

MILITARY COMMISSIONS AND NATIONAL SECURITY COURTS AFTER GUANTÁNAMO

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In his essay, Professor McNeal outlines several important factors for reformers to consider when proposing alternatives to the current judicial system for trying individuals suspected of involvement in terrorism.¹ Among these important considerations are the recognition of the constitutional rights of detainees, the importance of ensuring national security through preserving confidential intelligence information, and the problem presented by the current detainees in Guantánamo Bay. This response, based on my testimony before the Senate Judiciary Committee,² will address these important issues while detailing some of the important factors in my proposal calling for the establishment of a U.S. domestic terror court.

As a starting point, it is critical to state the obvious. In discussing where to try individuals suspected of involvement in terrorism, it is important to understand *both* that the status of all detained individuals must be fully defined and that all individuals have rights. Otherwise, definitional uncertainty will continue to rule the day. That definitional uncertainty has contributed to unending violations of civil and political rights for thousands of individuals held world-wide, either directly by or on behalf of the United States in the aftermath of 9/11.³

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¹ Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options* 103 NW. U. L. REV. COLLOQUY 29 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/28/LRColl2008n28McNeal.pdf> (link).

² *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (June 4, 2008) (statement of Amos N. Guiora), available at http://www.judiciary.senate.gov/hearings/testimony.cfm?id=3390&wit_id=7212 (link).

³ See Human Rights Watch, *U.S.: New Detainee Deaths Uncovered in Afghanistan*, HUM. RTS. NEWS, Dec. 13, 2004, <http://hrw.org/english/docs/2004/12/13/afghan9837.htm> (link); Human Rights Watch, *U.S.: Soldiers Tell of Detainee Abuse in Iraq*, HUM. RTS. NEWS, Jul. 23, 2006, <http://www.hrw.org/english/docs/2006/07/19/usint13767.htm> (link). According to a presentation by senior U.S. military commanders and officials 25,000 individuals are currently held world-wide either directly by the U.S. or on behalf of the U.S. Interrogation, Torture, and the GWOT, Law and Terror Symposium, Law of Armed Conflict Center, United States Military Academy (Sept. 2007). In the thirty

The question of where to try post 9/11 detainees is but one leg of a complicated triangle; what are the criteria for initial detention in what I refer to as the “zone of combat,”⁴ and how are suspected individuals to be interrogated⁵ are the other two. While all three legs deserve careful and consistent scrutiny by policy makers, the media, academics, and the general public in this response to Prof McNeal’s thoughtful essay, I will limit my comments to proposing that post 9/11 detainees be tried in the American judicial paradigm.

Part I of this Essay will address the importance of defining both “detainee” and the current conflict so that defendants’ rights can be firmly established before going forward with a viable judicial process. Part II will address the importance of classified intelligence information in trying suspected terrorists and proposes a mechanism for addressing legitimate security concerns while ensuring the defendant’s right to a fair trial. That section will also discuss various alternatives to the current system, including my proposed domestic terror court with specially trained judges as the most viable option going forward. Part III will specifically address the issue, raised by Professor McNeal, presented by the group of seventy-five current detainees and explains how my proposed domestic terror court creates a formal vetting procedure to determine whether an individual detainee presents a continuing national security threat.

I. THE IMPORTANCE OF DEFINING “DETAINEE” AND THE CURRENT CONFLICT

Professor McNeal begins his essay by citing the Supreme Court’s decision in *Boumediene v. Bush*⁶ holding that *detainees* have certain constitutional rights—specifically, the right to habeas corpus.⁷ Professor McNeal cites *Boumediene* as an important case to consider for those seeking to reform military commissions.⁸ As the Supreme Court has acknowledged

months immediately following 9/11 alone, U.S. authorities arrested 5,000 suspected terrorists. See ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 44 (2006).

⁴ Distinguishable from the traditional battlefield, the “zone of combat” refers to *any* location relevant to terrorism and counterterrorism ranging from the actual site of a terrorist attack to where that attack was planned and financed.

⁵ The hybrid paradigm recommends implementing—when necessary—coercive interrogation measures but under no circumstances (including the oft-mentioned “ticking time bomb” scenario) will torture as defined in the 1984 Convention Against Torture be permissible. For a fuller articulation of interrogation methods in the hybrid paradigm, see AMOS N. GUIORA, CONSTITUTIONAL LIMITS ON COERCIVE INTERROGATION (Oxford Univ. Press 2008); Amos N. Guiora, *Interrogation of Detainees: Extending a Hand or a Boot*, 41 U. MICH. J.L. REFORM 375 (2008).

