

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Joshua L. Dratel

Columbia Center for Oral History

Columbia University

2011

PREFACE

The following oral history is the result of a recorded interview with Joshua L. Dratel conducted by Myron A. Farber on March 29, March 31, and April 4, 2011. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

3PM

Session One

Interviewee: Joshua L. Dratel

Location: New York, NY

Interviewer: Myron A. Farber

Date: March 29, 2011

Q: This is Myron Farber on March 29, 2011, interviewing Joshua L. Dratel for Columbia University's oral history on Guantánamo Bay. Josh, how far are we from Ground Zero here?

Dratel: Maybe a quarter mile, maybe a little more, probably.

Q: How far are we in blocks?

Dratel: Three.

Q: This is 2 Wall Street, your office, is that right?

Dratel: Yes.

Q: You were born in 1957?

Dratel: Yes.

Q: Where?

Dratel: Brooklyn.

Q: Did you grow up there?

Dratel: Yes.

Q: You went to high school there?

Dratel: Yes, I went to Midwood High School.

Q: Graduating in?

Dratel: 1974.

Q: You went directly to Columbia College?

Dratel: Yes.

Q: Class of 1978?

Dratel: Yes, class of 1978.

Q: What were you studying?

Dratel: Political science was my major, but I probably spent most of my time at the newspaper, at the *Spectator*.

Q: Really?

Dratel: Yes, mostly writing sports, but I wrote other things, too. By the time I was done I had written a little bit of everything.

Q: I noticed when I came in the office here that on the wall you had some printouts of events relating to Columbia in 1968, during the student turmoil, as it is called.

Dratel: Yes.

Q: But you had no direct connection with that, did you?

Dratel: No, no. No personal direct connection, but it was the tenth anniversary, and the school had treated it as if it never happened. There was still a sense of embarrassment or outrage in terms of the official position on 1968. Some of us—most of us were probably affiliated with the newspaper; some people were not—decided that we would have an informal year-long set of programs designed to revisit that era, and then see if it was connected to where we were, in the sense of not just the larger political issues, but also the micro-political issues around the school itself.

Obviously, some of the issues that had been at the root of the issues in 1968 were still present, such as Columbia's relationship with the community. Columbia's relationship with ROTC [Reserve Officers' Training Corps] was gone, but Columbia's relationship with the CIA [Central Intelligence Agency] was still at issue. It certainly was current enough in terms of the Frank Church committee. That was in 1975 and 1976. There was a lot of controversy over [Henry A.] Kissinger's appointment as a professor. I think it was 1977 or maybe 1978, maybe even earlier.

All of these things were still roiling Columbia in many ways, and so we wanted to approach it that way. We were trying to be an anti-version of the official version that the school had provided of these student riots, as opposed to police riots.

Q: A couple of years after the student turmoil in 1968, when I was reporter for the *New York Times*, I was sent up to Columbia to meet with a panoply of students to talk about what their interests were. This may have been the class of 1974. I have to tell you that there was virtually no interest in revolution among these students. They were interested in their careers.

Dratel: I think at least half of any student body is only interested in that, whether or not it was a larger proportion that were not in 1968. The college is only maybe three thousand students.

Clearly there were at least several hundred students involved in the protests and the seizing of the building, so it is a substantial portion, even if it is a minority.

At the same time, when we were there, we had always heard that, in the period after 1968 for a good half a decade, Columbia had deliberately targeted for admissions people with backgrounds that were more comfortable with authority, and that they had deliberately tried to create a student body that oriented more in that direction. I don't know if that was still the same when I was there, because sufficient numbers of us were not that way, even though we were not necessarily revolutionary. It's hard to tell. We had heard that was an admissions policy. I don't know whether it was true or not.

Frankly, there are a lot of people whose ideas may have sounded revolutionary in 1978 when they were in school. By 1980, they were not. Most of the people I know there have gone on to lead more conventional lives than perhaps they would have been identified with when they were in college. I think that is typical of every generation.

Q: I take it you did not know people like Mark Rudd?

Dratel: I met them there, during the course of that year when we had this retrospective. We had a liaison in the sense of someone who had actually been at Columbia during that period. It was the Episcopal chaplain, a guy by the name of Bill Starr. He was someone who we knew. He was somewhat of a mentor, although not religiously because most of us were Jewish, so it was kind of an odd pairing. He was still political, and he was a very sage person. As a matter of fact, there is a famous photo of him on one of the buildings, standing up on one of the light posts in his clerical garb, in *Up Against the Ivy Wall*, a book published about the 1968 protests at Columbia. .

Q: You mean in 1968?

Dratel: From 1968, yes. He was still around in 1978, so he actually got in touch with a lot of these people for us, and got us [James S.] Kunen. We had Bill Sales, Mark Rudd showed up, which was a surprise. Mark Naison, Lewis Cole, and Juan Gonzalez. Juan Gonzalez was either already at, or just getting into, the *Daily News*.

Q: Did they collectively have some sort of advice for you in 1978?

Dratel: It is interesting. It was an across the board sense of the responses. Some of them were mildly embarrassed about the whole thing. Some of them were still very political, although not necessarily revolutionary. Some of the others were in between. I think the main piece of advice was—what they were trying to articulate, get across that those times were those times and that was a product of those times. You cannot replicate that generation after generation in a way just to say that it is being done. It has to be something that in some ways is spontaneous. When I say spontaneous, I mean that it generates itself from the emotional content of the student body, as opposed to people saying, “This is what we should do in order to do this.” There was a confluence of a lot of different events that led to that, as opposed to trying to manufacture it in some analytical way. That is not going to work.

Q: Bill Ayers, was he a Columbia student? Had he been?

Dratel: I think it was Chicago.

Q: Chicago, right. You must have found it curious how he emerged in the Obama-McCain campaign as a figure to be discussed?

Dratel: Yes.

Q: It was like he was raised from the dead by Sarah Palin.

Dratel: I met Bill Ayers later on when I was already a lawyer, because my first job for many years, and the job I had before I had my own firm, was with Jerry Lefcourt. I was Jerry's associate and then I was Jerry's partner. Jerry shared a building with Michael Kennedy. Michael represented Bernardine Dohrn, and I think represented Bill Ayers, too, when the Days of Rage thing came around and they had to resolve that when they came back from underground in the early to mid-1980s. I am trying to think when the Brinks incident was, because I think Bernardine was already—

Q: Brinks, I think, was in 1982.

Dratel: Yes, Brinks was 1982, because Bernardine was already back by then. I know that's why they put her in the grand jury. I think that was about the whole Brinks situation. When she had the problems with the grand jury, she ended up taking a contempt and being in jail for a while, and not being able to get admitted to the bar. She passed the bar, but she could not get admitted.

Q: She did become a lawyer, though.

Dratel: Yes, she is a lawyer, but she was never admitted to the New York Bar because of that. She could never get past the character committee.

Q: But that is when you met Ayers?

Dratel: That is when I met Ayers.

[SECTION CLOSED]

Q: So you did go to Harvard Law School. They took you, despite everything?

Dratel: Despite everything, yes.

Q: Well, actually they took you—

Dratel: —before everything.

Q: Well, you had a magna cum laude degree from Columbia, did you not?

Dratel: Yes, I did.

Q: Looking back on it, is there anything remarkable about your time at Harvard Law? By the way, had you always wanted to be a lawyer?

Dratel: When I was about fourteen or fifteen, I decided I wanted to be a lawyer. I found myself gravitating towards a combination of social policy issues and literate pursuits, as opposed to my earlier childhood when I wanted to be a doctor. Then sometime about thirteen or fourteen, I found science to be more mechanical for me and less natural than writing. Literary work was much more natural for me and much more interesting. Watergate had an impact on that as well. It was right at that time, 1971, 1972, 1973. I wouldn't say it was the germinating of it, but it was an important factor. When I was fourteen I read *Gideon's Trumpet*, which kind of embodied to me what lawyers are supposed to do.

Q: You know, the other day I was reading how much *Gideon's Trumpet* continues to sell, even now.

Dratel: It's a book that, because of the way that it was written, appeals to a fourteen-year-old and can also be a law school textbook at the same time. It's quite impressive. I know people who read it in high school. It's assigned reading in high school. It's assigned reading in college. It's assigned reading in law school, in addition to whoever's reading it because someone gives it to them and says, "Here, you know, I think you'd enjoy this book."

Q: Even *To Kill a Mockingbird* fits that bill to some extent. It can be read at all levels.

Dratel: Yes.

Q: So you got there, you spent three years there. They make you a lawyer?

Dratel: I probably wouldn't have said this twenty-five years ago, but I acknowledge now that it does shape how you approach problems. It has nothing to do with lawyering. It has to do with analytical thinking, in terms of parsing out problems and how to approach them, and sometimes even looking at them from different perspectives. That kind of skill comes from law school.

The actual lawyering has nothing to do with law school. I don't think it's Harvard's problem; it's a law school problem. When I was in law school, graduating in 1981, we were just starting to see the beginning of clinical programs. They are the hot thing everywhere now, but there were very few then. Northeastern had one that was very popular. Harvard was just starting a trial advocacy program when I was there. I took it in my third year. It was still in very nascent form, so it was not a recruiting mechanism. It was almost like they had to do it, because people were clamoring for it. The primary experience was still a pretty dry, scholastic method of teaching, but it was still very useful.

I probably would not have acknowledged it for a decade, but as I meet other kinds of people in other disciplines, I have begun to become more tolerant of legal education as an education in the sense that it does form certain analytical capacity that you do not find elsewhere. I don't think business school teaches it, medical school does not teach it and people in the financial industry

don't really have the same level of analytical approach that lawyers are taught to have. Lawyers may do it because they like to, too. Maybe that is why they are lawyers.

Q: Was there any professor that had a particular, special impact on you?

Dratel: I would say that [Alan M.] Dershowitz did. He was my Criminal Law professor. It was good to see someone with a defense orientation in that environment. It made me feel more comfortable, particularly at the beginning of law school. I didn't really have much to do with him, outside of asking him for a few names of lawyers who might hire a first year law student in a firm.

Q: But you took classes from him?

Dratel: Yes, I took two classes from him. One was just a basic criminal law class, which is in the first semester. Then in my third year I took a class that he taught with a psychiatrist, who I think is also a lawyer, named Alan Stone. They taught a law and psychiatry class about standards for competency and mental illness, and sort of that fine, gray, moving line.

Q: For later, doesn't Dershowitz have a position with regard to torture policy?

Dratel: Absolutely, yes.

Q: I'd like you to comment on that later on. But you didn't give any idea to getting a clerkship or something, after law school?

Dratel: I did not. Now I probably would have. If I had to do it all over again, I might pay more attention to that, simply because I see the value, not so much on a connections basis, but I see the value on a perspective basis. Being more sensitive to some of the issues that present themselves, or that judges face all the time, can be useful in being a better advocate. Rather than learning it over thirty years, I would have come out with it at the time. But at the time, there were two barriers to that for me. One was I had had enough school.

Q: You what?

Dratel: I had had enough school, and I just wanted to get out of school and start working. There were two things about that. One is that I didn't want to go somewhere again where there was this concept of applications and performance. I really just didn't. I just was tired of fifteen to twenty years of just, "What am I doing this for? This is for the next—what?" I want to do what I want to do, not do something to get to the next thing. Law school for me was not about grades or any of that. No law review, I never had any aspirations for that. I really just wanted to get to through law school and start working. The other thing was that I really did not want to work for the government. I did not want to be part of the system by the time I was getting out of law school, so it was not attractive to me.

Q: Well, when you found Jerry Lefcourt, he was not part of the system, was he?

Dratel: No, no. That was completely fortuitous, in a Branch Rickey kind of way.

Q: How so?

Dratel: Dershowitz had given me three or four firms. Because of the nature of the criminal defense practice, it's not like in a big firm where they take six associates a year. The four people said, "We don't have a position for the summer. We are not hiring." I went the customary route and started to look at big firms. I had an interview at Hughes Hubbard & Reed, which actually was across the street at One Wall Street.

Q: Now, you mean?

Dratel: No, no, they used to be. Now they're uptown, I think. I interviewed at Hughes Hubbard & Reed, and at Skadden. Those really didn't go well in the sense that it just was not a comfortable fit. One guy at Skadden was looking at my grades, and he says, "You got an A plus in criminal law, why don't you become a criminal lawyer?"

I said, "I'm here to interview with you guys, that's why."

They don't really hire too many first-year students for the summer, and so I didn't get offers from either of those. It was April of my first year and I was at a Seder, and my brother—

Q: Your first year?

Dratel: Of law school. So it was already April, and I didn't have a job for the summer. I was talking about something with my brother-in-law, and it had to do with [W. Mark] Felt, and [Edward S.] Miller, and [L. Patrick] Gray, you know, the FBI [Federal Bureau of Investigation] and something about their arrests, and their prosecution, which was happening right then. There was a discussion of something to do with Mark Rudd, who surrendered in my senior year of college, so it was huge news. We covered it in *Spectator*, as front page news, day after day, for days. I didn't realize at the time that his lawyer was Jerry.

Q: Lefcourt?

Dratel: Yes. I didn't realize the connection at the time, and I also wrote my senior thesis in Alan Westin's class on the Black Panthers, which is a case that Jerry did as well, without even realizing this connection that was going to be. Anyway, we were talking about Mark Rudd, and about whether he had cooperated against—

Q: You are speaking now at the Seder?

Dratel: At the Seder, I am talking to my future brother-in-law. He had been living with my sister for a while, and they got married a couple years later, but—

Q: You may want to seal that part. [Laughter]

Dratel: We were talking about Mark Rudd, and he was explaining Mark Rudd's role in the prosecution, in the sense of whether he was cooperating with the government or not, something to get on these FBI agents, because there had some kind of article or letter in *New York* magazine criticizing him. My brother-in-law was explaining that he had done this for this limited purpose of confirming some facts for purposes of getting these guys prosecuted.

He said the reason he knew is because he knew Mark Rudd's lawyer well. I said, "Really?"

He said, "Yes, would you like to work for him?"

I said, "Sure, of course."

He said, "I'll talk to him about it."

He knew Jerry because they played basketball together in Riverside Park, and their wives had been best friends and they lived on the West Side. He said, "Yes, give me about a week or two to get in touch with him, and then call him." That is what happened and then I got a job for the summer, and the next summer, and then full time.

Q: You did that several summers then at Harvard?

Dratel: Two summers, yes.

Q: Right. And you were associated with him from 1981 to 1996, is that right?

Dratel: Correct.

Q: Right. What kind of a practice did you have? Was it criminal?

Dratel: Yes. It was like this practice, in the sense of predominantly criminal law. There were no real exclusions. In other words, we handled pretty much everything that came in. It grew, in terms of diversity, as the general nature of the business diversified.

For example, when I first started Jerry had done a lot of work in drug cases, but that began to expand into organized crime, then into political corruption cases, and then white collar cases. It pretty much tracks the way criminal law evolved from the late 1970s through the early 1990s. It was fun. It was successful. It was rewarding. I learned a lot.

Q: It was interesting?

Dratel: Yes, very. It was great. There were a couple other fringe benefits, too, in terms of a lot of high profile cases and interesting people such as Abbie Hoffman and Mel Miller, the speaker of the state assembly, and a variety of other personalities.

Q: Harry Helmsley?

Dratel: Harry Helmsley, yes.

Q: I mean, Harry Helmsley, a criminal?

Dratel: I know. Although when we represented him, he was already in a state of disintegration, or deterioration, I should say. What we did for him was to get him out of that state trial, on the basis of his physical condition. There was also the [Michael R.] Milken case.

Q: Milken?

Dratel: Yes.

Q: Donald Trump?

Dratel: Yes.

Q: For what?

Dratel: Donald Trump was not a criminal case. We represented him. He sued the Pritzkers at the Hyatt at 42nd Street. His lawyer was Jay Goldberg at the time, and Jay said, "You want to write a RICO [Racketeer Influenced and Corrupt Organizations Act] complaint. Who better to write a

RICO complaint than people who know how to defend RICO?" So it came to us, and I wrote that complaint for the purposes of getting it past a motion to dismiss.

Q: Stanley Friedman?

Dratel: Yes. Well, we represented the co-defendant, but I got to know Stanley well. We tried that case and we were up there in New Haven for almost three months.

Q: He was convicted, was he not?

Dratel: He was.

Q: Whatever happened to him?

Dratel: He is now the manager of the Staten Island Hotel.

Q: You have also had a long association with the New York State Association of Criminal Defense Lawyers?

Dratel: Right.

Q: Has that been productive for you?

Dratel: Yes, oh yes. It has been a vehicle for trying to either change or retain policy in New York State, in terms of criminal defense issues in an institutional and organizational concept, in a way that is not possible to do as a single person. I've met a lot of nice people, good people and colleagues. Professional associations also help with business, and in being exposed in the community, so that people know who you are. I initially started because Jerry was one of the founders of that organization. I have sort of always been involved in it since 1986. Ultimately, I was president for a year, in 2005.

Q: Right. Today you are regarded as a distinguished member of what is called, sometimes, the ad hoc terrorism bar. You've been compared to Zelig in your roamings.

Dratel: Oh, yes, that's right. I have not read that by the way—the book by Anthony D. Romero.

Q: Being all over the place in terrorism.

Dratel: I have not read that whole thing all the way through. I can't.

Q: Anthony Romero, executive director of the ACLU [American Civil Liberties Union], has called you one of the “go-to” guys in terms of defense of terrorism defendants. Who else would you put in that category?

Dratel: Nancy Hollander, who is out in New Mexico, but who has done a lot of these cases; Linda Moreno from Tampa; Ed MacMahon in Virginia. Tom Durkin, in Chicago. John Cline, out

in San Francisco. David Nevin, Scott McKay, in Idaho. Andy Patel, here, who is right across the street. Sean Maher has done a fair number of cases. He is also here in New York.

Q: How about somebody like Joe Margulies, or David Remes?

Dratel: Oh sure. But Joe I don't think has handled any criminal cases. But they are extraordinarily active in the habeas aspect of the Guantánamo situation. If Abu Zubaydah ever gets charged in a commission, Joe would probably represent him as well. I consider Joe one of the founding fathers of the most successful litigation strategy in the history of this country, which is Guantánamo.

Q: Of the litigation strategy with regard to Guantánamo?

Dratel: Yes, and I know Joe from before then. It's funny, I know Joe, really, through his wife, who is also a very distinguished lawyer.

Q: But you draw a distinction between lawyers working on habeas cases with regard to Guantánamo defendants and lawyers doing criminal work?

Dratel: Yes.

Q: Can you explain that?

Dratel: Sure. Leaving aside the military commissions for a second, which are a separate animal, there are cases brought by the federal government. For example, there is the [Ahmed] Ghailani prosecution, the Holy Land Foundation prosecution in Texas and [Sami Amin] al-Arian in Florida. Those kinds of cases are the type that are essentially federal government criminal prosecutions, Article 3 court prosecutions. There are certain lawyers who have done a number of those cases.

Habeas cases are different in the sense that the rules are different, the objectives are different, and a lot of the legal principles by which you operate are different. The habeases are technically civil cases, which make them different on the certain level of constitutional rights. For example, they do not necessarily have a right to confrontation in terms of the evidence. Therefore, the government is allowed to present evidence *ex parte*, in secret, that the detainees' lawyers do not have access to. You could not do that in a criminal case. They do not have the right to counsel, like you do in the federal courts in a criminal case, so therefore the government and the authorities at Guantánamo, the Department of Defense [DOD], can create restrictions on attorney access that you could not do in a criminal case.

Q: Right, but the point you're making is that some of these lawyers can handle one thing better than the other?

Dratel: They just chose it, in a sense. I don't think David Remes has experience in criminal defense. I may be wrong, but I don't think his experience is in criminal defense. I think he was

basically a civil lawyer who became involved in the detainee situation early on, and found it to be a calling. Joe was a criminal defense lawyer. Joe did a lot of death penalty work.

My involvement in the whole Guantánamo situation is a result of Joe's situation, and his inability to do the David Hicks military commission, which is essentially a criminal prosecution. There have not been that many civilians involved in the criminal prosecutions, in the commissions. They are just a different animal, and they tend to be more intense because of the time frame in which you are working.

It's also because some of them are capital cases. The 9/11 case, when it was a military commission case, was a capital case. Obviously, the habeas cases are important, because if you lose, your guy can be held for life as well. The stakes are basically the same, but there is a difference between lawyers in criminal cases and lawyers who are doing habeases. Some do both. Nancy has done a habeas. I had Hicks as a habeas, as well as the criminal case.

Q: To what extent do these members of this ad hoc terrorism bar, so to speak, have experience as members of capital defense panels, for example?

Dratel: Yes. I would say that I am one of the few who has had experience in capital litigation. Joe has more experience than I do. Joe has considerable experience in the state level, like Texas, which is really hardcore. My experience in capital litigation is at least as a lawyer representing a client, as opposed to doing amicus work for organizations. It is solely limited to the federal

courts in New York State, which is not as bad as some of the states. It's not as bad as Texas, Georgia, Mississippi, and Florida—the death belt.

Q: Perhaps you should explain what a capital defense panel is here in the Southern District, for example.

Dratel: Yes. Well, they brought back the death penalty in federal court for all intents and purposes for real in the early 1990s. It existed for a couple years before that, but was very limited, and never instituted. When they expanded the number of offenses that were subject to the death penalty, the Southern District decided that they needed a panel of lawyers who were capable and willing to handle capital cases, so they sent out a questionnaire. I think I was one of the few people who said yes. I didn't have any experience in capital cases. I have practiced in New York my whole career and we never had a death penalty until [George E.] Pataki in 1993. Even then, not in New York County, but I got on the panel. There were about two dozen people on the panel, and it stayed the same. It's still the same.

Q: That means that the judge, with a capital defendant, can pick up the phone and call you and say, "Will you represent this guy?" Or will he tell you are representing?

Dratel: It's interesting because they have changed the methodology over the years. In essence, the Clerk's office is supposed to decide. It is not supposed to be cherry-picked because they don't want people to feel like the judge is making a decision because of the relationship with the lawyer. The Southern District is probably the best in the country at maintaining randomness of

assignments of judges and assignments. They are taken very seriously, and I think it's good, being on the defense side, because usually it is to the disadvantage of the defense when things are not done randomly. They go down the list, and they see who is available, and they call people. Generally, it's an honor system in the sense that if you said, "No, I can't do it," nobody is going to check on you. The purpose of you being on the panel is to take cases when you are available. So when I am available, I take the cases. I've done a few of them, trial to verdict, as a result of that.

Q: Isn't it so that even before 9/11, you had at least one case that involved terrorism, or a terrorist defendant? And that was [Wadiah] El-Hage?

Dratel: Yes, El-Hage.

Q: El-Hage, which was here in the Southern District?

Dratel: Yes.

Q: Can you tell me a little bit about that? This is before 9/11?

Dratel: This is July of 1999, when I got in that case.

Q: What was that case about?

