts asserting themselves during wartime in the face of arguments that they lacked the power to proceed, in the face of statutes purported to deprive them of jurisdiction; that in fact the judicial response from a judicial power perspective has been monumental, whether for better or for worse. I think it's a good thing. But I teach federal courts; I'd be out of a job if I didn't think that.

You know, from the perspective of our detainee policy, I think, ironically, judicial review has been a very good thing for the government -- right? -- because the reality is that judicial review over time has served to legitimize detention at Guantanamo, has served to mainstream arguments that, you know, certainly some of us might have dismissed during the Bush administration as based on radical conceptions of the war powers. Right?

So I think in the long term, the role of the courts has been good for the courts and for the government. I think where it hasn't been so good is for the detainees, you know, very few of whom have actually -- at least of those who are remaining -- benefited from judicial review, although I think the 600-plus who have been released from Guantanamo had judicial review in part to thank for that. And I think it's been disastrous for, you know, the hundreds and hundreds and hundreds of lawyers and advocates who have poured out a lot of time and money over the last 10 years into an incredibly circular body of litigation.

But, you know, there's my quick answer to your very broad question.

MR. ROBERTSON: That's a great answer. I wouldn't add a word to it. (Laughter.)

MR. ROEHM: Well, on that note, I think we're at time. So please join me in thanking our panel. (Applause.)

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