⁶ 128 S. Ct. 2229 (2008) (link).

⁷ *Id.* at 2262.

⁸ It is important to note that my proposal advocates not the “reform” of the military commission judicial regime but the creation of an alternative. The establishment of U.S. domestic terror courts is intended to supplant, in specified circumstances, both the military commission paradigm and traditional

that detainees have certain constitutional rights, it is critical to define the term “detainee.”

Precisely because the individuals I refer to as “post 9/11 detainees” are neither criminals under the traditional criminal law paradigm nor prisoners of war according to international law, we must establish a legal definition of “detainee” so that we may determine the rights and privileges to accord them. While various terms have been used to label detainees including enemy combatant, illegal belligerent, and enemy belligerent, all fail to define the rights such individuals should be granted. Admittedly, this process has been made more difficult by a continued inability—perhaps unwillingness—to define the conflict in a consistent manner. Is this a war? Is this a “war on terror?” Is this police action?

Aside from its decision in *Boumediene*, the Supreme Court has failed to articulate the rights granted to suspected terrorists. Similarly, Congress has failed to articulate these rights through its constitutionally granted oversight powers. I propose that detainees are neither prisoners of war nor criminals in the traditional sense; rather they are a “hybrid” of both.⁹ To that end, I recommend that the appropriate term for post 9/11 detainees is “individuals suspected of involvement in terrorism.”¹⁰ This definition adopts aspects from both the prisoner of war and criminal law paradigms, thereby creating what I have called a “hybrid paradigm.”¹¹ The hybrid paradigm seeks to balance—or maximize—the legitimate rights of the individual with the equally legitimate national security rights of the state. Furthermore, it seeks to move beyond the amorphousness that has defined much of the debate over the last seven years.

By clearly defining terrorism—essential to creating a rights-based regime—the hybrid paradigm facilitates the definition of “detainee.” In doing so, it takes the first step necessary to the establishment of a lawful judicial paradigm for trying individuals suspected of involvement in terrorism. Professor McNeal is correct that we must clearly and carefully define detained individuals, otherwise the slippery slope beckons. The slippery slope of the past seven years is best illustrated by the current state of the Guantánamo paradigm—indefinite detention of hundreds of detainees, many initially de-

Article III courts as I believe *both* are inadequate for trying individuals suspected of involvement in terrorism.

⁹ See generally Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT’L L. 511, (2008); Amos N. Guiora, *Where are Terrorists to be Tried—A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805 (2007).

¹⁰ While there are innumerable proposed definitions of terrorism I propose the following: “terrorists are individuals acting either alone or together who for the purpose of advancing a cause (political, religious, social or economic) kill or injure innocent civilians or cause property damage to innocent civilians or intimidate the civilian population.”

¹¹ See Amos N. Guiora, *Interrogation of Detainees: Extending a Hand or a Boot?*, 41 U. MICH. J.L. REFORM 375 (2008); Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT’L L. 511 (2007).

tained for unknown reasons and in spite of the fact that they presented no threat to U.S. national security.¹² That slippery slope was compounded by a failure to establish an institutionalized process for determining if the individual detainee presented a continuing threat to U.S. national security. In other words, the initial detention was, in many cases, unwarranted and the continued detention was similarly unwarranted. That is the essence of the slippery slope and the enormous danger that emanates from it.

As suggested above, it is also necessary to define the conflict. I suggest adopting the term developed by the Israeli government to address the latest and ongoing conflict between Israel and Palestinians: “armed conflict short of war.”¹³ This notion of an “armed conflict short of war” reflects the hybrid nature of a conflict that is neither a war (in the classic international law usage of the term) conducted between two states nor a conflict that falls within the traditional criminal law paradigm.

In deciding where to try suspected terrorists, the hybrid paradigm would afford defendants certain rights currently granted to traditional criminal defendants. Defendants will be tried before a bench (as compared to a jury), will be represented by counsel of their choosing, will be informed of the charges against them with articulated sentencing terms, and will have the right to appeal to an independent judiciary.

II. THE IMPORTANCE OF CLASSIFIED INTELLIGENCE INFORMATION

In his essay, Professor McNeal outlines what he terms the “nonprosecution paradox.”¹⁴ This paradox, he contends, is the failure of the current system to charge and bring to trial suspected terrorists stemming from challenges in protecting intelligence.¹⁵ Professor McNeal also suggests that “reforms must address this intelligence protection concern and can only endure if they provide benefits that meet or exceed those of the current system.”¹⁶

As previously mentioned, my proposal is premised on the principle that detainees must be brought to some form of trial while providing them certain rights and privileges. Further, because intelligence information is central to prosecuting suspected terrorists, the hybrid paradigm must allow for

¹² See MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 4 (Seton Hall Pub. Law Research Paper No. 46, 2006), available at <http://law.shu.edu/aaafinal.pdf> (reporting that there are over 500 detainees held at Guantánamo) (link).