Dratel: That's the embassy bombings case. That's the original trial. It's the same trial as Ghailani, only a lot broader.

[INTERRUPTION]

Q: Ghailani, well, he was charged with respect to the embassy bombings?

Dratel: Right. Yes.

Q: Now we are going back here to 1999?

Dratel: Yes. The bombings occur August 7, 1998.

Q: In Kenya and Tanzania, was it not?

Dratel: Correct, yes. My client is arrested after a grand jury appearance here in the Southern District in September of 1998. I do not represent him at that time. He has a court-appointed lawyer. After about four or five months, El-Hage decides he wants to change lawyers. He goes to the judge, and he gets a new lawyer in February of 1999. That lawyer's name is Sam Schmidt, who I knew well from prior cases. We had a very good relationship.

The embassy bombings case is the mother of all terrorism cases, with the exception perhaps of the fact that it will probably be eclipsed by the 9/11 case at some point. In many ways, it's even

more of a broad spectrum than 9/11 because the opening of the indictment is about the services office run by Abdullah Azzam in Afghanistan in the 1980s. It really traces the evolution of the mujahideen evolving into Al-Qaeda, from Afghanistan to Sudan back to Afghanistan. It is, in many ways, a historical treatment of the situation which later on became part of the narrative, but at the time was really not a narrative, in the sense that it was new to people. People didn't know whether it was just something that was in an indictment, or whether it had underlying factual basis.

Q: This material was in the indictment?

Dratel: Yes, the indictment is about 140 pages long.

Q: And emerged at trial, as well.

Dratel: Yes, yes.

Q: But let me go back a second. Who was El-Hage?

Dratel: El-Hage was a fascinating story in his own right. He was a special defendant, in the sense that his story was so unique that representing him made my exposure to all of this so much more diverse and complex. El-Hage was born Lebanese Christian, a Catholic. His father moved the family to Kuwait when he was very young, because his father was in the oil business as an engineer. El-Hage was converted by his schoolmates in Kuwait to Islam, and did not tell his

parents. His parents sent him to University of Southwestern Louisiana [USL] to get an education as an engineer. He came here and graduated, but it took him a while to graduate because he kept going back to Pakistan to help in relief efforts for the mujahideen.

Q: This would have been around when?

Dratel: Between 1980 and 1985.

Q: Excuse me, he was born in 1960?

Dratel: Yes. He came here in 1979 first for his freshman year at USL. He married a woman whose mother had converted her, and she is Caucasian. She is a blond American. He married her in 1985, and they have seven kids. He had gone back and forth. He was one of the first people really to go over there and give assistance. He couldn't help in combat because his right arm is withered because of a birthing accident. He has no muscles here, so his arm basically hangs. He does everything with his left arm, but he got to know a lot of the real players there.

Q: In Afghanistan?

Dratel: Yes. In 1990-1991, he is living in Arlington, Texas, and he gets a phone call from one of the guys he knew back then, who happens to be [Osama] bin Laden's brother-in-law.

Q: Would be?

Dratel: His name is [Sayed] Madani al-Tayyib. Someone he knew from Afghanistan says, "How would you like to come work for bin Laden in Sudan? He is running some corporations, and we would like you to be the marketing person. You speak English, you are educated. You could travel around the world and do marketing for these companies." He says, "Okay."

Q: Did he know bin Laden at that time?

Dratel: Yes.

Q: He knew him from Afghanistan?

Dratel: Yes, yes. He packs up the family of five kids, at that point, and moves to Sudan in 1991. He lives in Sudan for about two and a half years. He, for a period of time, is bin Laden's personal assistant and secretary in Khartoum, which is not a long-term position. He spent most of the time throughout Europe and Central Asia doing marketing. We traced a lot of his steps, through Vienna, Slovakia, and other places.

Q: Marketing what?

Dratel: Marketing agricultural products and buying equipment, because bin Laden was trying to market products that he was developing in Sudan such as sunflower seed oil and a tannery business. He was buying tractors and other agricultural equipment.

Q: This would have been what years, do you think?

Dratel: This is 1991, 1992, beginning of 1993. By the beginning of 1994, he moves to Kenya with his family. According to the government, he did this to run the Kenyan cell for Al-Qaeda. Subsequently, post 9/11, there has been a lot of information that would suggest rather clearly that El-Hage is not the cell leader. But he got convicted, nonetheless.

Anyway, so he's living there and the testimony at trial is that certain Al-Qaeda operatives come through his house. One of the guys who is a major figure in the bombing works for him. This again comes out in between and after.

Q: Who was that?

Dratel: Harun [Harun Fazul, aka Fazul Abdullah Mohammed. He is still a fugitive. [He was later killed in Somalia in 2011.]

Q: Who in fact, you say, is connected to the bombing?

Dratel: Oh yes, absolutely.

Q: He was working for El-Hage?

Dratel: Yes, and El-Hage was running an NGO [nongovernmental organization] called Help Africa People, which was trying to do malaria work in southern Somalia. A lot of what Al-Qaeda was doing at that time had to do with Somalia. This is 1994, 1995. Americans are already gone, but there are Islamist groups in southern Somalia, in particular, that are at the mercy of warlords and the Ethiopians. It's a combination of things. Al-Qaeda is in there trying to help them defend themselves and to spread the word in a very volatile environment. El-Hage does not go to Somalia, but Harun does. There are other witnesses, this guy named [L'Houssaine] Kherchtou who had gone there. One of the other defendants, [Mohammed Sadiq] Odeh, had been to Somalia during that time period. El-Hage is living in Kenya.

In April of 1996 the government institutes a wiretap on El-Hage in Kenya. No warrant, no FISA [Foreign Intelligence Surveillance Act], no nothing. This is outside the United States. It is a U.S. citizen, because El-Hage became a citizen in 1985.

Q: Of course, that is later upheld, is it not?

Dratel: I'm sorry?

Q: Years later that is upheld by the Second Circuit?

Dratel: Correct.

Q: So we'll deal with that later.

Dratel: They do it. It's an intelligence wiretap. This comes from other sources, like John Miller's *The Cell*.

Q: John Miller eventually became the Assistant Director of the FBI for Public Information.

Dratel: That's right, yes. I am reading and it says that the FBI and CIA—the guys who ran the bin Laden station in Virginia, decided that they would put pressure on El-Hage to turn. They decided to try to squeeze him to turn. So he is coming back from a trip to Pakistan, which they say was Afghanistan, and is coming back to Kenya. They decide to search his house that day, and stop him at the airport. They stop him at the airport and detain him, and they go with the Kenyan police. The FBI and the Kenyan police go and search El-Hage's house. They seize his laptop. They seize a lot of stuff. They detain and question El-Hage at the airport. They tell El-Hage, "You're in danger, because bin Laden's not going to be able to trust you now, so you are going to be in danger."

El-Hage said, "Well, you know, I'll take my chances. I feel more in danger from the Kenyans, now that they know I am aligned with an Islamic group." He decides to leave Kenya and return to the United States, so he goes back to the U.S. in September of 1997.

Q: During what period were the authorities bugging him?

Dratel: April 1996 to September 1997. Then he returns to the U.S. Upon his landing at JFK [John F. Kennedy International] Airport, after a twenty hour flight because he routed through Saudi Arabia to do a hajj, they slap him with a grand jury subpoena. Then they put him in the grand jury. He spends a day in the grand jury. They send him on his way back to Texas. He goes back to Texas. Nothing happens.

Q: A grand jury dealing with what?

Dratel: Bin Laden.

Q: Okay. This is 1997?

Dratel: Yes, I think the grand jury on bin Laden opened in the spring of 1996, or the spring or summer of 1996.

Q: Prompted by?

Dratel: It's unclear. In other words, I've read a few different versions. My belief is that it has to do with the initial defection of Jamal al-Fadl, the major witness of the embassy trial who shows up at a U.S. embassy in June of 1996.

Q: All right, but the embassy bombings have not happened yet?

Dratel: No, that's right. That's right. El-Hage goes home to Texas and he lives his life. Then the bombings occur, and they call him back to the grand jury. Then, after another day in the grand jury, they decide to charge him with perjury. They detain him and arrest him. Then, about two or three months later, they supersede the indictment and add the embassy bombings. Not the bombings themselves. He is never actually charged with any of the bombings. He is charged with being part of the formative Al-Qaeda conspiracy, the conspiracy to kill Americans anywhere you find them, based on the 1996 and the 1998 declarations by bin Laden. Those are the charges against him.

Q: That was a legitimate federal charge in the United States?

Dratel: Yes. It is a conspiracy to kill Americans, to harm property, and all the other things, but he was never charged with the bombings. In fact, in one particular count, there could have been a subsidiary question on the verdict sheet to ask, "Did death result as a result of this person's participation in the conspiracy?" The government withdrew that question from the jury. They got a sort of an omnibus guilty verdict, not something specific.

Q: But he appeared again before the grand jury?

Dratel: Yes.

Q: He was arrested in 1998, was he not?

Dratel: Yes.

Q: Was that after the bombings?

Dratel: It was after, yes, because they called him back after the bombings. Looking at it from the government's perspective, they bring El-Hage in in 1997. He spends a day in the grand jury. He appears to be cooperative. They let him go on his way. They are monitoring the situation. Then all of a sudden these bombings occur, and they feel like, "We had a guy here from Kenya and we let him off the hook. He lied to us. He must have known something."

The same thing happened to Ali Mohamed. I don't know if you know about Ali Mohamed. He's this shadowy Egyptian intelligence figure who becomes a cooperating witness and pleads guilty. He has not testified anywhere yet, but he is one of major figures in this whole situation. It's kind of like the triple agent, the guy who was also a Green Beret instructor on Islam in the mid-1980s for Fort Bragg. Anyway, they do the same thing to him. They arrest him in 1998, in September, right after putting him in the grand jury. They felt like they had been betrayed by these guys, that they must have known something about the bombing and did not tell in advance. They are both American citizens, and the government is very pissed off at them.

Q: Right, but staying with El-Hage only, he is arrested, and he is charged? Charged with conspiracy?

Dratel: Initially perjury, but ultimately conspiracy.

Q: And he goes to trial here in the Southern District?

Dratel: Yes, in the first half of 2001.

Q: Okay. How does he have the good fortune to find you?

Dratel: Sam Schmidt got appointed in February of 1999 after El-Hage had the first lawyer replaced. He was not happy with him, so Sam takes over. Sometime after a few months on the case, Sam recognizes, as a good lawyer, that this is too much for one lawyer. This is a monster case. This case is the biggest case ever. In many ways, it really was. Sam says, "I need another lawyer to help out." Sam's court-appointed, so he goes to the judge and he says, "I'd like to get another lawyer appointed to the case." The judge says, "Okay, I agree with you. This is too much." So Sam starts calling people he knows. He calls me because I know Sam and Sam knows my strengths, and his own weaknesses. It's a good complement as a pairing, and we always got along.

He called me, and he said, "How would you like to come aboard on this case?"

And I said, "Well, tell me about it." So he told me a little bit about it. I actually knew of the case a little bit, but not a lot.

I said, "All right, tell me more. How long's the trial going to be?"

He said, "About nine to twelve months."

I said, "It sounds like this is going to be our whole practice for a period of time. Are we going to get paid?" Judges have a habit, sometimes, of cutting vouchers. You could spend your whole life on a case, and the judge says, "I don't think it was really worth that much," and cut it in half. I could not do that and survive.

So Sam said, "No, the judge has been clear that he understands that this case is very labor intensive."

So I said, "Okay."

Q: Who was the judge?

Dratel: Judge Sand.

Q: Leonard Sand?

Dratel: Yes. Then, because I knew Sam had tried a lot of cases, a lot more cases than I had, and I knew he was somewhat headstrong, in certain ways—but we got along—I said, "Look, Sam, I want to try the case with you. I don't want to just sit there and watch you try the case." He said,

“Yes.” I knew Sam long enough that I took his word for it. He was true to his word, and that was good.

I said, “What other perks are there to get involved in a case that is going to be a year-long trial?”

He said, “Oh, we can go wherever we want in the world, because this case is global. This case requires a global investigation. We'll get to see some interesting places.”

I said, “All right, sounds good.”

There was a certain kismet quality to it, in this sense. In spring of 1999, my daughter, who at the time was almost eight, comes to me, and she says, “Daddy, what do you want for Father's Day?” Actually, it was my birthday. It was even before, it was early. My birthday is in March. She said, “What do you want for your birthday?”

I said, “You don't have to get me anything.”

“No, I want to get you a birthday present.”

I said, “Okay, how about a book?”

I look through my tear sheets from the *Times* book review section, tear something out, and there's a pile. I look through it, and I say, “Get this one, this one I'd like to read.” It was *Black*

Hawk Down. So I said, "Get that one." So her mom—at the time my wife, not anymore—they buy the book for me. This is March of 1999.

For three or four weeks straight, my daughter comes to me, "Have you read the book yet?" I said, "No, no I haven't had time yet. I promise you, I'm going to read the book." After about a month of this, I say, "I tell you what, Julia, when we go on vacation this summer, I promise you that I will read this book before I do any work. I will take this book and my project will be to read this book. I promise you I will do that."

We were going to go away to Europe in July of 1999. The week before we went away was when Sam called me about this case. I said to him, "Is there anything I can do? Send me the indictment. Is there anything else I should be reading to get up to speed?" This is literally a week before I am going away.

He said, "Read *Black Hawk Down*." [Laughter] Because that was charged in the indictment. That was one of the overt acts. We ultimately got it withdrawn by the government because we did a lot of investigation on Somalia. Sam and I know a lot about Somalia.

Q: Ultimately, El-Hage was convicted, right?

Dratel: Yes.

Q: Now this was the first terrorism case that you had been involved in, was it not?

Dratel: Yes.

Q: Do you recall, just generally speaking, how common it was to have terrorism cases in the United States federal courts at that time?

Dratel: There had been really two that you could point your finger at, particularly here in New York. One was the World Trade Center, and the second was Sheikh [Omar-Abdel] Rahman. That was really it. And Ramzi Yousef, which was really part of the World Trade Center. Those three cases were the templates for us. I have all those transcripts and that was all part of our preparation, just trying to get a handle on the players and what was done there.

Q: Had you been involved in any of those previous cases?

Dratel: No.

Q: What would you say you knew? What did you know about that world and those people, at that time?

Dratel: Very little.

Q: You probably knew more about Harry Helmsley.

Dratel: Oh, much more. My big contribution, in terms of coming into the case, was probably that more than anyone in those cases—because so many lawyers were appointed in those cases—I had a real experience with complex litigation from all the white collar cases. This was really more like a white collar case. This was more like a RICO organized crime case than it was a terrorism case, in certain ways, because of the number of documents and the number of arcane but very important legal issues. Things like that. Those are my strengths. Sam knew that. I think that is why Sam reached out to me. He knew that would be a useful part of the team.

Q: When was he convicted, do you recall?

Dratel: I think May 25, 2001.

Q: 2001?

Dratel: Yes.

Q: Okay. Can I assume it went on appeal?

Dratel: Yes, for a long time. A variety of different things contributed.

Q: Right, it went on appeal, and upheld on appeal?

Dratel: Yes, upheld on appeal.

Q: Were you involved in the appellate—

Dratel: Yes, yes, I'm still involved because he has not been re-sentenced yet.

Q: Where is he?

Dratel: He is in Florence, Colorado. He is in ADX [Administrative Maximum Facility]. He has been there since 2002.

Q: What interests me here is he is convicted in May 2011.

Dratel: 2001.

Q: 2001. Now where were you on September 11, 2001?

Dratel: How much time do you have? There's a story there.

Q: Well, listen.

Dratel: No, no, I'm just kidding.

Q: I know, but before we get there, when you tried the El-Hage case, and it went to verdict, did you think, at that time, “This is a new field for me?”

Dratel: No. It’s funny you say that, because first of all, when I got in the case and I read the indictment, the first thing I said to Sam was, “This isn’t a criminal case. This is World War III and we are in the middle. This is a very different situation than an ordinary criminal case. This is about a war against the United States. We have to think differently about this case, in other words.”

He already knew that, but to me, reading the indictment was striking because it was not a criminal indictment. It was really a historical narrative of two opposing—not states, necessarily—but ideologies. That was apparent to me from the very beginning. It made the case more interesting. It made the case more challenging. It made it fascinating. There was nothing more fascinating than that. And it also connected it to everything that was going on.

Q: But did you think—

Dratel: No. In May of 2001, I know I articulated it in my own head, and I may have talked about it with Sam, because we talked about a lot of things. The jury was out for three weeks and you talk about a lot of things when you’re sitting waiting for a jury. I said to Sam, “I feel like I learned all this fantastic stuff, not only in terms of the facts, in terms of just the whole world, about the history of the world since the moment that the Soviets entered Afghanistan.” The history of the world from that moment on until 2001, I felt like I had immersed myself in. We

interviewed guys in Hamburg who were part of the Hamburg cell, not knowing it, in June of 2000. We'd been all over, and I had read everything I could get my hands on.

Q: Were you in Afghanistan?

Dratel: No, because Afghanistan was still off-limits then. It was really still Taliban country.

Q: Okay.

Dratel: But the thing is, I said to Sam, "I can't believe, CIPA [Classified Information Procedures Act] and FISA and all this national security stuff that now I am an expert on. This is like a one-off. When will I even ever get to use this stuff again?" So it was disappointing.

Q: Do you recall what you literally did with yourself in the few months between late May and September 11?

Dratel: Yes.

Q: What did you do?

Dratel: There were a few things. One is to decompress after a five-month trial. The second is that we worked on El-Hage's post-trial motions, which we filed in August. They were extensive. It

was not just pro forma. We did a lot of work on that. I am the principal author of all that stuff, because that's what I bring to the table in this partnership on the case.

Q: By the way, how many co-defendants did he have in that trial?

Dratel: Well, there were a lot of people in the indictment, but three others went to trial. There was a fifth who was [Mamdouh Mahmud] Salim, who stabbed the corrections officer, and got severed out of the case. Then there was Ali Mohamed, who pleaded guilty in November of 2000. Four guys went to trial.

Q: So you worked on motions regarding this case, you decompressed.

Dratel: I had another case out in Queens, a rape case that I was getting involved in that was a big case at the time. I had to get involved and try to get the guy out on bail, investigating, trying to find the DNA expert, various things. I also had another case, a civil case I was trying for a friend of mine, which was awful.

Q: And by now, of course, it has been some five years or so since you left Lefcourt, right?

Dratel: That's right.

Q: Let me ask you parenthetically, why did you leave? Why did you start your own?

Dratel: Why did we break up?

Q: Yes. I mean, why did you go on your own?

Dratel: As opposed to somewhere else? All I can say is that it broke up for the reasons that partnerships break up, which is power and money. But I would say that there was a certain ceiling in the relationship. Some of it is my fault, and some of it is his fault, and that's just the way it is, in the sense of relationship. When you start out in an unequal relationship of law student and very successful, high profile lawyer, it is never going to get equivalent. That was a barrier for the relationship and partnership. He was great to work for, but as a partner, it just was never as comfortable as it should've been. Working was fine. It was the other parts that were problematic. It just was not the right situation in there. I decided to go out on my own because, frankly, I did not want a partner at that point. The largest firm Jerry and I ever had was four lawyers.

Q: What do you have in the office now?

Dratel: Five.

Q: That's what you did in the summer of 2001. On September 11, where were you? What was going on?

Dratel: Well, as close as we are here, I live closer.

Q: We're only three blocks away.

Dratel: I know. As close as we are to Ground Zero here, I live closer. I live in Battery Park City. I lived in the building right on Liberty and South End. You know where the marina is?

Q: Yes.

Dratel: In that first building off the World Financial Center, the one right down Liberty from the South Tower. So I was in my apartment getting ready to come to work.

Q: At eight, nine o'clock in the morning.

Dratel: At 8:43? Is that what it was? 8:42? I think I was brushing my teeth.

Q: First one, I think.

Dratel: I think I was brushing my teeth.

Q: What did you think had happened?

Dratel: I thought a plane had crashed into the ground.

Q: A plane had crashed into the ground?

Dratel: Because the ground shook so much that I thought a plane had crashed into the ground. I ran to the window, because it sounded like it was to the west of me, I thought it hit a building, or into the promenade, or someplace to the west of me, like the buildings right on the river. I'm in the complex there, and I'm furthest east in the complex. There's a semi-circle of buildings called Gateway Plaza.

So I think, just the way that the reverberation was, that Doppler thing of the jet engine was instinctive or whatever. You just knew that it—so I thought a plane had hit the ground. But I didn't think it was a jet liner; I thought it was like a small plane or something that had crashed in the ground next door or into the building next door.

I ran to the window, and I face north. I'm in a different apartment now, same building, but I face north, right onto the marina. I could see a little bit east, on an angle, down through Liberty and past the World Financial Center. I could see the Trade Center, I could see both towers. The southern part of the North Tower. If I look out like this, I could see the South Tower, just dead on, after the Vista Hotel. Or not the Vista, it was a Marriott by then. I go back. My parents were one of the first people in Battery Park City, in 1983.

Q: They moved in here?

Dratel: Yes, because my father worked on 90 West Street. My father and brother worked together in the securities business, and their offices were 90 West Street. But not at that time; they'd moved by 2001. But that's a tangent.

Q: You looked?

Dratel: I looked. I looked out on the marina, because that's where I had my best shot, and I see people running south. Not hordes of people, but just whoever is on the marina, people going to work. They are running south. I think that's one of the reasons why I thought it was to the west of me, because I thought they are running to see what has happened, or they are running to help, or they are running to where the crash has been.

Then I turn east and I see debris flying upward from the ground on West Street. Just ribbons of debris flying. It must have been the structure of the Trade Center. I didn't really know at the time. But it all looks like it's going upward, strangely enough. I can't see the north face of the Tower, Vesey Street—I can't see that far north. I'm blocked by the World Financial Center because I'm on the fourteenth floor. So I can see over the little building, the little turrets, but I can't see all the way on the street.

I begin to think, "What is that noise? Could that be two buses crashing? "I am hoping that, maybe, and I said, "No, no, it's a bomb. They've bombed the Trade Center again." That's what I think to myself. The first phone call I think I made was to Sam Schmidt, whose office is on 111

Broadway. It's still the same place but he's in the northwest corner of that building, which is on Trinity and Cedar, Trinity and Thames Street.

He can see into Ground Zero. I said to him, "Sam, what are they doing? Do they not know we have a sentencing in two weeks?" El-Hage's sentencing was scheduled for the September 26. I'm saying, "What are they doing? Do they not know we have a sentencing? We are going to get life now." El-Hage is going to get life.

Q: You can't know what happened yet?

Dratel: Oh, I knew what happened. I didn't know that a plane had crashed in, but I assumed that this was a terrorist attack on the World Trade Center, absolutely, by Al-Qaeda.

Q: Really?

Dratel: Absolutely.

Q: Well, because you had too much on the brain from this trial.

Dratel: Of course. I have a funny story to tell you after about some of this stuff. So anyway, I said, "Sam, what happened?"