¹³ See REPORT OF THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE 18 (2001), available at <http://www.jordanembassyus.org/Report.pdf> (link); ISR. MINISTRY OF FOREIGN AFFAIRS, SHARM EL-SHEIKH FACT-FINDING COMMITTEE: FIRST STATEMENT OF THE GOVERNMENT OF ISRAEL, at Part I.E.i (2000), <http://www.mfa.gov.il/NR/exeres/FCFDA57E-15AB-4F50-AFBD-BDCE6A289FA8.htm> (“The scale and intensity of these attacks has been such as to amount to an armed conflict short of war.”) (link).

¹⁴ See McNeal, *supra* note 1, at 43–53.

¹⁵ *Id.*

¹⁶ *Id.* at 43.

the introduction and review of confidential intelligence information for purposes of deciding guilt or innocence. In addition to Professor McNeal's theory that suspected terrorists are not being brought to trial as a result of concerns in protecting intelligence information,¹⁷ problems arise when introducing highly classified intelligence information in court.

There are three potential legal alternatives to the current military commissions system of prosecuting post 9/11 detainees. The first is a treaty-based international terror court. Although from a global perspective this alternative seems attractive, in order to establish such a court the nations of the world would need to address, among other things, how to cooperate in the gathering and sharing of intelligence information. While this is only one factor to be considered in implementing a treaty-based terror court, the necessary sharing of intelligence alone makes such a court an improper venue for trying suspected terrorists—especially considering the implications for failing to maintain confidentiality when introducing intelligence evidence.

The second possible alternative to the current system is trial in Article III courts.¹⁸ Since much of the evidence available against suspected terrorists, however, is predicated on intelligence information, Article III courts are inadequate venues for such prosecutions. Specifically, Article III courts are grounded in certain constitutional rights such as the right to confront one's accuser.¹⁹ This right explicitly deprives the prosecution in Article III courts from going forward with all available evidence, including confidential intelligence information. Because the state must absolutely protect its intelligence sources, if such confidential information were to be introduced secretly, it would offend the criminal defendant's right to confront witnesses brought against him.

Consider the trial of Zacarias Moussaoui²⁰ as an example of the deficiencies of Article III courts for introducing intelligence information. Moussaoui was brought to trial after he was suspected of training with al-Qaeda in preparation for the terrorist attacks of September 11, 2001. Perhaps because Moussaoui eventually pled guilty to six counts of conspiracy and admitted that he was supposed to fly a fifth plane into the White House, many thought that Article III courts would be effective venues for trying suspected terrorists. Moussaoui's trial, however, largely turned into a farce when he refused to proceed unless he was allowed access to "alleged terrorist ringleader Ramzi bin al-Shibh."²¹ Because Ramzi bin al-Shibh was in

¹⁷ See *supra* note 5.

¹⁸ See, e.g., RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., *IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS* (2008).

¹⁹ *Pointer v. Texas*, 380 U.S. 400 (1965).

²⁰ See *United States v. Moussaoui*, No. 01-455, 2003 WL 21263699, at *1 (E.D. Va. Mar. 10, 2003).

²¹ See Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With all Due Deference: Judicial Responsibility in a Time of Crisis*, 32 *HOFSTRA L. REV.* 795, 835 (Spring 2004).

federal custody, the government argued that giving Moussaoui access to al-Shibh would compromise national security.²² Moussaoui's trial illustrates the difficulties in deciding whether and how to introduce evidence that may compromise national security. Because they lack specialization in the intelligence arena, Article III courts are improper venues for trying suspected terrorists.

For the foregoing reasons of inadequacy in sharing, introducing, and considering confidential evidence in other terror-court alternatives, and because intelligence information is essential to the prosecution in these types of proceedings, I suggest a hybrid domestic terror court²³ that would allow for an *in camera* review of confidential intelligence information presented by the prosecutor and a representative of the intelligence services. In all candor, this proposal would not provide suspected terrorists with the same level of rights as would trials in Article III courts. Unlike the traditional criminal law paradigm classified information may be introduced against the defendant *ex parte*. Yet, significant measures will be taken to place limits on the intelligence information received by the court.

In those cases where the prosecutor determines that the available evidence that would be admissible under the rules of evidence in traditional criminal law courts is insufficient for conviction, he may ask the court to admit classified evidence. The presiding judge would view the evidence *in camera* and come to one of two conclusions.