He said, “I don’t know. It’s an explosion. I don’t know. It’s hard to see what’s going on,” because he could not see the North Tower either. He could just see that the Trade Center—that there was something going on.

I said, “All right, I will call you back, we’ll find out.”

I turn on the TV, and nobody has it on the stations. I’m scrolling through the stations. Nobody has it. Finally, like the second go-round, Fox has it, on Channel Five. They have a silhouette of the Trade Center, smoke is coming out. I think it’s a small plane. I’m thinking somebody took a plane from Teterboro, filled it with explosives, and flew it into the Trade Center.

I call my daughter’s school. I called Friends Seminary, which was where my daughter was. She was nine years old, so she was what, third, fourth grade, something like that. I called because I wanted to make sure she was there because my ex-wife was going to drive her to school that day. This is one of those great, fortuitous things that the public schools were not going to open until Thursday, the thirteenth. There’s a thing in New York, where if you are under a certain age, for elementary school, even if you go to a private school, the city has buses. You ride city school buses. The kids ride city school buses to the private schools. But they don’t start until public school starts.

So for two days, there wasn’t going to be any bus. My ex-wife—we were already separated by that time—was going to drive her that day. I knew it was also the first day of middle school or something, so she had an earlier schedule. Instead of having to be there at 9:30, she had to be

there at like nine o'clock, 8:45, which was great, she was already out there. So I wanted to make sure that she was—

Q: Where was she living?

Dratel: They live in another building in the same complex.

Q: In Battery Park?

Dratel: Yes, yes, yes, Gateway. That is where I had lived for ten years, since 1990, in one building. Then, when we got separated, literally two weeks before the trial started—first I moved into another apartment that my brother had, to keep in the city.

Q: You practically own this place, Battery Park City. [Laughter]

Dratel: My brother lived there, too.

Q: Does anybody else live there?

Dratel: I call up to make sure that she's okay, and that she's there in school. By chance her homeroom teacher is in the office and he says, "Yes, Julia is here." I said, "Good." I said, "Tell her that I am okay because you're going to hear about something at the Trade Center, and just tell her I'm fine." It was great because I didn't have to worry about my ex-wife being home. I

didn't worry about what she was going to do, and getting her out of there. Everybody was safe, and I just had to worry about me dealing with this.

I called Sam back. I guess I called my brother, who was in town from the night before, watching the Giants on Monday night. The Giants had lost to Denver in the opening game, Monday night, of the season.

Q: It was a delayed game, was it not? There was an injury?

Dratel: No, the next week, two weeks later. But the night before they had played Monday night, and my brother was still in town in the next building in his old apartment.

Q: I say an injury because I interviewed a fellow who survived the towers only because the game went late, and he missed his regular train the next morning.

Dratel: Yes, they ended at like 12:30, yes. So were talking and he said, "I'm not going to go into work."

I said, "Why?"

He said, "Well, I figure if they are attacking the Trade Center, the Stock Exchange is next. I'm not going into work." He worked just a couple blocks away on Broad Street, his office was there.

And I said, "Pretty good analysis, maybe I shouldn't go to work, and walk through this danger zone." So I called Sam, and—

Q: And your office then was?

Dratel: 14 Wall, so it was just down the block. So I called Sam back, and I said, "Sam, why don't you come here? You're not going to get home tonight. There's not going to be any PATH [Port Authority Trans-Hudson] train. They are taking people on boats and stuff. You can take the ferry from Battery Park City."

Q: You know this from television?

Dratel: Yes, I know this from television. I also know that we have a ferry that leaves right outside. I said, "Why don't you come and take the ferry to Jersey and have your wife pick you up? You'll never get out of Manhattan otherwise. It's going to be a zoo." He goes, "All right."

No, actually, the second plane came first, before I had that conversation.

Q: Did you know it was not a small plane now?

Dratel: Yes, by the time the second plane hit, I knew that it was a much larger plane. When the second plane hit, that was a lot more immediate, because it was basically outside my window. It

was like a missile had hit. I thought it was a missile, when that hit. The way it sounded, and the way it went by. Actually, there was no sound when it hit.

Q: No sound when it actually hit?

Dratel: I don't remember sound. I just remember a shudder. Just a complete building shudder, just like that, which I was in. The building just shifted.

Q: Well, you were not hit. You're talking about your own building shifting?

Dratel: Yes. Then when I saw it again on the news, that it was a plane, I thought about Ramzi Yousef with the nine planes over the Pacific. I said to myself, "How many planes are out there that are going to come here until this Trade Center falls down?"

Q: So what did you do?

Dratel: Well, I called Sam, and I said, "You know you're going to have to go home. Why don't you come here, and I'll take you to the ferry?"

He said, "Okay."

I called downstairs and I said, "Look, I know it's going to be crazy, I know it's chaotic, but I do have a friend who's coming here. So if somebody comes to the desk, I am expecting him."

They said, “No, no, no.” They want everybody out of the building.

I said, “All right, fine.” I figured I'd meet Sam downstairs.

So I called him up, I said, “I'll meet you down in the courtyard because they are evacuating.” I had taken a shower between the two planes—I didn't know, you know—so I was ready to go.

Q: Clearly, then, you were not in on the operation.

Dratel: No, no, I was not. Although someone did ask Sam that. Later on a reporter, a few days later, said, “Did you have any inkling?” It was like, “What are you talking about?”

I dressed in clothing that I thought would be good to run in if I had to flee. For some reason I left my window partially open, with a screen in it, because I thought, if there are reverberations from additional explosions, I didn't want it to break the windows. I wanted the air to have somewhere to go. Of course that meant that I had ash in my apartment when I came home, but I probably would have anyway, through the venting and all that. I went downstairs and I went into the courtyard, watching the two buildings burning, and waiting for Sam.

Q: Here you've got a good view?

Dratel: Oh yes.

Q: And they were burning? Neither tower had collapsed?

Dratel: No, no. But Sam shows up, and he comes into the courtyard. He's white. And I said, "What's the matter?"

He said, "People are jumping." He'd walked past and seen people jumping.

And I said, "You always see the horrible things." We had been together when the guy attacked the guard in the prison. I don't know if you are aware of this. Salim attacked the corrections officer at MCC [Metropolitan Correctional Center] with a sharpened comb and stabbed him through the eye. Sam and I were there that day. We were on the unit visiting El-Hage in one of the visiting rooms. We talked to the guy. Two seconds before he did it, he was talking to us, complaining about getting a severance in the trial, and upset.

Q: El-Hage or the other guy?

Dratel: The other guy, the other guy leaned into our room and said, "We've got to talk about severance." And El-Hage said, "I am talking to my lawyers—later."

Q: You mean he could just walk around?

Dratel: No, it was just lax. There was one guy on the unit. He was a nice guy. He let him. I testified in the grand jury and one of the questions was whether he was wearing handcuffs. And I've got to tell you, I don't know that he was. I don't remember. I remember that he had his orange jumpsuit draped over his arm. Somehow he had managed to get the plastic thing off that we put up on the door to talk to us, so maybe he had use of his hands. But anyway, it was crazy. I have worn a lot of hats, including "hostage." Although, it's good to not know you're a hostage until it's over. When they found the note, like months later, when we heard about the note that said, "We have the lawyers."

Q: That was part of that?

Dratel: Yes, yes, yes. [Laughter]

Q: Well, I guess if you have to be a hostage, it's good not to know.

Dratel: That's right, it is really the best.

Q: But in any case, did you actually see these buildings collapse?

Dratel: Yes, I'm getting to that part now. Sam comes in, and what I said to him was, "You always see horrible stuff," because he saw the people jumping, and when we were there at that time, he saw the guy with the thing in his eye when they brought him out. I kind of missed it

because I was looking somewhere else. I saw the guy covered with blood, but I didn't notice the thing sticking out of his eye. Sam saw that.

I said, "Sam, they want us to evacuate to the river, through the courtyard, through one of the buildings, to the river." I said, "They want us to go this way." I literally turned to show him and start walking in that direction, which is about fifty or sixty feet, maybe a little more. This is about 150 yards from Ground Zero, from the South Tower right now.

I hear this noise. It's the sound of wind, of something moving, of the air moving. I think it's another plane. And I turn around. It's not another plane. I didn't realize that the towers were collapsing. I didn't realize that the South Tower was actually collapsing because I think that was incomprehensible to me. But what I did see was it appeared to me that every floor was exploding. And I didn't realize that it was pancaking, because it was covered in smoke, and you couldn't see it moving down. I saw about eight to twelve floors explode in about a second and a half.

I said, "Sam, we have got to go." I ran through the lobby of the other building out onto the promenade, because I knew that whatever was coming was coming in this direction. Just the physics of it was that whatever was exploding out of the Trade Center was going to cover us at some point. It was one of those weird things, like a movie, or like a bad dream, in the sense that there's about another forty feet or so from the exit of the building to the retaining wall, and then you're on the promenade. Have you ever been down there?

Q: Yes.

Dratel: So I'm running through that backyard, essentially, beyond that building. There are people lined up looking out over the retaining wall, looking back at the Trade Center. The looks on their faces are the kind where you say to yourself, "Don't turn around. You don't have time. Do not turn around." Because the looks on their faces—like you are being chased by a dragon or something, whatever it is. I got to the other side of the wall, and there's no Sam. So I sit down on a bench, and I figure he's right behind me. I will wait for him.

A guy says to me, "What are you doing?"

I said, "Waiting for somebody."

He said, "You're not going to wait now." He points up, and literally, from over this thirty-five story building that we are hiding behind comes this cloud of paper, ash, everything. It was just thick, there was no air. There's about, I don't know, probably—seems like a long time, but I know that time calculations are very poor under those circumstances—about ninety seconds, two minutes. Zero air, just nothing. I thought everybody was going to asphyxiate right there on the promenade.

I thought about jumping in the river. Then I said, "That's not a good place to be if you can't breathe." I know that the Hudson is more powerful than it looks, in terms of current, and it is harder to swim than it looks, but some people did jump in the river. I know people who are on

staff at the complex I was in who jumped in, and were picked up by boats, and taken to New Jersey, in kind of their own little Dunkirk.

Q: What happened to Schmidt?

Dratel: I felt horrible. There is nothing. You couldn't see. I thought something—I didn't know if he had made it. I really didn't know. When I got to safety, I called his wife. This is about two or three hours later and she'd heard from him, which was very relieving, so I didn't have to explain to her that I'd left her husband behind, and he was dead or something.

It turns out he had found his way into a door, somebody cracked the door, broke a window on like a door to a basement in the complex, and they all went inside. Then when it cleared up about ten minutes later, enough to get out, they ran. As the North Tower started to collapse, they ran. He made it north to Chambers Street, to a ferry that was taking people across.

Q: By the way, did you ever have occasion to ask El-Hage his reaction? He was being held at the MCC, wasn't he?

Dratel: He was at the MCC, yes. We didn't get to see him for two weeks. They would not let anybody visit. Everything was crazy for a long period of time there. I will have to assert the attorney-client privilege on that one.

Q: Well, can I assume, at least at trial, he always maintained his innocence of being involved in the embassy bombing?

Dratel: Yes, absolutely. There is no evidence that what they call the “planes plot” began before 1999 or so.

Q: No, no, no, I’m not suggesting he’s linked to that, I’m just curious as to what his simple reaction would be.

Dratel: Fair question.

Q: I mean, don’t quote him.

Dratel: Let’s put it this way. El-Hage always took the position that he was against killing innocent people. People get like this with when they’re in jail and when they’re in solitary, because he has been in solitary essentially since 1998. They always refract back on the injustice that they see as being done to them, that that is what is paramount. It is always refracted back on that. So if you said, “Do you think it was a good thing?” he wouldn’t say, “Yes, it is a good thing.” He’d say, “No, but what about what they are doing to me?” You know, because he’s doing life for something he did not do.

Q: Once again, now that this has happened, did you think, “Well, I am going to be mired in this” or “I am going to have this kind of stuff in my career for the rest of my life”?

Dratel: It's funny. I didn't know what was going to be for a few days. I really didn't know. I did not know if I could do them again. You know, a lot of people never did. A lot of New Yorkers really did not want to do these cases anymore.

Q: Lawyers, you're talking about?

Dratel: It was to my advantage, ultimately, because it whittled down the number of people who were willing to do it. And so when people were looking for someone to do things, it was me. This is really a true story. For a good four or five days, we didn't even know if we could stay here. I woke up on Thursday morning, September 13, and my building that I live in lost every window on the eastern face. There was a fire that was started from parts from the plane that came in from the South Tower when it exploded. When the South Tower collapsed, it broke every window and not just broke the windows. It tore frames out. I saw the damage later on. It started a fire on the ninth floor. Let's put it this way—when I went back, there were photos of the black box and the flight recorder in the lobby next to the elevator, saying, "If you see these things, let us know." That is the immediacy of it.

The building was closed until December. I tried to go back on the twelfth, couldn't get close enough. The National Guard stopped me. I tried a couple of different ways. You could not get there. I didn't know whether the building was standing. There were stories about liquefaction of the landfill if the structural damage was such to the landfill. What they said was that the two plane impacts, and the two collapses, were essentially about somewhere between 2 and 2.2

seismic activity. Mini-earthquakes. They were not sure the landfill was going to survive that. Once the landfill loses its integrity, done. So we didn't know whether we'd ever go back to our homes. On Thursday, though, I woke up and looked at the *New York Times*, and they had a map. We were in the black zone. There was just like, no information about that.

Q: In fact, where were you living?

Dratel: In my sister's apartment. She is in the Village. Her son had just gone to college, it was perfect.

Q: Had just then gone?

Dratel: Yes, had just gone to college, was a freshman.

Q: And did you stay there for four months?

Dratel: Yes, I did, I did. It was just much easier. It really was. But the thing was, I woke up Thursday morning, looked at the *Times*, and they had a map of downtown, of the Financial District. And like I said, my house was in the black zone, there was not even anything to say about it. Then they had the outlying zone, and they had buildings with structural damage, structural damage. My office, 14 Wall, they said had structural damage. It was closed. I had gone there the day before, and it was closed. I am thinking, "I'm not going to be able to go to my home or my office ever again." It was a weird feeling. In some ways, it was liberating.

Q: Not to your office either?

Dratel: No. If it was structurally damaged, I'm thinking "I will not be going up to the twenty-ninth floor of a building that is structurally damaged." Who knows, what does that mean?

Q: What does it mean if you could not have gotten back to what you had?

Dratel: I don't know. It was weirdly liberating for a moment. And I said, "I can start all over again." It's great to be unhinged from everything.

Q: You're unhinged from your wife already.

Dratel: That's right, exactly. So it was kind of an interesting conceptual, but it passed, unfortunately. And I said, "All right, I've got to figure out what to do." You know what I did? I called Ben Weiser at the *Times*, who I knew from the trial. I said, "Ben, you've got to check this out for me, what does this mean?" And he called me back and said, "It's an error. It shouldn't have been included, that building." Anyway, then Sunday, my office was open on Sunday. I went back there. They let us go back in to our apartment building on Sunday to get stuff, which was another trip and a half.

Oh, so we were talking about what I thought. So I didn't know what was going to happen, I really didn't. But Rosh Hashanah was Monday night, the following Monday night. I'm sitting

there at the Village Temple, where my sister was. They used to have their services at Cooper Union on the holidays, because of the big crowds. I was just sitting there and I thought to myself, it came to me that this was what I do. It was already apparent to me, I guess, that there were going to be issues about civil liberties and the reaction, or overreaction, to 9/11, that was going to require people like me doing my job.

Q: Did El-Hage ever express any interest in the fact that you were Jewish and defending him?

Dratel: Nothing negative. Philosophical? Yes, we would have discussions about Islam and the role of Jews in Islam.

Q: The way you portray him, and maybe you have to this way, but the way you portray him, he was a convert to Islam, who had gone to be with the mujahideen in Afghanistan, in some fighting capacity?

Dratel: No, because of his arm he could not do that.

Q: All right. Then he comes to Louisiana and then he goes back to work for bin Laden in business enterprises, right?

Dratel: Yes.

Q: In other words, you do not have him in any even quasi-military activity?

Dratel: The government doesn't either. The government called him a facilitator.

Q: And that was enough?

Dratel: If you are a conspirator. If you're in for a penny, you're in for a pound.

Q: Yes, but conspirator in what aspect of it?

Dratel: Well, that was issue that we raised. Our position, and our defense at trial, was that a guy who is an associate of an organization like Al-Qaeda, who knows these people—they can never prove that he was actually part of Al-Qaeda, that he'd ever take a bay'at to bin Laden, or that he was a member of Al-Qaeda—but just because of his background, and because he'd been in Afghanistan so early, he was respected, and no one could argue with his credentials.

But our position was he would never do something against the United States. The fact is, if he was an opponent of oppressive regimes in Arab countries, that's one thing. He readily admitted that. Egypt, Saudi Arabia, places like that. He had no use for those rulers. He did not consider them to be legitimate, but he always said, "I am an American. My kids are American. My wife is American. I live in America. I am a citizen. I understand the roles and responsibilities of a citizen. I would not do anything against the United States."

Q: What are the predicates in the conspiracy?

Dratel: Somalia was a big part of it. Because this guy, al-Fadl, said, “They used to preach in Sudan, in Khartoum. They used to have these Thursday night sermons where they'd all talk about it. Bin Laden got up one day and said, ‘America is the head of this snake. They are going to go into Somalia to start taking over African countries that are Muslim. And next will be Sudan, and we have to go fight them, and stop them there. We are going to go attack the United States in Somalia.’”

There's no evidence that my client ever heard it, agreed with it or anything. My client was traveling all over the globe at the time. El-Hage was all over the place. There was another witness, Kherchtou, who said, “I don't remember that stuff.” To me, it all changed in 1995, really, when they started to talk about America as the enemy. By that time, they are back in Afghanistan, and El-Hage is in Kenya.

Q: Bin Laden and his crowd?

Dratel: Yes, bin Laden and his crew are back in Afghanistan, and El-Hage is in Kenya.

Q: What did they hear on these wires? Did they introduce wires?

Dratel: Yes, the wiretaps were him helping people get phony travel documents to go to Azerbaijan, which is really about Chechnya. It's all about transiting to Chechnya, Baku. Just a

lot of other stuff. He knows these guys. They talk to him and that when they are passing through Kenya, they'll call him on the telephone. But the problem is 224 bodies.

Q: Killed in the embassy bombings?

Dratel: That's what it's all about, and some of those photos, and some of the witnesses. I mean really, it's very moving, even from our side. But you know what? The first vote was five for acquittal on the jury, according to Ben. Ben [Weiser] did an article on it years later, when he got a hold of the jury. So El-Hage had a fighting chance. Pat Fitzgerald gave a great summation, a great rebuttal summation.

Q: Patrick?

Dratel: Fitzgerald. He's the guy who is now in the Northern District of Illinois. He's the guy who did the Valerie Plame and the Scooter Libby investigation. He did a great summation. He said, and I think this really had an impact on the jury—

Q: He may be the new head of the FBI.

Dratel: Yes, he may. It would be a good choice. Kind of a Webster type of guy, a guy who is very steeped in law, but has law enforcement respect, and all those things. But Pat said, in his rebuttal, "El-Hage had a choice when he came into that grand jury. He shows you that he is a conspirator, because he lied to us." He had twenty-three perjury counts and some of them were

terrible like not acknowledging his own signature, fingerprints on a document that he said he'd never touched, he'd never seen before. Not good stuff, some of it.

Q: I hear you. Earlier today you sort of portrayed this as even more important in the history of terrorism activity than 9/11?

Dratel: Yes.

Q: What do you mean? How can you say that?

Dratel: Because the organizational, doctrinal, operational origins of Al-Qaeda are what this case covered. It was not just about the embassy bombings. It was not just about two bombings. It was the entirety of Al-Qaeda, starting from its evolution out of the Abdullah Azzam organization. It was really all about the ideology of radical Islam versus the United States and the West. It was about real Al-Qaeda. What I mean by real Al-Qaeda is not kids in Indonesia or Africa who see bin Laden and want to go train and do jihad or kids in the United States—wannabes. These were really guys who committed their lives to it. It was a profession to them.

Q: You think that is not true of 9/11?

Dratel: No, no, no. 9/11 it is true; what I am saying is that, well, I think, [Ramzi] bin al-Shibh and [Mohamed] Atta were not the kind of Al-Qaeda guys that these guys were. They were not professionals. They were guys who came to Afghanistan and were used to do a job. But 9/11,

ultimately, it may be bigger than the embassy case. It may be. But you know what, the entire formative part of the 9/11 thing is all going to be the embassy case.

Q: I am sorry, say that again?

Dratel: In other words, the embassy case is going to be the first formative part of any prosecution of 9/11. But it also was the first part of it. In other words, before the embassy trial, I remember a reporter coming up, a foreign reporter coming up to me in the hallway after a conference, and saying, "Do you ever think this Al-Qaeda is a figment of the U.S. imagination designed to create an enemy, now that the Soviets are gone?" I said, "Well, you'll have to see at the trial, won't you?"

But there was a lot of skepticism. After the trial and after 9/11, all of a sudden there was recognition that this was something authentic, at least in terms of its own incarnation of it. It did not take the U.S. to make it real. It made it real by itself. But in any event, the 9/11 case will be more massive by the time it is done.

Q: What will it be?

Dratel: Well, good question. I don't know if there ever will be a case.

Q: I want you try to do something as an accomplished lawyer, whether they taught it to you at Harvard, or you picked it up on your own. I want you to take the position of those in the

government in the months after 9/11, and maybe even in the enveloping events that occurred in 2002 or 2003 in the government. Try to take their position of how you should deal with this now, now that it's happened. Apart from the military activity that occurred in late fall, going to Afghanistan, I'm talking about the decisions that were made with respect to people who were captured, the detention policies, and the issue of how to treat them, and where to treat them, and what have you. We will get into some detail on that later, with respect to your particular client, David Hicks, but I want you to try to argue the government's case for what they did. You were the editor with Karen Greenberg of *The Torture Papers: The Legal Road to Abu Ghraib* and *The Enemy Combatant Papers*?

Dratel: Yes, sure.

Q: Assuming that people like John Yoo, and Patrick Philbin, and David Addington, and what have you, were acting in good faith.

Dratel: Oooh.

Q: I know, I know, we're going to talk about that later on, but assuming that, what did they do, and why did they do it?

Dratel: Let me preface my response by saying the following. I'm going to accept the proposition, even though I think that even in looking at it as charitably as possible, some things do not pass

the good faith test, under any circumstances. But I will accept the proposition for purposes of this exercise.

Let's start with the proposition that the country cannot afford another terrorist incident like 9/11 and we don't know what's out there. Al-Qaeda may have operational capability to perform another act like 9/11, and we cannot afford it. Let's start with that as a proposition. The second part is the stakes being so different changes the nature of how you approach it. You can't wait around and then look for malefactors afterwards. You have to get out in front of the game.

The second part is if we are going to be proactive, it has to be the executive who does it because the executive is the only actor nimble enough to do it, both in terms of operations and also in terms of acquisition of intelligence and how to digest that. You can't have 435 members of Congress looking at classified information every day, and trying to synthesize that into its decision-making body. Only the president can act in that way.

These people are dangerous not only in the sense of their operational capacity, but they are also dangerous in the sense of their ability to manipulate process. For example, if you let them talk to each other, if you give them ordinary rights and privileges, they will take advantage of you. You are not going to get a more pliant custodial population. You are going to get a more manipulative one. The ability to gain intelligence is directly related to how much you can terrorize these people because to be terrorized is the only thing they understand. Being nice to them does not work.

These are the principles, I think, under which they operated. I think they operated out of ignorance, fear, anger, in many ways, a sense of otherness. What I mean by that is you hear people like [Michael B.] Mukasey talk about, “It’s only a couple of people this happened to. Big deal, it was not widespread.”

Well, that’s easy to say when it’s not about you, and you never worry that you, your kids, the member of your synagogue, they’re not going to be the people who are going to suffer. It’s going to be others, people of different cultures, and different religions, and different nationalities, who aren't going to affect you. The total lack of identification with the other is a critical part of it. Now that is not part of the good faith thing, but I sort of drifted off there.

I think there is a certain realpolitik aspect of it, which, again, could be part of a good faith, like [Abraham] Lincoln. I have always been ambivalent about Lincoln's remark about habeas corpus. I will paraphrase, “Should the whole republic fall for one principle?”

They are saying, “Tomorrow, when we don’t have a United States,” you can say, “Oh, no, no, no, we should have tortured that guy. It would have been okay to torture one guy.”

They reduced it down to a logic exercise. It doesn’t really work in the real world, but it works very well when you want to justify something—“Are you telling me that you would not torture someone if you knew you would save the whole world in the process?” So you are willing to let all the billions of innocent people in the world die, because you are not willing to harm a guilty person?

And that is a tough one to answer, right? But the fact is, in real life, it never happens that way. It is never about that. But if you reduce it to that, it becomes sort of an abstract exercise in justification.

Q: How important was it that 9/11 happened just when those people were in the government? I mean, after all, this is not long after that *Gore v. Bush* [2000].

Dratel: Yes, it was barely over.

Q: For example, if [Albert A.] Gore [Jr.] had been president, surely the Justice Department, the Defense Department would have had different people, right?

Dratel: Yes.

Q: People like [Richard B.] Cheney and Addington were drivers of a theory, even before 9/11, were they not?

Dratel: Yes, that's right.

Q: How important is that?

Dratel: I think it's important in the extremity of it. I think it's important in three ways. One is the extreme nature of what they did. Meaning that, I think that even Gore would have been a modified version, just like [Barack H.] Obama's a modified version of what [George W.] Bush did. There are some nuances, there are some accommodations to other principles, but yet, at the same time, there is this concept of national security as trumping everything. State secrets doctrine, a variety of different things. So it would have been a modified version. It would never have been as extreme as it was because of their complete lack of fidelity to founding principles of this country. In terms of process, they just did not see that applying to other people out there. It only applied to themselves.

But the second part is that it would never have been as insular a decision making process. One of their major mistakes was that they eliminated dissent. The only decision makers were people who thought exactly alike. As anybody who has been part of any kind of group decision making understands, that is a prescription for bad decision-making because you need dissent to modify extreme or imprudent decisions.

But yet, they did not do that, and they ended up making mistakes. It was abominable. Looking at it purely from a historical perspective, either legally or politically, it is a ridiculously, just an abominable failure on almost every level. They lost every Supreme Court case. They made us hated around the world. They have created a legacy that will take generations, like Argentina and Chile, to overcome. It's going to be really difficult. Politically, we are in a quagmire over it. Think about how much political capital, not to mention real capital, has been spent on places like

Guantánamo that could have been used elsewhere, for the actual fighting of a war, whether it is necessary or not. How much has been diverted to fighting that battle, over nothing?

The third thing was that they had no plan. They had no plan. I was shocked. And I used to tell people this, speaking, and they did not want to believe it. They all want to believe in conspiracy. I said it is less a conspiracy than it is just no plan. It was just day to day. Just do it, and then tomorrow they come up with a different policy. They never thought ahead. They never looked at an end game. They never thought about obstacles.

It's like [Donald H.] Rumsfeld in Iraq. It is like, "Sure I can do it on the cheap." Well, what if you can't? What if something happens? They never entertained the notion that they could ever have a problem, that something would interfere with their policy. It was bizarre. Guantánamo was run the same way, legally, operationally. It was very frustrating because it is very hard to have an adversary who does not have a plan because you like to be able to think ahead.

Q: But you did not, of course, know what they were up to in the fall of 2001 or in 2002, did you? I mean, what did you know?

Dratel: I did have a better sense. I'll tell you, once they started, there were a couple of things in 2002 that gave me a window, a little bit, on some of what was going on. The first is I was asked by the [Zacharias] Moussaoui team to come and help them to prepare in Virginia at the beginning. It's funny that you ask about what I was thinking back in May of 2001—was this

going to be—and what was I thinking after 9/11? By January 2002, they were talking about the rocket docket in Virginia, and this case would be tried.

Q: What was that? The rocket docket?

Dratel: The rocket docket, that's what they call it there, because everything goes to trial really fast in the Eastern District of Virginia. It's a culture there. I was laying out for them a plan for how to prepare the defense, and all the things that were necessary. They said, "We don't have time for that. We are going to be going to trial in May." I said, "You are not going to trial in May." I said, "Guys, this is not a case, this is a career. This will consume you. Just be prepared for it."

Q: You are speaking of people who were going to try Moussaoui? Just for historical purposes, if you read a hundred years from now, who was Moussaoui?

Dratel: Zacharias Moussaoui was sometimes known as the twentieth hijacker, but then ultimately he was not. He was someone who was arrested in Minnesota before 9/11 on immigration charges. He was ultimately tried for being a conspirator in the 9/11 plot, although not part of it. The government's position was that he was a second plot that was in the planning stages that was going to be a follow up to 9/11 involving planes. He had tried to do flight school in Oklahoma and in Minnesota. He was tried as a capital case in Virginia, and ultimately pleaded guilty. There was only a penalty phase. The jury could not agree, and so he is doing life in maximum security.

Q: Needless to say, he was never at Guantánamo Bay.

Dratel: No. But by 2002, with [Jose] Padilla, [Ali] al-Marri, those cases, I began to get involved as amicus counsel. In the National Association of Criminal Defense Lawyers, which is the largest criminal defense organization in the U.S., I have been a co-chair of the amicus committee since the mid-1990s, so we had a lot of work to do.

The *Rasul* [*v. Bush*, 2004] cases, the Guantánamo cases, all that started to percolate. I was not involved directly, but I was involved in helping formulate, and sometimes writing, some of the amicus submissions. Padilla was apprehended in April 2002 and I knew the lawyers really well. I had a background in a lot of things, like CIPA, classified information, things like that from embassy cases. People would come to me and say, “How do we do this? How do we do that? What do you do when this happens?”

Frankly, the embassy bombings case was a huge template for people to say, “Do you know who this guy is? Do you know about this? They are talking about this group, from this country, have you ever heard of it?” I was willing to do it. Intellectually, I was in a position to do it too. Some of the other lawyers did not care. They were not interested—it was just another case. To me, it was a lot more.

Q: Well, was it a lot more in part because you'd been through the El-Hage experience?

Dratel: Yes, but I mean, even the El-Hage case was a lot more. What I'm saying is I wanted to absorb every single thing about that. Where the other guys, just, you know, it's a case, and I will learn about my client, I won't bother to do the kind of research that we did to really get our arms around all this, to really understand it. To understand our client, and to figure out what was going on, it was a much more complex bit of work. When you have a bank robbery case, you learn about the bank robbery, you learn about the events leading up to it, but you don't have to learn about the history of the client's country.

Q: Right.

The first detainees went to Guantánamo in January of 2002.

Dratel: Correct.

Q: Do you know when you first became aware of Guantánamo?

Dratel: The day they got there.

Q: The day they got there?

Dratel: Yes. I remember reading it. I read the newspaper. I remember those photos of the orange jumpsuits, and the wire.

Q: Right. Had you ever heard the term enemy combatant?

Dratel: No.

Q: I'm not speaking about opposing lawyers in cases.

Dratel: Right. No, I could tell you that I knew almost nothing about military law or laws of armed conflict. I did know a little bit about the laws of armed conflict from El-Hage because there was a time when we were trying to defend against the Somalia allegations, where we actively considered a justification defense under the laws of war. That the Black Hawk Down incident was war and that the people—whoever killed those soldiers—were acting in self-defense.

The U.S. came in armed—a helicopter assault. What were people supposed to do? It's their homes, their whatever. They don't have to accede. I do think it was somewhat arrogant, the way the U.S. always portrays that and says that we have the right to go in, even in Afghanistan, even in Somalia now. I don't understand. What do they think people are going to do? Just say, "Okay, take over"? They have a right to fight back. We have a right to kill them then, if you want to. But call it war, call it what it is. So we considered that, so I had a rudimentary concept of the laws of war.

Q: And enemy combatant?

Dratel: No. Geneva Convention, no.

Q: Geneva Convention?

Dratel: I mean, I knew what it was. I knew a little bit about it, historically. My knowledge of it was fundamentally from a book about the Civil War about guerrilla warfare in Missouri, which is where the Lieber Code comes from. That was the only thing I really knew about it, just sort of historical.

Q: Well, surely you came to know more about the term?

Dratel: Oh yes.

Q: Do you understand why that term came about? And I don't mean just the exact words, but the idea.

Dratel: Of the Geneva Convention?

Q: No, of the enemy combatant.

Dratel: Oh yes. I think it's part of the Otherness. It was a way to create a category that was outside of the rules that had already existed, so you could treat these people uniquely and not afford them any of the rights that all the others are entitled to. In other words, there were no other

definitions that could fall outside of Article 3 of the Geneva Convention, and ultimately, not even “enemy combatant.” When they constructed the enemy combatant category, their purpose was to take it outside of all the rules, and put them in a place where there were no rules.

Q: Maybe they thought these were not people that you could fit into any of these other rules. They weren't soldiers in uniforms with commanders and what have you. They weren't spies, like the French Resistance. They weren't just civilians standing there by their building, being shattered. They were a new category of people who were willing to do anything. They were willing to do anything. They were willing to fly planes into the World Trade Center. So maybe they belonged in a different category.

Dratel: To me that was a conclusion looking for a rationale because everything you've said about them applies to the Northern Alliance. They didn't wear uniforms either. They didn't have insignias. They were just as ephemeral a fighting organization as the Taliban. There's no basis, you know—a failed state because it doesn't control its territory? What countries outside of the Western world control all their territory? Philippines? No. Thailand? No. There are so many countries, all of Africa. If those are failed, then everything is a failed state, and everybody is outside the Geneva Convention. The State Department—and this is part of that insular decision making—should know these things. [William H.] Taft [IV], who was counsel to Colin Powell at the time—

Q: Fourth. William Howard Taft IV.

Dratel: —he was adamant that they were wrong. They just didn't care. They wanted to exact revenge and pain. This goes back to my experience in the embassy case, too, because I could see that one of the reasons why these guys are treated the way they are in these prisons is because life in prison is too good for them. That's the way people think, because they're just so angry. The pain, and the anger, and the revenge factor, I think it moved people in high positions the same way, that they said, "Who cares? Who cares what happens to these people? They deserve it." A lot of people think the same thing. It's a natural reaction, but to me—particularly if you're a lawyer—but if you're a person of responsibility in government, you can have that emotional response. That is permissible. But what you can't do is then make a policy out of it. You have to pull back and say, "Wait a second. I understand I'm angry. I'm upset. This is a horrible thing. I would like to go out and kill every one of them if I could. But is that the right thing to do? Is that something that promotes an objective that is useful for us, in the short term or the long term?"

I think you have to realize, just like anything when you get angry and you want to do something crazy, you have to pull back and say, "Wait a second, this is crazy. I can't do something crazy. I have to do something consistent, something that is legal, something that will fly when I try to sell it to an ally, or the world, or to my own constituency, or whatever." They didn't care.

Q: Let's say they belong in the Geneva Conventions. Make the argument. Where can you fit them into the Geneva Conventions or into the Convention Against Torture, or into the law?

Dratel: I would say that the vast majority of people who were picked up and sent to Guantánamo—particularly in the early days it was mostly out of Pakistan and Afghanistan—fell

into one of two categories. Prisoner of war. In other words, someone who is captured on the battlefield fighting the Northern Alliance is a prisoner of war.

Q: Fighting whom?

Dratel: The Northern Alliance or the coalition forces, once they landed. Because it was Northern Alliance until the end of October. October 7, 2001 is the beginning of the air assault on Afghanistan. I don't think ground troops from the U.S. or any other coalition partner are introduced until late October.

Q: All right. But then the Northern Alliance is allied with them, right?

Dratel: That's right. But what I'm saying is, anybody who is fighting them out in the open in a military engagement is a prisoner of war. Then there's the Geneva Four, which has to do with the irregulars, and it's a little more complicated. We have never signed on to that, although we recognize the principle. I think those are prisoners of war.

I think if they're not prisoners of war, many of the other people were really civilians, non-combatants, and then the question becomes, who are they? Time has born that out, because out of the 750 who've gone through Guantánamo, you have 150 left, of whom the government says about fifty are worth trying at all. In that sense, they weren't anybody. They should have been either classified as prisoners of war, civilians, or non-combatants.

Now, among that category, there are war criminals or suspected war criminals. People who acted outside the laws of war, people who are responsible for 9/11, responsible for other terrorist acts. Not engaged in military combat against an enemy in a theater. Those people are potential war criminals. But you have to figure out who they are, and what they've done. I used to say about Guantánamo during the Bush administration, because they'd talk about recidivism rates. I said, "Of course you're going to have recidivism. They didn't care who they let go." There was no screening in, and no screening out. You went in because someone sold you for a bounty, or you were in wrong place at the wrong time, or you really were guilty, who knows. No one even bothered to adjudicate, no one ever bothered to have a trial and no one ever bothered to investigate these cases.

Q: You're speaking with regard to this?

Dratel: Yes. They let people go because of what country they came from. If you were Saudi, if you were Kuwaiti, if you were British, if you were French, if you were Danish, you got let go because those countries would not tolerate them staying at Guantánamo. They bargained their people out.

Q: Well, that's not a hundred percent true in some cases. It's certainly not true in Binyam Mohamed's case, who had to hang around until 2007 because the British were not doing anything.

Dratel: Well, because he was a resident, he was not a citizen. The subjects all were out.

Q: As we'll talk about in Hicks, the Australian government was not too—

Dratel: Right. Oh no, we made a point of that. By the time Hicks was out, he was the only subject of a Western country that had not been repatriated.

Q: All right, but the fact is, of the 530 in the Bush administration, 360 alone went to Afghanistan, Saudi Arabia, and Pakistan.

Dratel: Right. Saudi Arabia definitely worked on behalf of their people to get them back. With Afghanistan, they just realized after a period of time that these people weren't anybody. Or they couldn't prove anything, or they didn't know.

Q: Well, wait a second. How can you sit there, even in the comfort of your own office, and say that these were nobodies?

Dratel: I'm saying, of the 530, we have no idea who was anybody because they never screened them, coming in or going out.

Q: Wait a minute. These were people who, according to the chairman of the Joint Chiefs of Staff, Richard Myers, "would gnaw hydraulic lines in the back of a C-17 to bring it down."

Dratel: Yes, right.

Q: That's right. These are the people that Donald Rumsfeld famously called the "worst of the worst."

Dratel: That's right. So they let them all go. What kind of policy is that, they let them all go?

Q: Well, what else were they to do with them? What else were they to do with them?

Dratel: Easy. Everyone knows how easy it was. It was so easy that we didn't want to talk about it for the first two years because we were afraid they would do it, which is have a Geneva Convention Article 5 hearing for each one of them. Once that's done, you could declare them whatever you want. Now with an Article 5 hearing, there's no lawyer and there's no counsel. It's three military officers reviewing it and saying, "You are a war criminal. You are a war criminal."

Q: Wait a minute, wait a minute, is that Article 5 under the Geneva, or under the Uniform Code of Military Justice?

Dratel: No, Geneva. Yes. That's all they're entitled to.

Q: Well, now, just for the future, you used the term Common Article 3 before, now you are using Article 5. Can you just—?

Dratel: Sure. Article 5 is a status determination, meaning that before anyone gets treated as one thing or another under the Convention, there has to be a status determination.

Q: By a competent tribunal.

Dratel: That's right. But a competent tribunal. An Article 5 tribunal, through history, has been a bunch of military officers from the occupying country—from the prevailing country, so to speak—to determine things. It's not a trial of anything like we know it, but they couldn't even do that. They couldn't bring themselves to do that, the simplest thing. They were being told to do that. The first thing my military counsel said to me is, "Nobody knows why they didn't just do Article 5." The U.S. military did ten thousand Article 5 tribunals in Desert Storm.

Q: Josh, you are actually prepared to argue that these people either belonged as lawful combatants, entitled to prisoner of war status, or they belong as unlawful combatants? They belong as unlawful combatants entitled at least to the protection of Common Article 3, which precludes inhumane or cruel treatment, let alone torture, right?

Dratel: Correct. I think some of them were even outside of those two categories and would have been classified as non-combatants—as civilians, essentially. Until their status is determined, they are supposed to be treated as prisoners of war until there's a status determination. The default position is prisoners of war, somewhere in between. It's not quite as good as being a civilian because you can hold non-combatants.

There are reasons that you can hold non-combatants during hostilities. It has to do with danger and all sorts of things. You're supposed to find a way to let them go, but there's no, "Okay, you are gone right away." It doesn't necessarily mean immediate release. There's some sort of repatriation process that you can do. There's a lot of flexibility there that they didn't take advantage of, because they had another agenda.

Q: That agenda being, what, just being able to go around saying people were the worst of the worst?

Dratel: No, to isolate them from law so that they could create this intelligence laboratory. Leaving aside the emotional part of it—in other words, the physical revulsion for the things that were done, and the things that people do to one another in torture situations, anywhere—the resort to torture, in the first instance, to me was inexcusable. But it was also inexplicable, in this sense.

First of all, the military had very little—and the CIA had even less—experience interrogating people since Vietnam. They had no mass interrogation situations where they had armies of thousands to interrogate and to deal with in this way. They had no experience on how to interrogate people. They certainly had no experience interrogating terrorists, assuming that these people were terrorists, yet they completely tried to marginalize the FBI that had experience doing it, and had success doing it, and who wanted to do it their way. They eliminated them from the process, to resort to torture without any—and I mean any, zero, zero—empirical, practical, or

any evidence that it worked better than ordinary methods or that it got you accurate information, faster, more reliable, more complete, nothing.

That's where I think the fear and anger part comes in very strongly. I really do believe that this was a reaction in many ways that was about extracting revenge as much as it was intelligence. You know Ali Soufan, you know the agent?

Q: Yes.

Dratel: Look, he says it more powerfully than I do, because he was there. The guy who wrote the book *How to Break a Terrorist*, Matthew Alexander—I think it's an alias—was a military criminal investigator. These people were a disaster who performed these things. They didn't know what they were doing.

Q: Not Soufan?

Dratel: No, no, no, no, the people who were doing the enhanced interrogation didn't know what they were doing. They had no idea.

Q: The people who took over?

Dratel: Yes, they had no clue.

Q: With their SERE [Survival, Evasion, Resistance and Escape] techniques?

Dratel: Well, yes, but that's the other thing. They took something that was designed for one purpose and totally distorted it and perverted it into something else that it was not designed for.

Q: Right, let me come to that. But in this period, you became aware of Guantánamo and what was going on when the detainees arrived. Were you aware of the fact that the United States government rendered people to other countries?

Dratel: Yes.

Q: How?

Dratel: Because two of the defendants in the embassy case were rendered to the United States from other countries. I was aware that the United States had a policy of not necessarily availing itself of extradition laws or other ordinary process, and of just basically doing what it wanted. Certainly by the middle of 2002, I was aware of renditions to other countries for purposes of intelligence gathering.

Q: But which had occurred at least as early as the [William J.] Clinton administration?

Dratel: The ones I'm talking about from the embassy case were Clinton administration renditions.

Q: Yes, but I'm not talking about rendered to the United States.

Dratel: You're talking about rendered to other countries.

Q: That's right. That's right. So you had some awareness. How about black sites?

Dratel: No. I don't think I was aware of black sites until a reporter called me about them in, I want to say, 2004. I got a call from a very, very good journalist, Dana Priest, who broke the story. She said, "What do you know about this stuff?" I said, "I don't know anything." Hicks was never at a black site.

Q: Right. Let me finish today by asking you this.

Dratel: Sure.

Q: Is it true that from January 2002 until maybe the middle of 2004, Guantánamo detainees were not allowed to have a lawyer?

Dratel: It is only true in the sense of the habeas situation. I think they have corrected it now, at least when I have seen people talk about it, but there was someone who used to go around saying that she was the first lawyer to visit a client at Guantánamo. She was the first habeas lawyer, in

June of 2004. Gita [Gitanjali S.] Gutierrez. I was the first lawyer. I went in January of 2004 because Hicks was referred for a commission already.

Q: Let me start again. For roughly two years after January—

Dratel: Oh yes, for roughly two years, yes, until January 2004, no Guantánamo detainee was permitted to see a lawyer until the latter part of 2003. In the latter part of 2003, in December of 2003, Hicks's military lawyer, my co-counsel, Major Dan Mori, now Lieutenant Colonel Dan Mori, and the Australian lawyer for Hicks's family, Stephen Kenny, were permitted to go to Guantánamo in early December of 2003.

Q: Okay. No Guantánamo detainee had, or could have, a lawyer, is that correct?

Dratel: That they knew about, yes.

Q: That they knew about?

Dratel: Well, the nine people in the *Rasul* case in the Supreme Court had next friends, so to speak, for habeas purposes, or families. They did not know they had lawyers, but they had lawyers representing their interests.

Q: They were not allowed to have even military lawyers?

Dratel: Correct. Hicks was the first person assigned a military lawyer and [Salim] Hamdan was second.

Q: I'd like to begin our next session with what this process of best friend, and next friend, and what have you and dovetail into the Hicks case and your involvement in that.

Dratel: Sure.

Q: Thanks.

Dratel: How's it going so far?

Q: Perfect.

Dratel: Oh yes? Good. I won't change a thing.

[END OF SESSION]

3PM

Session Two

Interviewee: Joshua L. Dratel

Location: New York, NY

Interviewer: Myron A. Farber

Date: March 31, 2011

Q: This is Myron Farber on March 31, 2011 continuing the interview of Joshua L. Dratel at his law office at 2 Wall Street in New York for the Guantánamo Bay Project of Columbia's Oral History Research Office. Josh, I want to dispose of something. Have you ever represented clients facing capital punishment in state cases?

Dratel: No, federal only.