First, the judge can find that the evidence is relevant and should be considered, and that the government has demonstrated a sufficient danger to sources to justify keeping the evidence classified and withholding it from review by the defendant and his lawyer. In such cases, the judge would permit the prosecutor to present the evidence to the court without the defendant being present. The judge would then act as both judge and defense attorney, questioning the evidence as would be done during cross-examination.

However, a defendant's conviction in a terror-court cannot rest solely on classified evidence. Classified evidence can only be used to support evidence presented in full court and subject to cross-examination by the defendant or his attorney. In other words, if the prosecution can prove its case without having to rely on confidential intelligence information, it must rely on that evidence—presented in the proceeding where the defendant has the opportunity to review and rebut it—instead of relying on classified intelligence information. In cases admitting classified evidence, however, presid-

²² *Id.* at 835–36.

²³ The proposed system for terror courts would require legislative rearticulation of the Foreign Intelligence Surveillance Act (FISA) court because trials would be conducted before the FISA Court. The judges would be the same judges who presently sit on the FISA Court, though depending on the number of cases, there may be cause for adding additional judges to the FISA Court to hear the trials. The court would be a standing court rather than an “ad hoc” court. Appeals would be heard by the U.S. Court of Appeals.

ing judges will have to have some discretion to decide how much weight to afford classified evidence as compared to the evidence subject to a cross-examination by the defense on a case-by-case basis.

It is important to understand that in these hybrid courts, the sitting judge must construe all evidence and make determinations of admissibility of evidence in a light most favorable to the defendant's rights. I disagree with Justice O'Connor's claim in *Hamdi* that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."²⁴ Although the introduction of intelligence information is crucial to prosecuting suspected terrorists, and based on my experience, in most cases it is almost impossible to try a suspected terrorist without it, complete reliance on such evidence cannot stand. In those circumstances, the detainee must be released.

Second, the judge can decide that the government has failed to show sufficient danger to sources to justify keeping the information classified. In such a case, the presiding judge would present the prosecutor with the option of either obtaining permission to declassify the evidence and presenting it as would be done in a traditional criminal court, or simply not presenting the evidence for consideration against the defendant.

The efficacy of this model depends heavily on judges being trained in understanding both the substance of intelligence information and the processes involved in procuring intelligence. This model would be very similar to the Administrative Detention Process in Israel, designed to address this complicated balancing of interests between the state and defendants suspected of terrorism.²⁵

Again, Professor McNeal suggests that "reforms must address . . . intelligence protection concern[s] and can only endure if they provide benefits that meet or exceed those of the current system."²⁶ I submit that my proposed domestic terror court will do just that while maintaining the important rights of the defendant. Governments should not have to choose between prosecuting a suspected terrorist and keeping intelligence information confidential. A domestic terror court would allow the government to maintain the security of intelligence information and to go forward with the information available in prosecution.

²⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

²⁵ See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, at 1833 (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41723.htm> (link); AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM 332-42 (2007); Marsha J. Berger & Marc D. Stern, *Introduction to the Symposium on Reexamining the Law of War*, 56 CATH. U. L. REV. 745, 754 (2007).

²⁶ See McNeal, *supra* note 1, at 43.

III. THE CHALLENGE PRESENTED BY THE CURRENT DETAINEES

Professor McNeal has identified a group of seventy-five detainees whom the Department of Defense intends to hold in preventive detention. Professor McNeal is concerned with any reform strategy that acts only prospectively and fails to account for the influx of cases created by this group. In addressing this issue I suggest that while the seventy-five detainees Professor McNeal refers to are important, the 25,000 detainees held around the world represent a more significant number that we need to address.²⁷ The problem that Professor McNeal addresses in his thoughtful essay extends *far beyond* the group of seventy-five. Simply put, the seventy-five are but part of a far larger and more complicated reality whereby thousands of individuals are subject to indefinite detention *on behalf* of the U.S.

The current system of trying terrorism suspects in military commissions is commonly understood to be unsuccessful. Thus far, only one detainee has been tried or convicted.²⁸ Furthermore, despite the widespread disapproval of the use of waterboarding as both an abusive and ineffective interrogative method,²⁹ Legal Advisor to the Convening Authority for the Military Commissions Brigadier General Thomas W. Hartmann testified before Congress that the evidence obtained by waterboarding might be used in military commission trials.³⁰ Brigadier General Hartmann's comment points to the current system's lack of adequate safeguards for suspected terrorists as well as its overall ineffectiveness.