Q: But in federal?

Dratel: Yes.

Q: I mean for example we spoke the other day about Wadih El-Hage. Was he facing death?

Dratel: No. He was not death eligible because he was never charged with the actual homicides. There were three other defendants in the case who potentially faced the death penalty and the government sought the death penalty as to two of them and not as to one of them. No one got the death penalty. The two who went to trial got convicted. They went through the penalty phases, and in both cases the jury could not agree, which effectively is a verdict of life imprisonment without parole.

Q: El-Hage, has he exhausted his appeals?

Dratel: Yes. What we call his direct appeals have been exhausted. He has a re-sentencing coming up probably in the fall.

Q: He got life without parole, isn't that correct?

Dratel: Yes, correct.

Q: With regard to capital punishment, I just want to dispose of something here. There's been a substantial move in recent years toward this life without parole instead of the death penalty. There are a lot of juries who buy into that, who might have given death previously. Illinois, the other day, became the sixteenth state to repeal the death penalty in the state. Of course, there's the whole question about what the Innocence Project has done showing that there are people on death row who are innocent in fact. Today, somewhat unexpectedly, some executions are being held up by the shortage of the drug sodium pentothal. My question to you is whether the death penalty in this country—let's say we came back twenty years from now. What would it look like?

Dratel: I would hope that it would be gone entirely. I'm not sure that we would have a Supreme Court decision to that effect. I think that the prevailing trend is that a significant number of states

will not have the death penalty. But looking at a twenty-year window, probably seven or eight states will probably still have it. Maybe a couple more.

Q: I take it you are an opponent of the death penalty?

Dratel: Yes, I am.

Q: If we had had this conversation twenty or thirty years ago, would you say things were not in the favor of the opponents of death penalty in the last twenty or thirty years?

Dratel: I would say the last twenty years. The period of time that the death penalty essentially disappeared from criminal justice in the United States was the early to mid-1960s. The 1972 decision *Furman v. Georgia*, 1972] and then *Gregg v. Georgia*, 1976] created requirements for the death penalty that states had not met. They had to go back to the drawing board. There was a period of time and then Gary Gilmore was the first execution in the United States in 1977. From that point on, for the next probably ten to fifteen years, death penalty proponents were very powerful in their influence.

I'd say since the early 1990s, with the advent of The Innocence Project, with the advent of DNA, with the international move against the death penalty on a significant scale in the EU [European Union] and really all civilized westernized countries with the exception of U.S.—China is responsible for most of the executions in the world—I think that has swung the pendulum back in the other direction. I think also proportionality is continuing to be a factor that derails the

death penalty. Proportionality and race are things that when people look at them objectively derail the death penalty.

Q: Proportionality?

Dratel: Yes. In other words, the types of offenses that routinely result in death penalty cases as well as death penalty verdicts in places like Texas and Florida and the South. We don't even think about charging death penalty here in New York, or even Illinois when it had the death penalty. And California. The lightning strike aspect of it—

Q: Well there can't be any question, can there, about the racial component? The statistics show that, do they not?

Dratel: That's right.

Q: Uniformly.

Dratel: That's right.

Q: But the Supreme Court, I think it was in 1988, I've forgotten the name of the case, but they didn't buy them. But in any case, in the filing on the subject, after *Gregg* in 1976, many states adopted or had to adopt a second sentencing phase where aggravating and mitigating

circumstances could be waived to the benefit or detriment of the defendant, who has already been convicted. Did that work?

Dratel: In theory it sounds like it's a system that affords the defendant the prospect of making his case. In practice it did not, for two reasons in many states in which the death penalty is popular and regularly applied. One is that the quality of counsel was poor. There were appointed counsel with no experience, people who slept through trials, and people who did not want the cases but were forced by judges to take them. You combine that with the complete denial of resources for the purpose of mounting effective penalty phase cases, and you have in effect a system that affords that for the defendant in name only. Now you have ABA [American Bar Association] standards of practice for death penalty attorneys that are dramatically different than what occurred through the 1980s and 1990s in many of these jurisdictions in terms of what was afforded the defense in terms of resources and what the standards were for counsel, and what had to be done. If people really knew what went on, they would be made sick.

Q: One still hears about things like that happening.

Dratel: But let's put it this way. Communications and the commitment of lawyers acting in death penalty cases has probably reduced significantly the ability of these outliers, although they still exist.

Q: Before we get back to Guantánamo Bay—you know it is hard to get to Guantánamo Bay unless you are running across a field in Pakistan or something, or the Northern Alliance wants to sell you or something.

Dratel: It's shockingly easy.

Q: Let's talk briefly about some of the other terror-related cases that you have handled other than Hicks, other than Guantánamo Bay. We spoke about El-Hage. There was a case in Idaho, was there not?

Dratel: Yes.

Q: Tell me briefly about that case, and what happened.

Dratel: Sure. That was a prosecution of a Saudi named Sami al-Hussayen. He was a doctoral student at the University of Idaho in computer science. He was prosecuted beginning in 2002 and the early part of 2003, initially on immigration charges and then on material support for terrorism charges, alleging that he had used websites to promote material support for terrorism both in terms of the ideological content and also in fundraising and recruitment. He was acquitted of all the terrorism charges. The jury ultimately hung on one immigration charge, and he agreed to go back to Saudi Arabia, where his family had already been deported when he was arrested.

This was a guy who really had done nothing, and the jury out there did the right thing. The government had a very weak case. It was really about the First Amendment in many ways. The government, and I kid you not, the prosecutor said that the First Amendment is only for legitimate news and authorized academic scholarship. That was his position, and that was designed to limit who could say what about what. To me it was the government's position in that case that Muslims cannot be part of a political discussion.

Q: Was it the allegation that he was running a website that supported terrorism?

Dratel: No, he was the technical webmaster of a site that in the course of its existence had at one point published some clerical opinions by four clerics, who had at one point in terms of what the government called the "suicide fatwa." It was, essentially, doctrinal support for suicide bombing in Iraq, Hamas. That was the context of it because this is already 2000. I guess it was pre-Iraq. It was probably Hamas and PLO [Palestinian Liberation Organization]-oriented.

Q: He was arrested in February 2003.

Dratel: Right. But the thing is these websites were much more than that. Our expert, who was a former CIA agent, testified at the trial that he found the same websites within two clicks of being on his site for the Episcopalian church, which was his confession of choice. That site, he pointed that out to the jury, was basically an omnibus site for Islamic information, whether it be what can you do during Ramadan about some aspect of your daily life to advice on a variety of different Islamic issues and included some of this political stuff. But they could never prove, and in fact

the proof was otherwise, that al-Hussayen had anything to do with the content. What happened is he would get the material from the server and upload it. You could see from the forensics of the computer analysis that we were able to show a lapse of sometimes a minute or thirty seconds, so he never edited content or supervised content. He received the material that was sent to him and he put it up there. The reason he was a webmaster is because one, he volunteered. He was not getting paid for it. Two, because he had a computer science background that made it compatible with these organizations that wanted to put up these sites.

Q: Is it your recollection that he was arrested before 9/11?

Dratel: No, he was arrested after 9/11.

Q: Excuse me, he was arrested in February 2003. Was he a teacher at University of Idaho?

Dratel: No, he was a student. He was a doctoral student. He may have been teaching on the side, but he was a student still.

Q: How in the world did you get involved? You've probably never been to Idaho.

Dratel: I had never been to Idaho. I really love Boise, I must tell you. But anyway, what happened was in the spring of 2003, there was the first of its kind—now there are many of these things, but it was the first of its kind—of a program sponsored by the federal defender in Detroit because they had a big case out there, which was one of the first big post-9/11 cases, [*United*

States v.] Koubriti [2007]. It was the case in which the prosecutor got disciplined and then was prosecuted. He got acquitted for withholding evidence. He had a big contretemps with [John D.] Ashcroft, and so they prosecuted the prosecutor. They had this big case, so they held a conference on a weekend for essentially terrorism cases. These looked to be burgeoning by then. By May of 2003 there were a much larger number of these cases. They invited me to speak, and so I spoke. Then I was invited to lunch by these two lawyers from Boise who wanted to talk about their case. We talked about it, and I gave him whatever ideas I had and all these things. I didn't really hear from them. I sent them some materials.

About four or five months later al-Hussayen was named as a defendant in the 9/11 litigation here in New York in the civil litigation. Because he was under indictment and he was Saudi, they thought "deep pocket," and so they named him as a defendant. Oh, and about four hundred other people, and banks and the princes and all these organizations. So they asked me if I wanted to be local counsel here for that case. I said, "Sure." Then a couple of weeks later they superseded the indictment and added all the material support counts. Then they asked me if I wanted to get involved in defending the criminal case and trying that case with them out in Boise. That's how I wound up going out there.

Q: Except for 9/11, would he have been prosecuted?

Dratel: No.

Q: Let me ask you about a case involving the Holy Land Foundation for Relief and Development. This also is post-9/11?

Dratel: Well, yes and no. The prosecution is post-9/11. All the conduct alleged in the indictment is pre-9/11.

Q: In sum, you represented a man named Mezain, is it?

Dratel: [Mohammad] El-Mezain.

Q: El-Mezain. That case is in Texas?

Dratel: Yes.

Q: Briefly, what is it about, and what happened?

Dratel: It's about the provision of charitable goods and services to Palestinian institutions in the West Bank, and the government alleging that those institutions were essentially fronts for Hamas or alter-egos of Hamas. Actually they didn't even say they were alter egos. They said that they were supporting Hamas and were helping Hamas win the hearts and minds of the Palestinian people, so as a result, giving aid to those institutions was tantamount to providing material support to Hamas.

The case was tried in fall of 2007 in about two or three months. The jury was out for twenty days. They came back with a split verdict in the sense that they hung completely on three defendants. They acquitted one defendant entirely. My client was acquitted of all but one count. Somebody else was acquitted of all but two counts. They polled the jury, which means you ask the jurors individually whether this is your verdict, and that is your verdict. A couple of the jurors said, "No it is not." So the judge sent them back to deliberate.

After a while, I convinced the judge to figure out whether, when they say it is not their verdict, do they mean all defendants? Could it be just one defendant? Maybe somebody is saying it's not their verdict because they would have acquitted when in fact it was a hung jury. The question sort of needs further clarification, so the judge brought them out. It turned out my client was the only verdict that stuck in the sense that he was acquitted of all counts but one conspiracy count. The guy who got completely acquitted, they said, "No, we do not agree with the verdict." So he was back to square one. The guy who was acquitted of all but two counts went back to square one. We ended up retrying the case in the fall of 2008 in front of a different judge, with a different jury. Everybody got convicted of everything. My client was convicted of that one count. He got fifteen years. Some of the others got sixty-five years. It's on appeal. The briefs have been submitted, and we are going to argue it this spring or summer in New Orleans, where they argue the Fifth Circuit cases.

Q: Did you represent someone by the name of Javed Iqbal?

Dratel: Javed Iqbal, yes.

Q: Javed Iqbal. What's that about?

Dratel: That was a case in which he was charged with providing material support to Hezbollah by essentially—and when I say essentially, there was one tiny piece of equipment that he gave to the Lebanese Broadcast Corporation that they claimed was material support. The real material support in the case was him broadcasting the signal of Al-Manar, which colloquially is Hezbollah Television, and that, by broadcasting that in the United States, he provided material support to terrorism. I have trouble seeing that as a crime. We made very substantial motions. We lost pre-trial. He ended up pleading guilty. Rolling the dice, going to trial, getting fifteen to thirty years is a big difference than the five years he got.

Q: That was here in New York, was it not?

Dratel: Southern District, right here.

Q: Didn't the prosecutor call him "Hezbollah's man in New York" or in the United States or something?

Dratel: Preposterous. That kind of hyperbole, it just really serves no purpose. The government agreed in the plea agreement that he shouldn't get the terrorism enhancement because he was not motivated by anything but profit. You know what his other two channels were? Do you know what his other two big channels were? Christian Broadcast Network, you know these evangelical

networks, and porn. So this is not your jihadist. This is a guy looking to make a dollar. It just was a bad situation. Unfortunately, he kind of acted in a way that made him look like he was guilty even if he was not.

Q: Did you represent one Ahmed Abu Ali?

Dratel: I came in the case after the trial. He had already been convicted. I did the initial sentencing. I did the appeal. I did the re-sentencing.

Q: Correct me if I'm wrong here. These are not prosecutions of people who are alleged to be plotting to attack the United States, right?

Dratel: Well, Abu Ali they claimed was involved in discussions. The level to which they went beyond pure talk is debatable. They said when he came home, he researched something on the internet. But there was never any step forward. But certainly, Iqbal, never. Al-Hussayen, never. Never alleged. The same thing with the Holy Land. Never attacked the United States. In a lot of ways I think that sometimes informs the verdict as well. In the sense that if it's not Al-Qaeda, and it's some other conflict somewhere that doesn't directly involve the United States, and the people involved are not alleged to be involved in attacking the U.S., you have a better shot. But then again you look at Lynne Stewart. I represented her on appeal and in sentencing and appeal.

Q: Let's look at Lynne Stewart for one second. Lynne Stewart was a New York attorney. Is it fair to call her an ardent leftist?

Dratel: I think that's fair. I don't want to label her, but yes, certainly.

Q: She has represented many unpopular causes and people over the years, right?

Dratel: Yes.

Q: She was the attorney for the so-called "Blind Sheikh," right?

Dratel: Right, Sheikh Rahman.

Q: She was attorney for him at trial?

Dratel: Yes. Basically the attorney in the sense that she and Ramsey Clark represented him. But I think she tried the case pretty much. I was not involved in the trial, but I believe that she tried the case.

Q: Do you remember when that trial of the sheikh was?

Dratel: The trial was 1995.

Q: Now in 2005, those many years later, she was convicted of conspiracy and providing material support to terrorists, right? Very briefly, what was alleged that she had done?

Dratel: Well there are these things called Special Administrative Measures, which restrict the communications of certain inmates. And Rahman was under those restrictions. I have a bunch of clients under that too. All terrorism cases—let's take El-Hage for example. If El-Hage tells me, "Pass a message to Bob Smith that I want him to read this book that's out there," I can't do that. If Bob Smith says, "Tell El-Hage that we are waiting for him," I can't go and tell El-Hage that either. It has to be about the case. It has to be in the course of some legal issue. That's the only kind of communication that I can have with El-Hage. I can't just pass willy-nilly messages from third parties. And I can't, vice versa.

So she was under those restrictions. As Rahman's attorney, she signed an affidavit saying, "I will abide by it." And she came out of a meeting with him, she called a reporter for an Egyptian newspaper and read him a statement from Sheikh Rahman. It was his position on the expiration of the ceasefire between the Egyptian government and Rahman's organization, IG, the Islamic Group essentially.

Q: In Egypt, was it?

Dratel: Yes. There were some other things that were passed along too. They said that was the major thing. If there hadn't been that press release, it would have been a real de minimis. I mean it was de minimis as it was, for example, that the interpreter read him a letter from somebody. Nobody alleged much about that. It was really about this issue about the ceasefire that the

government concentrated on. They alleged that she had provided support to a conspiracy overseas to kill people, which is this IG. But there was no actual conspiracy that they defined.

Q: But was that episode the only real count, so to speak, or did they see a pattern of her doing these things?

Dratel: Like I say, there were other issues as well in terms of other aspects of it where they claimed that she passed messages back and forth from someone who was his paralegal. So it's unclear as to whether or not that would be considered something that was okay or not. But his paralegal was also a member of IG, according to the government, and was prosecuted at the same time.

Q: What is fascinating is that when she was convicted in 2005, she was sentenced to only twenty-eight months in prison. Well, I shouldn't say only. She was sentenced to twenty-eight months in prison.

Dratel: The length that the government asked was thirty years. The probation officer set guidelines for thirty years.

Q: She got twenty-eight months. The government appealed that?

Dratel: That's right. We appealed the conviction. The government appealed the sentence.

Q: Were you in the case by then?

Dratel: I did the sentencing.

Q: You had not been involved before?

Dratel: I did the post-trial motions and the sentencing. I got in like two weeks after the conviction.

Q: Had you known Lynne Stewart for some time?

Dratel: No. In fact, I knew who she was. We had never actually been in a case together directly, so I really didn't know her. I had met her, but I didn't know her.

Q: But she was sentenced to twenty-eight months. That goes before the Second Circuit. You lost on the conviction, right?

Dratel: Correct.

Q: But what does the Second Circuit do? It's fascinating. They send it back to the judge, do they not, for re-sentencing?

Dratel: Yes.

Q: Because?

Dratel: Because she said, "I could do it standing on my head."

Q: Pardon me?

Dratel: That's why. Because she said after sentencing, about the sentence of twenty-eight months, she said, "Oh, I can do that standing on my head." That's why.

Q: So they sent it back to the same judge, right? Who was the judge?

Dratel: Judge [John G.] Koeltl.

Q: And he sentenced her to what?

Dratel: Ten.

Q: Ten. Now, you were involved by that time in the case.

Dratel: I didn't do the re-sentencing.

Q: Okay, but you are around.

Dratel: Yes, yes, no. I'm in the case. I'm in the case up to about two months before re-sentencing, I was representing her.

Q: All right. When you heard her say this, did you think, "Jesus, what a dumb thing to have said"?

Dratel: I'll tell you the truth. Judge Koeltl imposed twenty-eight months. It was a huge relief. Twenty-eight months is not nothing, but it's not thirty years. It's not ten years. It's not eight years. It's not five years. For someone who just was in the middle of surviving cancer, and was sixty-seven years old, all these things, I thought the team of lawyers had done a phenomenal job. I was really relieved. It was that sense of euphoria of the relief and decompression from an extraordinarily stressful case and period and just a lot of pressure and worrying about the result. We go downstairs in the elevator, and we are walking, and I just kind of lost track of her. I lost track of the situation because I was just so relieved. Then she immediately headed towards the bank of cameras and microphones, and I knew it was it. I knew that was it.

Q: And that is when she said it?

Dratel: Yes. No, but I didn't even go outside. I walked back. I went back to my office. I just knew something was—you know there was someone who wrote a letter on her behalf who was a career prosecutor, and at one point was a top official in the Justice Department under Janet Reno, second or third in command. One of the assistant attorney generals in charge of a lot. She knew

Lynne from here because she was from here, and she tried a lot of cases and had a lot of cases with Lynne. And she said, "You have to understand, Lynne is the kind of person who is always going to take the opportunity to put a stick in the government's eye." And she did it once too often, twice too often. Once too often with the crime that she was convicted of, the conduct. Whether it is a crime or not is dubious, but the conduct. Then, what she said after sentencing.

I've been practicing on the Second Circuit for thirty years, and I don't remember a case while I have been practicing, and I never heard a case before, where the opinion on sentencing where the government actually quoted the defendants post-sentence remarks. They say, "Oh, this doesn't affect us," but they actually put it in a footnote, which shows that it had a tremendous impact on them. It was Judge [John M.] Walker who really led the charge in that regard. He's George H.W. Bush's first cousin. If you're asking me if that has an impact, probably.

Q: Well I'm glad I asked you. The filing with regard to these cases, were you involved in the Steven Hatfill?

Dratel: You know, tiny, tiny. What we did was we were local counsel for the service of certain subpoenas and actually in Brian Ross.

Q: Brian Ross. ABC.

Dratel: Right. Brian Ross was actually deposed in this room. I was not present. I think Aaron [Mysliwiec] sat in on that, but we didn't do it. The guys from Washington came up. We did

some papers for them and did some preliminary procedural stuff here, but the lawsuit ultimately got settled.

Q: These kinds of cases we've talked about, do they represent ten percent of your practice, thirty percent of your practice?

Dratel: Good question. It depends on what you mean by percentage. For example, numerically, they probably represent ten to fifteen percent. In terms of the amount of work that needs to be done, depends on the time, but they can take up a lot of time. They can be twenty-five to thirty percent of the man hours or woman hours here at the firm, and sometimes even more if you're preparing for trial. They tend to be a little more complex, and require a little more innovation and preparation because they often are international in scope. They have wiretaps and other labor intensive aspects, but you know they just represent a portion of the practice. It has fluctuated from time to time in terms of how many cases.

Q: Would you say that those kinds of cases we were talking about, leaving aside Lynne Stewart for a moment or even including her, are typical of the kinds of terrorism cases, laying aside Guantánamo Bay, that the government prosecutes?

Dratel: In terrorism cases? Yes, yes, yes. They are almost all material support cases. I haven't had too many in which they were not material support cases, where they are immigration or other types of cases. They have been mostly this sort of basic transparent—when I say transparent, the

charges aren't a substitute for something else that the government would rather charge, but does not have the information.

Q: We spoke the last time we met about the Geneva Conventions and the enemy combatant status. Is it fair to say that under the Geneva Conventions, there is only a lawful combatant and an unlawful combatant? There is no enemy combatant under the Geneva Conventions. I'm talking the fourth or fifth convention.

Dratel: Right.

Q: Now draw a distinction between a lawful or unlawful combatant and a war criminal.

Dratel: A lawful combatant is someone who obeys the laws of war. I don't mean that to be self-defining, but by that I mean wears the uniform, chain of command and conduct. You can be a lawful combatant but still be a war criminal in the sense of you could have all the insignia, but if you don't do that last thing, which is obey the laws of war, that is the sort of defining point of whether you are a war criminal or an unlawful combatant. You can be an unlawful combatant and not be a war criminal. If you never shoot your weapon, but you're in an enemy force that's unlawful because it's irregular in some way, it doesn't mean that you're a war criminal if you haven't done anything. There is not a crime of conspiracy in the context of laws of war. It's not recognized. It's what is called a theory of liability. It's somewhat technical.

Q: Give me an example of what would make you a war criminal as an unlawful combatant, or even lawful.

Dratel: The way it was explained to me by someone who is an expert in this is that you have to have an unlawful motive and achieve an unlawful result. By this I mean if you're looking to kill a combatant and you inadvertently kill a non-combatant, you're not a war criminal. If you are looking to kill a non-combatant, and you don't—maybe it's an attempt there, but at the same time, you not only have to be targeting the wrong person, but you have to do it on purpose. In other words, if you thought someone was a combatant, and it turns out they were a non-combatant—so for example, you were walking down the street, and you are a lawful combatant, and you're walking down the street in an urban warfare setting, and someone bolts out from a building with a shiny object, and you shoot them, and it turns out it was just someone holding whatever is shiny—you're not a war criminal just because you shot the wrong person. You have to have the intent to shoot someone who is privileged, so to speak.

The way I understand it is that unless it is perfidy, unless you dress up as somebody, which is a specific type of offense, the enemy soldiers are always fair game. In the ordinary sets of combat and even in the outside of combat, if you were to kill the enemy forces, that is okay regardless of how you do it, unless if you use gas or whatever else is outlawed.

Q: Many people, I guess if you ask them who's a war criminal, they would be thinking of somebody like Milosevic or Charles Taylor, on a grand scale—the chief of a tremendous force that is committing horrific acts against people. But it has a much smaller definition as well.

Dratel: Oh, sure. Those cases are better known, but also they are prosecuted because of an international consensus that you should concentrate on those who ordered an organized policies that violate the law of war as opposed to looking for every rank and file member. Sometimes it's not possible, so it's symbolic prosecutions of people in charge. But you look at Sierra Leone, they prosecuted a lot of people who were on the ground chopping off hands and things like that as well as people who are supervising and ordering, and Rwanda too, sort of a mixture.

Q: You mean the United Nations tribunals afterward?

Dratel: Yes. I think the Yugoslavian tribunals are concentrated on what you might call executives, or commanding figures.

Q: Peter Honigsberg wrote a book called *Our Nation Unhinged* and he discusses the Geneva Conventions in there. He says that the Fourth Geneva Convention sets out the rights and protections of civilians. He says that this category includes civilians who have taken "a direct part in hostilities on their own without being integrated into the regular armed forces or into militias or volunteer corps that meet the requirement for POWs [Prisoners of War]. Guerrillas, insurgents, terrorists or members of a terrorist group in a war zone would be considered unlawful combatants under this definition." Now you buy that, do you not?

Dratel: Unlawful, it says?

Q: Yes, in other words, terrorists and people who support terrorism.

Dratel: Yes, but that's not the full range of protections under the Fourth Geneva Convention because the Fourth Geneva Convention talks about intrastate conflict, and that guerrillas and insurgents are protected, but the United States has not signed on to that part. I'm not saying that a terrorist is necessarily a POW. I am saying it depends on the context in which the conduct for whatever he is being apprehended for or detained for occurs. For example, I don't think that 9/11 is an act that is protected by laws of war. I think of it as a crime as opposed to a war crime. I think people who fought on the battlefield in Afghanistan against the Northern Alliance or the coalition forces as part of units that may have been affiliated with specific groups like Al-Qaeda or that fought as units under the auspices of the Taliban are entitled to prisoner of war status because they are combatants in what we ordinarily consider a war.

There are obviously situations that present more of a grey area and more ambiguous circumstances. Ones that I've heard people use at symposia and other conferences that I've been at when these things are discussed—these are the kind of things that are possible in the modern world much more than they were even a hundred years ago. Let's say there's someone who lives in Amsterdam, and he is a communications expert. He is responsible for the communications aspect of remotely detonated devices in Afghanistan. What is he? Is he a combatant? Is he an illegal combatant? What is he? Flip it. The guy who sits in Langley, or wherever he sits, and operates a drone with a joystick, what is he? What if he is a contractor? What if he is not U.S. Air Force or U.S. Army? What if he is a contractor? What is he? Is he a war criminal if he kills civilians on purpose?

Q: Well, maybe Donald Rumsfeld would say that all these people are enemy combatants, or what later came to be sometimes called, after Congress got involved, unlawful enemy combatants.

“I’m Donald Rumsfeld. You’re wearing a uniform and you’re part of a militia. I give you prisoner of war status not because I’m obligated to because we signed a treaty, but I’m going to do it out of the goodness of my heart. Do you understand?”

Dratel: But they didn’t. They didn’t. Even the people from the battlefield were treated like war criminals at Guantánamo. They were not afforded the rights of prisoners of war.

Q: We are going to get to that for sure.

Dratel: But if you wanted to make that distinction, that is a principled distinction at least. That you could say, “Look, I’m going to limit my coverage, my Geneva Convention coverage, to people involved in traditional combat.”

Q: And not because in this War on Terror I have to do that, he would say, but because it’s the right thing to do, Bush would say, and did say.

Dratel: But they didn’t. They said it, but they didn’t do it. They said, “Okay, we’ll give them Geneva Convention.” But they didn’t do it.

Q: Including Common Article 3. Well, that was before *Rasul*. Before *Hamdan* [*v. Rumsfeld*, 2006], right?

Dratel: They can say whatever they want. His book used parts of it. He can say whatever he wants. It's all post-hoc rationalization.

Q: You speak of Rumsfeld's book?

Dratel: Yes. It's a joke.

Q: He's probably glad you didn't review it. Do you know the term "unitary power of the executive?"

Dratel: Yes.

Q: What does that mean to you?

Dratel: In the context of government or in the context of the current climate?

Q: Context of government.

Dratel: Context of government meaning that the president has certain powers. Let's say there are three types of powers that the president has exclusively, that cannot be interfered with by

Congress or the Courts. I don't mean that in a broad sense. I mean defined powers, in the John Yoo version of that. But powers that he can delegate as opposed to powers that he cannot delegate because there were some powers that have been found non-delegable. Then there are other powers that he has only with the consent of Congress or at the direction of Congress that he exercises. I would put the unitary powers of executive in that first category. Those powers where, like in the [Robert H.] Jackson formulation in *Youngstown* [*Youngstown Sheet & Tube Co. v. Sawyer*, 1952], where the president's power is at its zenith and is least susceptible to interference from either the Congress or the Courts.

Q: That's right. In simple terms for the layman, it undergirds the idea of a really powerful executive as against the two other branches of government, the Congress and the Supreme Court.

Dratel: It depends on how you define what those powers are that the president can exercise. It depends on where you top out the rest of the powers. In other words, if you take a John Yoo approach to it, there's one other power that is left for the rest of the government. If you take my view of it, the president has about three out of a hundred that he can exercise unilaterally. Ironically for Obama, he doesn't do the ones he can, like send people home to their countries from Guantánamo.

Q: We'll get to that for sure. Is it fair in your opinion to say that two of the leading proponents within the government of this unitary power and this ultra-strong executive were Cheney and his chief of staff David Addington?

Dratel: Yes. I think that they went beyond that. When you say ultra-strong, I would say exclusive. In other words, exclusive authority for virtually everything was the executive's—if the executive wished to exercise it.

Q: Now let me ask you this. Do you think that that notion of the unitary power and the presence of Cheney and even Addington—who is no shrinking violet—after 9/11 had an influence on the Office of Legal Counsel [OLC] with the Justice Department? What it did with respect to the torture provisions?

Dratel: Well before any of the—

Q: Maybe we should say what the Office of Legal Counsel is first.

Dratel: The Office of Legal Counsel is essentially the arm of the executive of the government that issues opinions for the executive branch as to what is legal and what is not, and what policies are constitutional or not constitutional. It is essentially the final word for legal advice in the executive branch.

Q: Not just for the Justice Department itself, but for—

Dratel: No, for the entire executive branch. In this context, CIA and DOD all refer to the Office of Legal Counsel for guidance and for clarification. I think the answer to your question is yes. I also think that even before the IG's [Inspector General] report came out—even before the

revelations beyond 2004 and 2005—I think if you look at my introduction to *The Torture Papers*, I expressed it there. If not, I was thinking it and speaking it in other places. There is always a chicken and an egg aspect of all these issues when lawyers come up with opinions as to whether the lawyer's opinion is independent of the will of his principal, or was it merely a ratification of what the principal communicated they wanted to hear. Having read what I have read from everything, from the OLC report that came out, the books—

Q: The what?

Dratel: When they initially wanted to refer Yoo and [Jay S.] Bybee for discipline, and then the report that came out was revised. They say, “No, we’re not going to do that.” But ultimately that report, other—

Q: David Margolis’ report.

Dratel: Yes, and other books like Jane Mayer's book and [Seymour M.] Hersh's book and all the books that have explored this territory. One would have to say that it would have been an extraordinary event if the influence had not come from Cheney and Addington. It would have been an extraordinary event if the people in the Office of Legal Counsel had come up with that on their own or had somehow decided to do something that Cheney and Addington did not want given the concert in which they operated in terms of ideology and objectives.

Q: It was a pretty closed group of people, was it not? We are talking about five or six people.

Dratel: Yes, of course the insular nature of it was bound to make terrible errors. I'm not the one who said it. Jack Goldsmith said it was terrible legal scholarship that Yoo performed on these memos. He's the one, not me. It's his buddy.

Q: Interesting. Jack Goldsmith who came in to run the office in maybe 2003 or 2004.

Dratel: 2004, I think.

Q: He did not say that the torture treatment should be stopped. He said that they had overreached, but he didn't say, "My God, let's stop that torture if we are doing it."

Dratel: Yes. Look, I'm not creating him as a hero like some people are. I don't consider him a hero. I think anyone who looked at the treatment of detainees at that period of time and signed off on those methods really has to answer on a moral basis and a legal basis.

Q: We'll soon enough talk more specifically about Guantánamo Bay, but the torture policy as enunciated by Yoo and company certainly influenced the activity in the black sites as much as at Guantánamo, wouldn't you say?

Dratel: Although again it's the chicken and egg situation, which is unclear. Without knowing the communications between Cheney and the OLC and between CIA and OLC, CIA and Cheney and all of that, without knowing what the communications were at the time, it's hard to know

whether—I think you were right, it did influence it down the road—those OLC memos that the CIA was so desperate to get were designed to ratify stuff that had already happened and to grandfather it in.

Q: Well, they were justifications were they not?

Dratel: Yes, yes.

Q: Is it possible in a forum like this to summarize what it was that they approved in terms of torture? When I say that I'm talking about not only what Yoo said, not only what went to Rumsfeld—not only what Rumsfeld for a time approved and then stopped approving—and then the working group took over and there was a forum. In other words, can you pull this together? What does it add up to?

Dratel: It adds up to the approval of a series of methods that have consistently been deemed illegal under United States law, international law, the Geneva Convention and international humanitarian law. Take a standard, whatever it is. We have prosecuted people for waterboarding in the 1990s in this country. I saw Mukasey. He gave a speech. He said that the waterboarding that was done in the Japanese prison camps was different than the waterboarding here. It's just extraordinary what lengths people will go to rationalize for themselves their refusal to acknowledge—whether it is a mistake or whether it is something they still believe in—that there's a squeamishness about this behavior. They have to start talking about it in different ways

than they did in 2003 and 2004, 2005. Even as late as 2008—I saw Peter King at a luncheon make jokes about torturing terrorists.

Q: But waterboarding is just one element. Can you characterize what it—?

Dratel: Yes, it'll take a series of beating people, putting them in confined spaces for prolonged periods of time. How about what they did to Khalid Sheikh Mohammed? As unsympathetic a figure as he might be, taking his children captive and putting them in closed spaces and letting insects crawl on them—which is what the United States did—to me it's not really that much further when you bring someone's child in and rape them in front of them. It's really not that much further.

Q: How about mental torture?

Dratel: That's a little bit more complicated because when you look at the history of police interrogation in the U.S., there are some types of mental—obviously they would not be called torture—but there's some types of mental gamesmanship that has passed muster. So I don't want to speak too broadly. For example, mental torture, you know, loud music twenty-four hours a day, sleep deprivation, things like that. Yes. But sleep deprivation in the context of certain interrogations in police custody has been deemed okay, not necessarily for three or four days. But denying someone sleep, bringing them out, getting someone at six o'clock in the morning, going into the house, waking them up, bringing them downstairs, putting them in their dining room and saying, "What have you got to tell us?"

Q: But when Yoo and his boss, Jay Bybee, wrote these drafts in August of 2002, *Re: Standards of Conduct for Interrogation*, and the CIA had been asking them for something, they said that torture requires intent. The precise objective to inflict suffering “equivalent in intensity to the pain accompanying serious physical injuries, such as organ failure, impairment of bodily functions or even death,” and inflicting “cruel, inhuman or degrading” suffering was not necessarily something that interrogators risked being prosecuted for if they could make an argument for self-defense. Right?

Dratel: Or that their intent was something else. Their intent was to get intelligence. That’s what happens when you let lawyers start getting involved in these things, because they are capable of giant leaps of abstract thinking that have no bearing on what is really happening. It’s like letting physicists run the stock market. You know, the quants. Same result. You get disaster.

Q: When did you first become aware of these torture memos?

Dratel: Well to place it for you, we are trying the case in Idaho, right? That started in the beginning of April and ended in the middle of June. Abu Ghraib is broken somewhere in the middle. Or early on in our trial, Abu Ghraib is disclosed. Within a few weeks these memos start to come out. That is my first recollection of hearing about it. I can tell you by late June I already knew about them because I had lunch with Karen Greenberg, and we talked about doing a program on torture. That’s what really started the whole project of *The Torture Papers*—collecting all this material. It was really first for this program that she was organizing at NYU

[New York University] as part of the Center on Law and Security that she runs there. That was the first time that I met her, and she invited me to be on this program, and we were just trying to fashion what the program would be about. We thought it would be useful to collect these memos as an adjunct to the program. By the time we finished collecting, they were six inches thick, so an editor from Cambridge Press who was there thought it would be a good idea to put them together.

Q: How did they come out? By what means? They were not released, were they?

Dratel: They were leaked.

Q: They were leaked?

Dratel: Yes. I want to say that Dana Priest had a bunch of them. I think that's the first person I read talking about them, but I could be wrong. It goes back a long time now.

Q: As a smart, savvy guy—indeed the Leonard Zelig of this terrorism defense world—as we discussed yesterday, what was your reaction? Were you surprised? Or, did you say, I expected this? By the way, you had already been to Guantánamo?

Dratel: Yes, I had already been to Guantánamo.

Q: But when you saw these memos and read them, did you think, “Well, this doesn’t surprise me. These guys, they’ll do anything.”

Dratel: By the time these memos came out, I had already been to Guantánamo and spoken to Hicks. I had no illusions about the conduct of individual persons—either law enforcement, military, CIA—that there would be abuse, that there had been abuse. We’d been hearing stories about it. Now that you mention it, by the time I got into Guantánamo and spoke to Hicks, there were already stories of some abuse. What surprised me and what I found the most objectionable was the policy. I know that you can’t eradicate emotion from all of these situations. You’re going to have people whose emotions get the best of them or whose lack of competence in an area get the best of them. They are going to do things that are wrong and that are against the rules. Now how do you treat them? Case by case. Some people, depending on the damage done, and what they have done, you don’t prosecute them. The people who have actually gone well beyond and did so deliberately and caused damage, those people get prosecuted. That’s the way it goes. They have to pay the price. But here what you have is the opposite. You have a policy that promoted it.

I was shocked at the pervasiveness of it, and I was shocked at the casual nature in which these decisions were made. The ones that really disturbed me the most were those exchanges between [Alberto R.] Gonzales and Taft. In the sense that Taft is citing time-honored, precedential material for purposes of a certain conclusion, and the answer he gets is, “Well thanks very much, but we don’t think so. We were going in a different direction. Sorry.”

Q: You yourself use the term the corporate right—

Dratel: Corporatization.

Q: —of government lawyering. What do you mean by that?

Dratel: I'm not saying by any means that this is common to all corporations or all lawyers in that regard. Maybe I'm jaded because I usually see it when it's a problem in the criminal context. In other words, you see situations of corporate objective, which is survival and profit and then obscene profit in that order. What you see is lawyers and other people in corporations, such as mid-level executives whose moral compass gets out of whack because of trying to either please, because of ambition, being amoral, or because they could care less. To give people the benefit of the doubt, they'll do it and they know better, but they're worried that they're going to lose their job—or because they have a kid in college, they have a house, they have this, or they have that. They have all these things they need to protect, or they just lack the courage to speak out. Some people just don't do it. I went to law school with lawyers who everybody considered the smartest people in the world because they went to Harvard Law School. You would be amazed at how few of them really wanted to make decisions.

Q: How few of them—?

Dratel: Really wanted to make decisions even for their own lives. It's a big deal for people to come out. The whole whistleblower culture is a bizarre one in many ways because most people

just don't do it. The people who do it tend to be a little eccentric. As a result it makes the whistleblower culture marginalized and ostracized and made to look like crackpots. They are harassed to the point where their paranoia, whether it is real or not, is manifest because they are actually being harassed. That was the other thing about learning about these things. My point about the corporatization is that the incredible pressures to go along with the ultimate objective of the institution clouds people's ability to say, "Wait, that's wrong. We can't do that." There are very few people in institutions who do that and they don't do it enough. The Enrons, the WorldComs and all those cases are the same in that regard.

Q: Finally with respect to the torture, we were talking last time about your slavish devotion to Alan Dershowitz because he was a professor of yours and told you to go to work. He has identified with the idea of a torture warrant in a ticking bomb situation. How do you evaluate that?

Dratel: I can't. I cannot reconcile it.

Q: You cannot?

Dratel: No. I have never spoken to him about it. I don't have a personal relationship with him. We've never spoken about it. I've read some of the stuff that he's written about it, but not a lot of it. I've written the opposite. I wrote an article in a book that Karen Greenberg edited. I wrote an essay in *The Torture Debate in America* about the ticking time bomb. I'll send it to you. It

doesn't mention Dershowitz by name, but it's a fallacy. The whole concept is a fallacy on many levels. You know, I don't know why. It could have to do with Israel.

Q: But isn't he saying, if you think you've got a ticking bomb situation, you go to a judge? Maybe there's a special court of judges or something. And you say, look this is a ticking bomb situation. We need a warrant to—

Dratel: Put the guy's kids in a small place and then put insects on them. What are we talking about? That's what I would like to ask him. What are you talking about? What are you asking federal judges to approve?

Q: Well he would say, "I'll tell you what I'm talking about. I'm talking about saving a disaster like eleven planes blowing up between Asia and Los Angeles by terrorists."

Dratel: That is again a fallacy. That's sort of like that moral question of, "Would you not save the whole world to torture one person?" If we look at who was tortured and why, and what happened, it is never that simple. I've gone back to Ali Soufan, who says they are lying when they say that they got actionable intelligence from this stuff. They are lying. They got nothing actionable. As a matter of fact, Ali Soufan says, "You know what? I got everything actionable before they ever walked in the room with these stupid torture processes."

Q: That's what he says.

Dratel: He's a FBI agent. It's not as if he's a defense attorney.

Q: I know. I understand. Just like the FBI and the CIA have been at loggerheads over many things for many years, one can expect them to be at loggerheads about how to interrogate people too.

Dratel: That's true.

Q: But does the name [Abdul Hakim] Murad mean anything to you?

Dratel: Yes. Sure.

Q: Who was Murad?

Dratel: Murad was Ramzi Yousef's co-conspirator.

Q: In the Bojinka plot.

Dratel: Correct. He was arrested out there in the Philippines. I think he was the guy they sent back. I think Ramzi Yousef and maybe Khalid Sheikh Mohammed were probably out there at the same time, although I don't know if that is true or not. He was in the same indictment. Khalid Sheikh Mohammed was in the same indictment. The fire breaks out. The laptop is back there.

They send Murad back to get it. He gets arrested. I knew the person who represented him well. His name is David Gordon.

Q: All right. He does get arrested. That's right. They beat the crap out of him for sixty-seven days, didn't they?

Dratel: I don't remember.

Q: Well they waterboarded him. They beat them with chairs and lumber. They had cigarettes extinguished on his penis and his testicles.

Dratel: Who? The Philippines? The Filipinos?

Q: Yes.

Dratel: Oh, okay.

Q: Before they sent him to us.

Dratel: That was unknown to me at the time. I just knew about the case.

Q: All right. Well Dershowitz would say, "Look, this guy knew what the hell they were doing about planning to blow up eleven planes."

Dratel: Right. How do you know until you know? My point is that you have not tried the guy yet. If we are going by police hunches, you can't imagine the things that people have done to people who they were sure were guilty. Let me present it to you a different way, all right? By the end of year there were seven hundred people at Guantánamo in 2002. Do you think that a federal judge would have issued a torture warrant for any one of those people based on what everybody thought about the people at Guantánamo? Yes, of course, for each one of them—and six hundred of them would have been innocent people getting tortured. That's what we're talking about.

Q: I guess you won't be able to go back to Harvard Law.

Dratel: They would never ask me back, so it's okay. They have a different priority, which is raising money. I'm not a fundraiser, so I'm of no use to them.

Q: When we left off a couple days ago I had asked you, is it true that the detainees at Guantánamo Bay did not have access to lawyers for two years after January 2002?

Dratel: Yes, for virtually two years. One of them did in December of 2003.

Q: That is David Hicks.

Dratel: Right.

Q: But didn't you say that some of them had lawyers, but they didn't know it? What are you talking about when you say they had next friends?

Dratel: The habeas concept is one that says that someone who acts in the interest of the detained party can bring the lawsuit as a next friend. That's what it's called. For example, relatives can be next friends. David Hicks' father was really the first nominal plaintiff. For some of the British guys, it was their relatives as well. It had to be because there was no contact between the detainees and their lawyers. There were a limited number of detainees who had lawyers at that point. In the beginning it was the Brits, it was Hicks and the Kuwaitis. Tom Wilner is representing the Kuwaitis early on. CCR [Center for Constitutional Rights] is trying to collect as many next friend petitions as they can. Hamdan had a next friend initially, and then he was able to do it himself when his lawyers got to him.

Q: Do you have a clear understanding, Josh, of why Guantánamo Bay was chosen as a detention facility?

Dratel: Yes.

Q: Indisputable? What is it?

Dratel: Well, I think it's a combination. I don't want to go overboard. I want to say that what started out as a force security issue—meaning how do we hold this many people in a place where

we don't feel secure—evolved within a couple of months as an opportunity for an intelligence laboratory. In Karen Greenberg's book *The Least Worst Place* there is the account of this.

Q: That's right. Did they want to hold them in some place where the reach of American law did not go?

Dratel: Yes. Well, not initially. In other words, force commanders like Myers and Tommy Franks didn't say, "Can we send them to a place where there's no law?" No. They said, "Can we send them to a place that's secure? We need a secure place." Some other genius had the idea of saying, "Hey, Guantánamo Bay has this advantage because not only that, but no one can come and get them."

Q: You see remarks by Yoo or others who are saying that it appears that as if the writ of American law won't run there.

Dratel: Yes. I believe there is a December 2001 memo.

Q: All told—according to the government—some 779 detainees passed through Guantánamo. By the end of 2002, 632 of the 779 were there. What is your understanding of who they were, and what criteria were used to decide, "You'll go to Guantánamo, you won't go to Guantánamo?"

Dratel: Let's start with the easier one. If there was someone who was identifiable as a really valuable Al-Qaeda operative, they were not sent to Guantánamo. They were sent to a black site.

If they were marginally valuable, they were sent to Guantánamo. If they were American, like John Walker Lindh or [Yaser Esam] Hamdi, they could not be sent to Guantánamo. That was a political, strategic decision. I've always believed that it was designed to just simply eliminate a constituency in the United States for caring about these people. It has been the hardest thing in the world to get ordinary U.S. citizens to care about individuals at Guantánamo. They just don't.

The others were people who were sold for bounties by Northern Alliance, people who were opaque, but were either in the wrong place at the wrong time—either on purpose or accidentally—people who were swept up in the Northern Alliance route of the Taliban forces, people who were transiting from Afghanistan back to Pakistan, or fleeing Afghanistan back to Pakistan, without either an excuse as to why they had been in Afghanistan in the first place. Like Moazzam Begg, who did not have a legitimate excuse that they believed—or people who did not have a sponsor like ISI [Inter-Services Intelligence] or whoever else was helping actual Al-Qaeda get from Afghanistan to Pakistan. It's unbelievable. Look at it this way. Moazzam Begg and hundreds of people like him get arrested, but Padilla and Richard Reid get through. What does that tell you? That actual Al-Qaeda, and bin Laden and [Ayman] al-Zawahiri and all the other people had means of crossing the border to Pakistan with protection.