The United States is responsible for the detainees it holds and must quickly develop a workable judicial process. Despite the fact that some of the current detainees may pose a real threat to national security, indefinite detention violates constitutional principles and is morally reprehensible. It must be understood that indefinite detention, regardless of the detainee's citizenship, is unconstitutional.³¹ For this reason, I propose immediately im-

²⁷ See *supra* note 4.

²⁸ See William Glaberson, *Bin Laden Driver Sentenced to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1, available at http://www.nytimes.com/2008/08/08/washington/08gitmo.html?_r=1&scp=6&sq=Hamdan&st=cse&oref=slogin (link).

²⁹ See, e.g., Letter from Rear Admiral Donald J. Guter (Ret.), Rear Admiral John D. Hutson (Ret.), Major General John L. Fugh (Ret.) & Brigadier General David M. Brahms (Ret.), Retired Judge Advocates General, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary, Nov. 2, 2007, available at http://static.crooksandliars.com/files/uploads/2007/11/jag_letter.pdf ("Waterboarding is inhumane, it is torture, and it is illegal.") (link); Lisa Graves, *Ten Questions: Responses of Lisa Graves*, 33 WM. MITCHELL L. REV. 1619, 1620 (2007) (calling waterboarding "ineffective and appalling"); Press Release, Amnesty Int'l, Amnesty Int'l Calls for Criminal Investigation Following CIA "Waterboarding" Admission (Feb. 6, 2008) ("Waterboarding—where detainees are subjected to simulated drowning—is torture. Torture is a crime under international law.") (link).

³⁰ Josh White, *Evidence From Waterboarding Could Be Used in Military Trials*, WASH. POST, Dec. 12, 2007, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/11/AR2007121102110.html> (link).

³¹ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2271–77 (2008) (holding that detainees must have the opportunity to present "reasonably available evidence" showing that their continued detention is unjusti-

plementing a formal vetting process for the current group of detainees. This vetting process will determine whether the detained suspects present a continuing threat to national security. If it is determined through the vetting process that the detainee is no longer a threat, the individual must be released or prosecuted as criminal suspects in traditional criminal courts.

As Professor McNeal suggests, any reform system, especially one contemplating the rights of the current group of detainees, requires the development of significant infrastructure. Not only will the system need trained individuals and security cleared personnel, but it must also consider the logistics of returning a particular detainee to his home country in accordance with the principles of international law. As Professor McNeal argues, setting up such an infrastructure will be difficult. Logistics, however, must not interfere with substantive and procedural rights.

CONCLUSION

My proposed domestic terror court is not problem-free. It will allow, however, for suspected terrorists to receive a trial in a court of law that simultaneously balances their constitutional rights and addresses legitimate national security concerns. Professor McNeal has called on reformers to consider workable alternatives to the current system, and given the inadequacies of the available alternatives—including maintaining the status quo—it is imperative that we develop a workable judicial model.

For this reason, a properly constituted domestic terror court—comprised of judges schooled in understanding intelligence reports and intelligence gathering procedures, and aware of the necessity of preserving constitutional rights—is the proper starting point in moving forward with post 9/11 terrorist prosecutions. The proposed hybrid paradigm will ensure both the state’s obligations to keep intelligence and matters of national security confidential as well as the defendant’s right to a fair trial.

As a final thought, Professor McNeal’s essay and the thoughtful responses by both Professor Davis³² and Colonel Davis³³ represent important efforts to ensure that this issue does not fall out of the public discourse. The debate over how to treat suspected terrorists raises enormously important and complicated questions that touch upon constitutional law, criminal law, and international law, and has significant policymaking implications. In many ways, it defines and raises several important questions about who

fied and that the Detainee Treatment Act’s attempt to strip federal courts of jurisdiction to hear such claims was unconstitutional); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (“[F]ederal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals [held at Guantánamo] who claim to be wholly innocent of wrongdoing.”).

³² Benjamin G. Davis, *No Third Class Processes for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/32/LRColl2008n32Davis.pdf> (link).

³³ Morris D. Davis, *The Influence of Ex Parte Quirin and Courts-Martial on Military Commissions*, 103 NW. U. L. REV. COLLOQUY 121 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/34/LRColl2008n34Davis.pdf> (link).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

we are as a society: Will we accept indefinite detention even if our Constitution forbids it? Will we permit a torture-based interrogation regime? Where and how should we try suspected terrorists?

Unfortunately—perhaps tragically—the current Presidential debate has largely ignored this issue. Whether the media or the candidates themselves are to blame is irrelevant; what is of grave concern to me is that the public is not fully engaged in this most critical of issues. I only hope that this and other fora contribute to educating the public and facilitating public debate.