Q: But you know that most Americans probably thought that there must have been a big battle there north of Kandahar, and Americans swooped in and charged over the hill and found all these guys standing there and arrested them and sent them to Al-Qaeda. The fact is that there were thousands who were taken into custody who never went to Guantánamo, right?

Dratel: Right. Most of them were Afghans who were spoken for by other Afghans—in other words, not sold in bounties to the U.S. Very few foreigners were let go. If the Northern Alliance caught a foreigner, or the Coalition Forces once they were involved on the ground caught a foreigner, meeting a non-Afghan, that person was presumptively Al-Qaeda.

Q: Many Saudis and Yemeni, no?

Dratel: Correct, and Brits. There were thirteen Brits initially.

Q: All right. But didn't a lot of people end up in Bagram?

Dratel: Sure.

Q: Whatever happened to those people?

Dratel: I don't know. A lot of them got released. I think most of them got released. My understanding is that the Afghan government, once it was constituted with [Hamid] Karzai, was relatively active in getting its people returned, which is why when you talked the other day about the numbers of Afghans who were repatriated—

Q: Now on June 20, 2005, several years after the thing began and clearly the time when everybody could know who they had, the president of the United States said, “these are people picked up off the battlefield in Afghanistan.”

Now three days later the vice president of the United States said, “The people that are there are people we picked up on the battlefield primarily in Afghanistan. They are terrorists. They are bomb makers. They are facilitators of terror. They are members of Al-Qaeda and Taliban. We let go those that we have deemed not to be a threat. But the 520 that are still there are seriously deadly threats to the United States.” That was on June 23.

Four days later the Defense Secretary Donald Rumsfeld said, “These are people all of whom we captured on a battlefield. They are terrorists, trainers, bomb makers, recruiters, financiers, bin Laden's bodyguards, would-be suicide bombers, probably the twentieth 9/11 hijacker.” Now they are all talking battlefield.

Dratel: Right. It's a lie. It's a repetition of a lie.

Q: Is it a lie, or is it the result of a mindset that considers the world a battlefield?

Dratel: That is conceivable, but I think it's too charitable to them. What I see from what you just read, particularly considering the immediate time frame in terms of how close they are in time to each other, is a group of skilled politicians taking a set of talking points developed by other people and spinning them with their own particular brand of exaggeration or embellishment. They had a set of talking points such as “Say these are battlefield captures. Say these are dangerous people.” They all put their little spin on it, but the fact that they all say the same thing and repeat the same lie means that it was a deliberate lie. It's a talking point that their press

office or the DOD or whoever invented these ideas in the first place told them, "Here's what you say." I've been part of it in terms of lawyering. In high profile cases we say, "Here's our message. Always say this." That's what they did.

Q: Well it goes back to what I was saying a moment ago perhaps.

Dratel: Did they know it was a lie? They didn't care.

Q: When they keep using the word battlefield, most Americans think of World War II or someplace or even maybe Vietnam. But there's a battle going on, right? A lot of these people were running around.

Dratel: I think that was their terminology for battlefield too. I think they deliberately—well, they didn't care because the truth really has no meaning to them to begin with because they are politicians. So why would it have meaning? Truth does not have meaning to most people. It's a random event in most people's lives. If you look at the things people say, it's conceivable that they were thinking of it in the abstract term of what they now consider the battlefield.

I do agree with you. They see a global battlefield and a never-ending war with an enemy who could be anyone at any time. Therefore they do not have to define the enemy. They only define the enemy after they have captured him, or the enemy is defined as those we capture as opposed to defining something and then capturing that person. The enemy is someone whom we capture. That is the concept of enemy combatant. He is an enemy combatant because we captured him.

Q: All right. Now let's talk about Hicks. You represented David Hicks as a civilian counsel, right?

Dratel: Correct.

Q: And Dan Mori represented him as his military counsel?

Dratel: Yes, and we had some other people on the team from time to time.

Q: Tell me how you came into this picture, and who David Hicks was.

Dratel: My entry into it was a confluence of acquaintances to a certain extent. In August of 2003 at its annual meeting NACDL, National Association of Criminal Defense Lawyers, passed an ethics opinion which said that submission to some of the conditions for representation at Guantánamo would be unethical without contesting them. It also said that submission to some of them might be unethical even if you contested them if you lost.

Q: I'm sorry?

Dratel: For example, in May of 2003 they came out with the first military commission orders and the military commission instructions. It was very slight. It was really not a system, but the DOD started to promulgate certain rules and regulations. One of them was Annex B, which was an

affidavit that a civilian lawyer had to sign in order to be permitted to represent someone in the commissions. Annex B said you have to agree that your communications with the detainee including your meetings could be monitored and recorded at all times. You had to agree that you could not ask for an adjournment of any of the proceedings. You had to agree that once you came down to the island to work on a case, you had to finish your work there and you could not take it off the island. You could not leave the island until you got permission. You had to agree to the fact that some proceedings would be ex parte and that you would not be permitted to participate. There was one other one that was objectionable. There were five truly objectionable features of this Annex B. NACDL's opinions was—

Q: Of this? What did you call it?

Dratel: Annex B. It was basically part of an application to be part of the civilian counsel pool.

Q: They were looking for a civilian?

Dratel: Yes. They weren't looking for it, but they realized that they had to at least acknowledge the possibility that a detainee would have a civilian counsel, just like in military courts. NACDL took the position that a lawyer could not ethically represent someone and just say, "I will sign." They had to contest those provisions. There was a discussion about what if you lost. For example, if you moved in front of a judge and said, "I think this particular provision of monitoring my meetings with my clients is an invasion of the lawyer-client privilege, an invasion

of his right to counsel, I think you should strike that, judge,” and the judge said, “No I’m going to leave it in there.”

In NACDL, there was a rather vigorous debate as to whether if you lost that kind of motion it would be unethical to continue representation of that person. Ultimately they took a sort of a middle approach, where they said that you had the duty to contest it, to continue to contest it and contest it as vigorously as possible. They didn’t want to make decisions for people and say, “You can’t do this, or you can’t do that, or it was unethical to do it.” That was my first real exposure to the nut and bolts of military commission practice. Two months later in October of 2003 in New Orleans, at another NACDL meeting, a friend of mine from Orlando said, “There’s somebody you’ve got to meet.”

I said, “Who?”

He said, “These military lawyers are desperate to know whether we’re going to be in their corner if they get into trouble over these ethical issues from our ethics opinion.”

I said, “Let me meet them.” So I went over to meet them. There were three of them. One was Dan Mori. One was Mark Bridges, who ultimately represented one of the initial defendants.

There was another guy whose name I don’t remember because he actually never got assigned to the Defense Office.

They were there to seek our help and said, "If we take a stand that we won't represent somebody, or we're not going to get involved in cases if we have to concede that all of our communications with these defendants are going to be monitored or things like that, or if they make us do things that are outside of what we consider correct practice as defense attorneys, are you guys going to support us?"

I said, "Absolutely. We'll give you amicus support. We'll give you strike force assistance," meaning actually getting a lawyer to represent them. We would do whatever we could do. We had this long discussion. We spent some time together that weekend. It was encouraging that the military lawyers were thinking in that way.

Q: Was he then a major, Mori?

Dratel: Yes. He was a major in the Marines.

Q: Was he in the Judge Advocate Corps?

Dratel: Yes. He was a military prosecutor in Hawaii at the time. He had been in Japan, Hawaii and Thailand. He had done a lot of Far East service.

Q: As a prosecutor, you say.

Dratel: No, but also as the defense. You do both in the military. You go back and forth. I think at the time that he was actually assigned to the Defense Office, I believe he was prosecuting at the time.

Q: Now at that time that you had that meeting with him, had he been assigned to Hicks' case?

Dratel: He thought he was going to be assigned to someone very soon. I don't recall him saying that he'd been assigned to Hicks. He heard that he was going to get the first case.

Q: All right. And meanwhile you left that meeting—

Dratel: Encouraged.

Q: But with the idea that you were going to be involved down there?

Dratel: No, no, with the idea that I was going to be involved in supporting these guys with the amicus briefs. I should say that in the run up to that, particularly in light of *Padilla* [*v. Rumsfeld, U.S. Court of Appeals for the Second Circuit*]—which started in the spring of 2002 and wended its way through the Second Circuit by the middle of 2003—and the *Rasul* case, we were doing amicus work on that. We had some military law experts at NACDL, including Don Rehkopf in Rochester, who was on the board of NYSACDL [New York State Association of Criminal Defense Lawyers] with me. I was probably president-elect that year, in 2003 or 2004. I was

moving up the chain of the board. I learned a lot from him about the fundamentals of the process. He was very instrumental on the NACDL opinion in terms of lending a certain context.

Q: Do I hear you say that you actually worked on amicus briefs, with respect to *Rasul*, which was wending its way toward the Supreme Court before you were ever involved with Hicks?

Dratel: Correct. *Rasul, Padilla, Hamdi* [*v. Rumsfeld*, 2004]. I did not write those briefs. I wrote one brief, but most of the time I just I brainstormed. I did some editing. I found the authors. Don wrote a lot of the briefs.

Q: Pardon me?

Dratel: Don Rehkopf wrote a lot of those briefs.

I leave that meeting thinking that my role is going to be a support role similar to other types of amicus stuff that we do, but for this one we know in advance, which actually helps a lot, as opposed to having to jump in after something happened. Three weeks later, around Thanksgiving, I get a call from Joe Margulies. I knew Joe through his wife, Sandra Babcock. Joe said, "I've got an issue with Hicks. I represent Hicks, the Australian, but I may need you to be the conflict lawyer." It happens all the time in federal court here.

Let's give you an example. Imagine a mafia case. Big organized crime family. They indict six guys, right? Lawyers show up. One of the lawyers represented one of the witnesses eight years

ago on another case. Now the guy has turned. He has been arrested again. There's a conflict, because you have confidential information about that guy. You could cross-examine him. Some of these conflicts are waiveable. Some of them aren't.

There's something called a Curcio hearing. The reason it's Curcio is it was a mob case where this first came up and that was the defendant's name. The court appoints a lawyer, usually from the CJA [Criminal Justice Act] panel, to give that defendant advice about the nature of the conflict so that the defendant can make an independent decision as to whether he wants to waive the conflict, whether he wants to keep the lawyer or whether he says, "No, I'll get a new lawyer because I don't want the guy burdened by that conflict. That is the most important cross-examination in the case." I'm a Curcio lawyer right now in a huge drug case in Manhattan. It happened in the Southern District. It happened on my CJA day a couple of weeks ago. That's what they wanted me to do for Hicks.

Mori had already been detailed to the case. They had heard that there was a potential that Hicks was going to cooperate. Joe was concerned that if he went down to see Hicks and talk to him about his case, that he would find out that Hicks was cooperating against all those other plaintiffs who were in *Rasul*. Joe did not want to take that chance of corrupting and contaminating the whole representation.

You bring in a conflict counsel to determine whether there's a conflict or not. Ninety-nine times out of a hundred it's worked out. Your job is just to explain to the defendant to his satisfaction as to his options. Usually people want the lawyers they choose. They usually don't want a new

lawyer. They usually say, "I'll waive it, or I'll cross that bridge when I come to it. I want to keep the same lawyer." It's usually a very short and narrow engagement, so that's what I thought it was going to be.

I said, "Okay, I'll do that." It sounds like a righteous thing to do, to help out. I did not expect to get paid. There was no agreement that I was going to get paid. I thought I'd have a day and a half of work, of conferences with people. He said, "Dan Mori is going to contact you because Dan is going down to Gitmo to see Hicks. He is going to come back and report."

Q: Dan Mori?

Dratel: This is what Joe is telling me. Joe is saying that Dan is going to go to Guantánamo, see Hicks, and then come back and report to you on what Hicks has to say. Then we'll have this conflict exercise where I'm the conflict lawyer to say, "Oh I think there's a conflict" or to say, "No, no, it's workable. It's okay. I don't see a conflict." I anticipated that I would say the latter because that's what happens ninety-nine times out of a hundred.

Two weeks later Dan comes back to me. He talks to me again, and he says he's going down to Guantánamo. This was happening intermittently. It's not even on my radar half the time. It's just something that I sort of agreed to do for nothing. Sometimes as a lawyer you say, "Why did I agree to do that for nothing?" But I was not going to turn these people down. I already told them that I would be helpful and Joe is a friend of mine.

So Dan goes and comes back. He calls me up and says, "We really have to sit down and talk about this." We had a meeting at CCR the next day.

Q: I beg your pardon?

Dratel: At CCR, Center for Constitutional Rights. We had the meeting the next day with Dan, the Australian lawyer Steve Kenny, who had also been to Gitmo, and me, to discuss this issue.

Q: Let me back up a second. What you've run past here naturally is how did anybody know there was a David Hicks at Guantánamo? How did this ball get started? I thought it was all a big secret who these people were. Let's back up here. Even as far back as how his parents knew that he was at Guantánamo.

Dratel: I was trying to remember. I do know that certain governments like the Australian government were able to get confirmation of people's status. I also think that there were letters that were allowed out at some point. Certainly by the time 2004 rolled around, there were letters allowed out from Guantánamo. They were redacted. They were reviewed. I'm pretty sure that David had been able to communicate in some way. I may be wrong. I may be missing the time frame there, but I don't believe that there was any doubt that obviously he was there.

Q: You said Mori was going to go down to see him. So Mori knew that he was there.

Dratel: Yes, he had been detailed to him.

Q: I mean somebody knows he is there.

Dratel: Sure. Right. Exactly.

Q: Even Stephen Kenny—Stephen, is it?

Dratel: Yes.

Q: Even Stephen Kenny, who was hired, was an Australian lawyer. David Hicks was an Australian, from Adelaide, right? Or his parents live in Adelaide or around Adelaide?

Dratel: Yes, David is from Adelaide.

Q: His parents couldn't afford a lawyer, could they?

Dratel: No. Steve has a certain human rights orientation there and does those kinds of cases.

Q: That's right. So he volunteered as the lawyer for David Hicks.

Dratel: He really volunteered for Terry Hicks, for the father. When it came to representation for David there was a lot of interest in that. It was obviously an opportunity to get Australian

lawyers down there, so he took on that responsibility as well. He was formally David's foreign attorney consultant in the beginning. That's what they called them, foreign attorney consultants.

Q: Would you say that David Hicks' parents were next friends?

Dratel: Yes. His father was the next friend. His mother is very shy and quiet and retiring and does not get involved in these things, but the father was the next friend. I believe that that is what the original suit was.

Q: Now you just mentioned that there you go to this meeting at the CCR with Mori and Kenny. Is it your understanding that Kenny originally approached Mike Ratner at the CCR looking for help?

Dratel: Whether I knew that at the time, I certainly know it now. I didn't know the exact chain of events, but I knew that CCR was intimately involved in the Hicks' situation because I know Joe was working with CCR. Joe, Michael Ratner, Eric Freedman and Clive Stafford Smith are the four people who really invented the Guantánamo litigation. That's who I credit with starting it and keeping it going and really getting that case to the Supreme Court.

Q: But any of those, Clive Stafford Smith, could have become the lawyer.

Dratel: Well, he had the same problems that Joe would have had. Clive represents more people than anyone. I don't know how he does it in terms of the conflict issue, but he does.

Q: Right. You go to this meeting, and now you know a little something about David Hicks, right?

Dratel: Sure.

Q: But let's back up here a second, and tell the story of who David Hicks was.

Dratel: David Hicks is kind of like El-Hage in the sense of a fascinating story that defies the stereotypes of who these people are that were in Guantánamo or in Afghanistan or whatever. He has written his book now, so I guess I can say this now without worrying.

Q: Oh really?

Dratel: Yes, he wrote a book. It's not available here in the United States. It's only available from Random House Australia. It is called *My Journey*. I don't feel so awkward speaking about it since he has written his book, because I always wanted him to be the one to tell his story. Now he's told it, so I can tell it too. I'm going to say things that people might say, "Oh so what," but it actually informs it.

David comes from a divorced family. He is 5'3". He definitely had issues about his place in the world, about his self-esteem, about his parents and his father, particularly that his father remarried a woman with very athletic kids who played a lot of rugby. I think the father gravitated

in that direction and David felt left out. He was always trying to prove himself to his father and prove himself just generally. He had the personality profile of someone who would go do something and then not finish it. He would be real excited about something, get totally into it and then kind of back away from it because it was hard or required education or things like that. He dropped out in the ninth grade. He went to Japan and became a horse trainer there for two years.

Q: At the age of?

Dratel: Eighteen or nineteen. He had some sort of spiritual conversion there and came back to Australia. I think the way he constructed it was that he had a dream. He started to get involved in religion and spirituality while he was in Japan mostly. Then he had a dream. He was thinking about becoming Jewish. That's true. Then he had a dream that the Jews and the Muslims were in conflict, and the Muslims won. So ergo, might as well go with the winner, right?

When he gets back to Australia, he starts seeking out Islamic education and winds up converting. He wants to join the Australian army, but he can't because he doesn't have the sufficient education. They don't take ninth grade drop-outs. So he said he decides to go to one of these Tablighis in Pakistan, against the advice of the people in Australia. They said, "Why don't you learn a little bit more about Islam first? Why don't you get grounded in it?" But David wanted to prove himself in the world. He wanted to be an adventurer.

Even before this, after Japan, he went to Kosovo. Well, he didn't go to Kosovo. I shouldn't say that. He literally got on a plane, not knowing anyone, and flew to Albania.

Q: This is before he came back to Australia?

Dratel: Well, he may have come back for a brief period of time, but it was before he converted. He actually never made it to Kosovo. He went to Albania because he wanted to fight for the KLA [Kosovo Liberation Army] whenever it was that Kosovo, was it 1999, right? Wasn't it 1998 and 1999?

Q: I don't know.

Dratel: I think so. He wants to fight there, and he goes to try to join the KLA. He literally does not know anybody. He meets a guy on the plane who puts him in touch with some people. He goes to Albania, hooks up with the KLA and trains with them. He never gets to Kosovo because by this time the issue is resolved by the Accords.

The whole Kosovo issue is one in which Kosovo, unlike the Bosnians, have managed to secure Allied assistance. One of the conditions of Allied assistance is no foreigners, because they knew that in Bosnia there were a lot of these sort of travelling jihadists from Afghanistan and Sudan. Some of the Al-Qaeda people had been involved in Bosnia and there were a lot of Muslim organizations there, NGOs that were alleged to be fronts for guerrilla activity. The U.S. was much more sensitive to it by 1999 than they had been in 1993 and 1994. They told the Kosovars, "We will help you, but we don't want any of these foreign agitator groups," so the Kosovars were very conscious of that.

They would never send an Australian like David into Kosovo for fear that he might get captured, and it would screw up their whole relationship with NATO [North Atlantic Treaty Organization]. David spent his whole time in Albania writing stories that other people told him as if it was himself and sending them home to his father to impress him. When his father gave all these to the Australian press, and when he gave them to the Australian government, it was like David is this terrorist who had a prior terrorist experience.

Q: The father gave them?

Dratel: Oh yes. It's a whole story.

Q: The father? He was writing to his father and his father gave the stuff?

Dratel: Two years later. After 9/11.

Q: Oh. Later on he gave them to the press.

Dratel: And the government.

Q: I see. Okay.

Dratel: He gives them to the government and to the press, so then it becomes, “Oh, David spent time in Kosovo as an Islamic freedom fighter. This is a time-tested jihadist, who is now in Afghanistan.” But it’s not true. There’s a famous photo of him with an RPG [rocket propelled grenade] in Kosovo which he sent back to his father. Like, “Look at me!”

Q: With a what?

Dratel: With a rocket propelled grenade launcher on his shoulder. It’s a famous photo. So David goes to Pakistan to this Tablighi, but he is really looking to find himself something to make his bones—to become a man, a coming of age.

Q: Can I just insert that he was born in 1975, so he is twenty-four years old in 1999.

Dratel: No. No, no, no. He’s not that old.

Q: He was born in 1975.

Dratel: Is he? I guess when he was in Japan he was probably like twenty-one. David is thirty-six? I find that hard to believe.

Q: You mean now, you mean?

Dratel: I guess it has been a long time, but I don’t remember him being thirty when I met him.

Q: Well I mentioned it to give some perspective on how old a person we are talking about here.

He was born on August 7, 1975.

Dratel: Okay. He is younger than that.

Q: In any event, in November 1999 he left for Pakistan. Had he come home from Albania?

Dratel: Oh yes, so maybe he converted before he went to Kosovo.

Q: For years Hicks has been described somewhat blithely as a kangaroo-skinner.

Dratel: He was at one point.

Q: The Australian kangaroo-skinner.

Dratel: He was a chicken-boner and kangaroo-skinner. Those are some of the jobs he had.

Q: That is minor stuff, right? He wasn't a professional kangaroo-skinner for years.

Dratel: No, no. But he was a professional chicken-boner.

Q: But in any case, as you say, he goes to Pakistan in late 1999. What happens then?

Dratel: He goes to a Tablighi. They are pretty radical. Some of them are radical. Some of them aren't. He hooks up with Lashkar-e-Taiba [LeT].

Q: Is this the same group that has been held responsible for the bombing in Bombay of the Taj Mahal Hotel, was it?

Dratel: Yes. It was a different organization at that time in the sense that it was much more focused solely on Kashmir at the time. It's a creature still to this day, but at the time even more so because it was less diffuse, a total creature of the Pakistani military intelligence services.

Q: The ISI.

Dratel: Yes. They ran the military part of LeT. As to the political part that operated out of Lahore, who knows. They may have been professors working their own political philosophy but the military part of it was clearly run by the government.

Hicks goes to train. He is on the Line of Control in Kashmir for a little bit, just hanging out in the bunkers. Then he wants to train more.

Q: Train as? Train as what?

Dratel: Just training. Military training, as a mujahideen. Then he wants to be a trainer for them. They say, "Well you have to get more training. We don't have that available here. You have to go to Afghanistan and get trained in some advanced training. And then you can come back and train for us." So he goes to Afghanistan. There he hooks up with what turns out to be the Al-Qaeda camps and trains there until 9/11.

Q: Training as a?

Dratel: Mujahid. Just ordinary military training such as some additional surveillance training and things like that.

Q: Right. And what happens to him?

Dratel: While this is going on 9/11 happens. He decides to stick around because now he has a chance to get into combat. Ultimately he is assigned to guard a tank at the airport in Kandahar. Then they get sent up to the battle in Kunduz, but he doesn't get there in time. He gets there in time for the massive—

Q: Al-Qaeda tank? Taliban?

Dratel: No, Taliban, but he is assigned that by Al-Qaeda. He sits in a foxhole all day next to a tank at the airport, but then he goes up to Kunduz because they hear the fighting is up in Kunduz.

Q: Excuse me. This is before or after September 11?

Dratel: This is after 9/11.

Q: But before 9/11 while he was in these training camps, what have you, is it your understanding that he met Richard Reid?

Dratel: That is what the government alleges.

Q: Richard Reid being whom?

Dratel: The original Shoe Bomber.

Q: The guy who has sent billions of people through airports without shoes on?

Dratel: That's right.

Q: That's right. He could never have imagined what he was going to accomplish by what he was doing. Did he also meet Osama bin Laden?

Dratel: Well yes. He said he actually asked bin Laden why they didn't have training guides in English.

Q: Pardon me?

Dratel: There was a group, and bin Laden speaks to the group. He's there at this lecture and he raises his hand. "What's your question?" He says, "How come you don't have any training manuals in English?" Basically they told him, "Go fuck yourself."

Q: You wouldn't say he was a close associate of bin Laden?

Dratel: Yes. He always hangs out with ninth grade drop outs from Australia. That's his thing.

No. The answer is no.

Q: But is there any reason to doubt that he ever did see bin Laden?

Dratel: No. No doubt.

Q: No doubt about it.

Dratel: I don't think there's any doubt about it, but he saw him like in the context of "Hey, the boss is in camp. Let's go see. The celebrity is here."

Q: Now this was before 9/11?

Dratel: I don't think he really heard of bin Laden. The reason I say that is if you read his letters that he wrote to his parents during this whole period, you can see that he really does not have initially a sense of who bin Laden is. Then over time he obviously—from hanging out in the camps—becomes informed of all these things. It's a mythologized image to an extent.

The camps were divided along sort of national language ethnic lines. One can assume that all the English speakers knew each other. When you ask did he meet Richard Reid—all the English speakers were put together to make training easier. You could have a trainer who spoke English, and he could train the Filipinos and the Americans and the Brits and whoever else spoke English.

Q: How about John Walker Lindh? Did he meet him?

Dratel: I believe so.

Q: Right. But that was after September 11, was it not?

Dratel: No, I don't think he met John Walker Lindh after September 11. Well, he definitely met him afterwards on the boat. He may not have known him before. I don't know.

Q: In any event, you say after September 11 in summary terms, what did he do after September 11?

Dratel: He guarded a tank. He tried to get up to the frontlines in Kunduz to get himself some combat. There was a massive chaotic retreat from Kunduz. The Taliban line collapsed. There was a massive retreat. He gets close enough to artillery. In other words, the Northern Alliance is pursuing this massive uncoordinated retreat behind artillery. David gets close enough to see artillery in action and says, "I've seen enough. It's good for me. I've got my experience now." He heads in the opposite direction again.

Q: Who is in retreat here?

Dratel: The Taliban is in retreat south from Kunduz. Retreat is a charitable word for apparently what it was. It was chaotic, panic flight, like many battles.

Q: Northern Alliance after them?

Dratel: Yes, and using artillery to chase them southward in front of the advancing Northern Alliance troops. So David gets on the fringes of this with all this artillery. He hooks up with some food service group that is fleeing. He gets back down to some small town where he hides out. He is taken in by a good Samaritan. Ironic word, but a good Samaritan. It was a good Afghan, not a Samaritan. He takes him in, gives him some ordinary clothes and tries to smuggle him out of town. This was not so successful. David is 5'3". He's a white guy. He's got a big beard. He's got the whole look, but he isn't really passing. He gets arrested at a taxi stand.

Q: The taxi stand in—?

Dratel: I'm forgetting the name of the town now.

Q: Was it Kunduz?

Dratel: No. No. Something with a K though.

Q: He was captured by the Northern Alliance in Baghlan, Afghanistan.

Dratel: Oh okay. Not a K. But that's where it was. Baghlan, right? Not Bagram.

Q: Not Bagram, no. He was captured by the Northern Alliance.

Dratel: Correct. He was sold to the U.S., we have heard, for \$30,000 because he was a foreigner, and foreigners were expensive.

Q: You heard that he was sold. I mean, is that right?

Dratel: Yes. He was in Northern Alliance custody for a couple of days.

Q: Is there anything to substantiate that?

Dratel: Yes. I don't recall the sourcing of it, but I was satisfied by the sources that we had that he was sold.

Q: Are you familiar at all with the work of the Seton Hall group under Mark Denbeaux?

Dratel: Sure, Mark Denbeaux. Now Jon Hafetz, but Denbeaux's really are the guts.

Q: You have confidence in that work?

Dratel: It's hard to say because I don't know at what time you're talking about. In the beginning I didn't have confidence in any work.

Q: I'm talking about their studies from 2006, 2007.

Dratel: I would say probably a lot of it is accurate, but it could be like the newspaper. Erwin Knoll, the former editor of *The Progressive*, had a rule that everything that you read in the newspaper is accurate except for that story about which you have personal knowledge. That may be the case in this too.

Q: Denbeaux and his colleagues wrote that of the five hundred and some detainees that they studied using government records after they were available. Pakistan had turned over sixty-six percent of the detainees and the Northern Alliance twenty percent not on the battlefield.

Dratel: Right, none of them. David was not on the battlefield. It was a taxi stand.

Q: But you heard what the president said.

Dratel: Oh, so he must be right. I'm sorry. I stand corrected. [Laughter]

Q: They also wrote that fifty-five percent of the 517 detainees were not accused of committing any hostile act against the United States or allies. Even those acts that were committed in hostility were often very slight. Only eight percent were characterized as Al-Qaeda fighters. Sixty percent were held because they were "associated with." In other words, how would you describe the cast of characters they have got down there at Guantánamo with David Hicks?

Dratel: The concept of Al-Qaeda has evolved and has changed from what it was before 9/11 to what it became after 9/11. This goes back to my initiation into the study of Al-Qaeda from the embassy case. Al-Qaeda was a formal membership organization defined by contractual obligations and rights. It was not, "I'm Al-Qaeda because I'm an Islamic jihadist person who's campaigning for Sharia law against the West." At that point, that does not define somebody as Al-Qaeda.

Al-Qaeda was a very closed, formalized membership organization. What you had was this training concept which was sort of like a Fresh Air Fund for jihadists from around the world to be able to get out there and do jihad and to feel like they had accomplished something. You're talking about the 1998 to 2001 period. I'm not saying that it all was innocent or that it was naïve,

but some of it was. Look at the guys in Lackawanna who went there. One of the guys got there, and a week later he said, "I don't like this. I'm going home." It was the same with the paintball guys in Pakistan. Some of them went home when they went to Lashkar-e-Taiba. With the paintball guys from Virginia, some of them said, "It's not for me. I'm trying to get out here now." Some of them said, "I'll finish it and I'll go home. I'll be able to say I did my jihad." Even from the beginning it was like that.

Talk to Milt Bearden, who was the station chief in Pakistan and Afghanistan during the anti-Soviet jihad. We interviewed him for hours during the embassy case thinking about him as a possible expert witness and also to learn from him because there was so much to learn. His position was that most of the Arab mujahideen in Afghanistan, ninety-nine percent of them, were not combatants. They never fought. They trained. But they managed to get a lot of Saudi money to match the U.S. money in terms of aid to the actual people doing the fighting, the Afghans, by sending these people there as if they were going on some jihad. Most of them died of disease or accidents. Very few of them ever got into combat before the Soviets left. After the Soviets left, it was different because then they aligned themselves with the Taliban, and they became more of a heterogeneous force. During the fighting against the Soviets, the Arabs did almost nothing and played no part in the real course of the conflict.

Q: Actually even after. Do you know the work of Peter Bergen?

Dratel: Sure. I know Peter well.

Q: You trust it?

Dratel: Yes. I would say that his post-9/11 work is far more grounded than pre-9/11. Let me just say that. It's hard to get to access to these things. Now there are a lot more ways to get access and information. A lot of it is above the radar now, which it was not back then.

Q: But in November of 2008, he wrote that only four percent of the detainees in Guantánamo Bay were ever alleged to have been fighting at all.

Dratel: Right.

Q: At all. In any case, Hicks gets captured by the Northern Alliance. They—according to you, or what your understanding is—sell him to the U.S.

Dratel: To the Special Forces for \$30,000. By the way, just to go back to one thing about war crimes and insignia. The first U.S. forces on the ground in Afghanistan were Special Forces who were not wearing uniforms, not wearing insignia, and violating the laws of war. They were doing exactly what Al-Qaeda was doing on the other side. Symmetry.

Q: I hear you. We like this symmetry. So he gets captured. He gets turned over to the U.S. in Pakistan?

Dratel: No. Afghanistan.

Q: In Afghanistan. Now who is he being turned over to? The CIA? The military? The FBI?

Dratel: We never learned who they were precisely. They were not in uniform. That we know.

Q: They are not in uniform?

Dratel: The initial people he is turned over to are not in uniform.

Q: Is there any reason to believe at that time they thought he was of any consequence?

Dratel: Yes. He was an English speaker, and he was foreign. They may have believed their own hype at that point for all I know.

Q: Do you know from any records that they thought that he was a figure in Al-Qaeda of some consequence?

Dratel: No, not that he was a figure in Al-Qaeda, but they figured that he was someone of importance either as intelligence, or that like John Walker Lindh he was someone who was dangerous because he was Western. He was detainee 002. Lindh is 001. That shows you what they thought of him. They put him on the USS *Peleliu* with Lindh.

Q: Hold on. Lindh was arrested around the same time?

Dratel: Around the same time, yes, around the fall of Mazar-e-Sharif.

Q: By a certain date John Walker Lindh, who was never sent to Guantánamo, but back to the United States.

Dratel: Right. He should have been sent to Guantánamo. He would be home by now. Poor guy.

Q: And David Hicks together end up in custody on the USS *Peleliu*, a ship—where?

Dratel: It was probably in the Persian Gulf or the Indian Ocean.

Q: How did they get there together? When is this, and how come they are—

Dratel: There are about a half-dozen detainees, maybe a few more, who the U.S. obviously believed were of some importance to their counter-terrorism efforts. Some of them were Western. Some of them were Afghans. Let's put it this way. It was Lindh and Hicks and then just a half-dozen more Afghans or Pakistanis or Arabs. But David believed that they were all players, or at least the government or commanders and people like that thought they were players.

Q: Why are they put on this ship?

Dratel: To isolate them. It is unclear to me because of the lack of a chain of discovery that tells us precisely what happened. We did a lot of interviews, but you can only find out so much from interviews because there is a Rashomonic effect, where you are trying to put together different perspectives. We don't really have a clear narrative. I could give you one that I think is rather benign frankly, which is that someone with a brain said, "These are the important ones. Let's take them separately, and let's work on them." They were not tortured. David was not tortured on the boat.

Q: Was he interrogated?

Dratel: Yes. Others may have been tortured. He heard screaming and yelling and things like that. There may have been someone with a non-benign intent who said, "Let's get these people, and let's rough them up. Let's work them over." David suffered the worst physical abuse not on the boat, but while he was off the boat. They took him off the boat. They took him and somebody else off the boat to a hangar somewhere on land, on a helicopter. And blindfolded—

Q: You mean took them by helicopter too?

Dratel: Yes. Blindfolded, bound, and beat them with rifle butts, and things like that.

Q: When is this? When are we talking about?

Dratel: We're talking about December of 2001.

Q: By January 12 of 2002 he arrives in Guantánamo with Lindh, right?

Dratel: No.

Q: Not with Lindh.

Dratel: Not with Lindh. Lindh is going to Virginia. But David is with the first group.

Q: That's right. Then he is designated, "Detainee 002," David Hicks? And who is Detainee 001?

Dratel: Lindh.

Q: You say he didn't go to Guantánamo, which he did not.

Dratel: No, he did not.

Q: But he is Detainee 001.

Dratel: Because he is American.

Q: That's right. But he's Detainee 001 anyway.

Dratel: Yes, yes. I think Hamdi was fourteen or something.

Q: So in effect your man Hicks, who you have not met yet, is the first real detainee to arrive there.

Dratel: Probably. I can't remember whether the manifest suggests that he is the first or second trip, but he's there in the first day or two.

Q: Then when we resume we will pick up with the story of David Hicks at Guantánamo.

[END OF SESSION]

3PM

Session Three

Interviewee: Joshua L. Dratel

Location: New York, NY

Interviewer: Myron A. Farber

Date: April 4, 2011

Q: This is Myron Farber on April 4, 2011 concluding the interview for Columbia's Oral History Research Office regarding Guantánamo Bay, with Joshua L. Dratel at his office. We are here at 2 Wall Street at the top of Wall Street, near Broadway and across from the Stock Exchange, are we not?

Dratel: Correct.

Q: You mentioned the other day there are some marks in that building. What were you saying?

Dratel: Yes, the Morgan building, which sits at the southeast corner—Wall and Broad Street was the site of the most deadly terrorist attack in the United States before Oklahoma City. I forget the number of people killed, but it was substantial. It was dozens and dozens. I think in 1920, 1919 or 1920, a truck of nitroglycerin. They never solved the crime. Anarchists were blamed. They have never repaired parts of the outside wall of the building and you can still see the pock marks from where some of the shrapnel damaged the building.

Q: But it had nothing to do with 9/11. Before 9/11, was your office at number 2?

Dratel: It was at 14.

Q: At 14, right. When you moved back, did you continue using 14?

Dratel: Yes. 14 opened the following Monday, the seventeenth.

Q: And you came back into the office?

Dratel: Yes.

Q: I take it there was no damage in the office.

Dratel: There was just dust from where people had left windows open. There was a little dust, just a fine covering. It was nothing pervasive.

Q: But if you were to walk around there at that time, there certainly would have been a level of fear and anxiety in this area, right?

Dratel: Sure.

Q: Today that is all vanished?

Dratel: I wouldn't say all vanished.

Q: On the street, so to speak.

Dratel: I would say that on the streets, for the most part, I think people are generally oblivious to it. I don't think people who were here at the time are oblivious to it. I think that there is a retained sense of alertness. There are certain things that reinforce it. Things that have changed since 9/11 remind you all the time. For example, the extraordinarily militarized presence in front of the Stock Exchange is a constant reminder.

When I went down to Guantánamo the first time, in January 2004, I remember coming back and someone asked me, "Was it uncomfortable or awkward being around heavily armed people on a regular basis?" I said, "No, I do that on my way to work every day." You have guys with M-16s and riot gear and SWAT outfits and the Kevlar and the helmets out there every day in front of the Stock Exchange.

Q: Today even.

Dratel: Yes, even today. It's not quite as regular in terms of their patrol, but they are there and you see them various times. The way that Wall Street has been reconfigured, there was no traffic after, and I wasn't even working here at the time. I moved my office here to 14 Wall in October of 1996. But I believe that after Oklahoma City they essentially eliminated traffic on Wall Street between Broadway and Broad, the first block of Wall Street, for security purposes. After 9/11 now, Broad Street is a mall going south. The one block of Nassau is closed off and you can't get up Wall Street. You have to go to Williams Street before there is vehicular traffic on Wall Street.

You're reminded by that as well. In addition, in front of 120 Broadway, between Cedar and Pine, that is the building that houses the governor's New York offices, and the attorney general's office—

Q: About a block and a half away.

Dratel: Yes. There is a bottleneck that is created all day by security checks of trucks going past.

Q: I saw that.

Dratel: You know why that's happening. It's always a reminder as to where we are and why this place looks the way it does now, in terms of the level of security. You go into buildings presenting ID and signing in. That was certainly not de rigueur before 9/11. Now it's expected.

Q: Let me get back to Guantánamo Bay for a moment. Now, is it your understanding that in the first two years—January 2002 into, let's say mid or the end of 2004—no one on the outside knew who was being detained at Guantánamo Bay?

Dratel: Between the beginning of 2002 and the end of 2003, you could not have full confidence as to who was there, although it was obvious that some people were there. In other words, that the Hicks and the Rasuls were there. Apparently the government had acknowledged that in some way. I don't quite remember how it was learned definitively, maybe in the context of a lawsuit and they didn't deny it. But by and large, for ninety percent of the people, you didn't have a

confirmation. I might be telescoping the timeframe, but you're right, because for probably at least the first six months that I was going down there, I remember that either CCR or ACLU or maybe both were fighting with the government in FOIA [Freedom of Information Act] requests over getting a roster of detainees. Through 2004 it was still uncertain as to what the full roster of detainees was at Guantánamo and who they were.

Q: Now let me return to the Hicks case. Hicks has the distinction, does he not, of being the first person charged in a military commission at Guantánamo in June of 2004? He was the first person to be tried in a military tribunal since, actually since World War II? Isn't that correct?

Dratel: Yes.

Q: But you were also the first lawyer to go down to Guantánamo to meet with the detainee, to wit, Hicks?

Dratel: I was the first U.S. private lawyer. Yes. My military co-counsel had been there, and the Australian lawyer had been there once in the end of 2003. So I was the first in January. I think January 9 of 2004 was my first trip down to Guantánamo.

Q: And you went down there, would you say, a total of how many times over the years?

Dratel: Between that period and March of 2007, which as of right now is my most recent trip, I went fourteen times. I went a lot in the first two years. Then I hurt my back.

Q: You hurt your back?

Dratel: I herniated two disks on a trip down there. Well, I didn't herniate it there, but that is where the pain started in earnest—when I was there on a trip in October of 2004. There was a period of time where I had trouble traveling.

Q: Now just consolidate your impressions of Guantánamo over the years. I don't want to restrict it to certain dates. Just tell me your general impressions, or what you saw yourself, what you observed yourself, over the years at Guantánamo, which surely changed. For example, by the time you got down there in the first instance, Camp X-Ray, the famous pictures of the orange jumpsuits and the cages all that. That was all gone?

Dratel: It was all covered with weeds and banana rats. We went out to see it. I had asked to look at it because it was relevant to our issues in terms of David's first few months there. They did take us out there for a tour. It was in complete disrepair. It wasn't being used for any purpose.

Q: What else did you observe over the years down there?

Dratel: Well I observed a couple of things that were good and a couple of things that were not good. The things that were good were that the sunlight of world interest in Guantánamo—in lawyers going down there, in media being permitted to go down there—reduced the reign of the interrogators dramatically from how it existed in 2002 and 2003. It was no longer a free for all

for interrogators once lawyers and other people started to get access to detainees on a regular basis. That was obviously a very good development.

I think this also coincided with the ICRC [International Committee of the Red Cross]. The Red Cross had been there from the beginning, but the fact that other people were going down helped. The Red Cross is an organization that does not like to advocate. They operate on a cooperative level with governments, but I think it made their job easier once lawyers began to advocate on a consistent basis for detainees. It became easier for the ICRC to make advances in detainee treatment because now the government could not just say no. Before they could say no, confident that no one would know, because ICRC does not go public with its reservations about government conduct in that regard. Even the report that the ICRC submitted in 2007 was confidential and was leaked by somebody else.

Q: There was actually an internal dispute within ICRC about whether they should go public, which is pretty rare.

Dratel: Very. That tells you how extreme the situation was for them. In retrospect, I don't know whether it has changed anyone's mind in terms of when you think about black sites and things like that—whether ICRC now feels like they would have done the same thing or whether they would have come out earlier in public on that issue—because they were being lied to consistently about who was where and whether all the detainees were accounted for. Because now we know—I believe it is public, I don't know it from any classified source so I must know it from a public source—that they released a couple of the high value detainees who were in

Guantánamo for a very brief period of time between two black sites. The ICRC was lied to about having seen all the detainees. They were not given access to all the detainees. These were special places where they were held on the island, on the base, which were not considered part of the ordinary detention. It was run by the CIA, not by DOD. That is my understanding.

Q: Is that called Camp 7? Was that Camp7?

Dratel: No, no. Camp 7 is just an ordinary facility.

Q: This is actually a facility that has never been identified publicly.

Dratel: Exactly.

Q: But it is down there?

Dratel: Yes. But in terms of impressions, I don't consider myself a political partisan in any particular way. In other words I don't have a particular liking for Democrats over Republicans. I don't perceive myself that way. I don't work on campaigns and I don't get political in that way. It's more issue by issue and person by person, and the reason that I preface this is because I'm not coming into this from some sort of vast conspiracy theory kind of political position. But if you had told me when I first went down there that the entire Guantánamo operation was not just an intelligence laboratory, but also a war profiteering opportunity, and that it was all about money, I would have said, "Eh, come on. You're crazy."

By 2007 I was beginning to shift the other way. The level of money that was poured into there unnecessarily—to make that facility permanent, to build buildings and just create things, and contractor, pork barrel—was just unbelievable. Even the building of the Camps 5, 6, 7 and all of these permanent facilities there. When I went there for the first time, they were literally digging the utility trench for Camp 5, the first of the permanent facilities. They just never stopped. It was like a constant opportunity for building and “public works,” that were really private opportunities. I just wonder how much they pumped in there for no reason at all. They wasted so much money and so much time and wound up with nothing really out of the first two years of this construction that they did there.

Q: At the base? The courthouse?

Dratel: Yes. Here's what they did. The reason that they told us, when I first got involved in the beginning of 2004, was that it was going to be a while before the commissions got underway. It was not only because of logistic purposes, but also because they had to retrofit the first floor of the courthouse—which was the old courthouse that used to be for court martials, not the one they use now—to take out all the windows because there could be a lot of classified information and they needed security so that no one could look in. They needed to make it like a SCIFF—which is a secure, compartmentalized information facility—where you review classified information. It is supposed to be a windowless room, so they wanted to take the windows out of the first floor and that took a long time.

They built these rooms and built ways that would separate the audience and then we had the first proceedings in August. When we came back in October, or maybe it was early the next year, we could not use the first floor anymore. Our office on the first floor was not available because they had too many administrative personnel that they needed to put on the ground floor that were court support personnel. We got put on the second floor where there were these two beautiful giant windows, of course, which they never bothered to remove or to worry about people spying in on that. It was like that.

It was run, as I was talking about last time, almost like there was never a plan. As if every day you would come up against something that no one had anticipated and being confronted with things they hadn't anticipated, which would never lead them to think that there's something else we have not anticipated that is going to happen tomorrow, so let's think ahead.

The third defendant who was arraigned on the day of the first court appearances in the commission was [Ali] al-Bahlul and he said, "I don't want these lawyers, I want to represent myself." Since this is radio, I'm putting my head in my hands on the table, which is what the judge did as a habit when he faced a conundrum.

That was [Peter C.] Brownback, who I don't have any ill will towards at all. The sense of a guy in a position that was something that they could have trained people better for what they were getting into there. He came in not really knowing what it was going to be. He had a lot of experience as a military judge and tried to use that experience in a way that was in some ways good for us and in some ways not good for us, but I didn't perceive him as someone who came to

stack the deck necessarily. He put his head in his hands because there was no provision in the rules of what to do. There were barely any rules at all. This happened at every appearance. It was chaos because of things that no one knew how to handle because they were not provided for. They only had three years to get it up and running so it's understandable that they had no rules. That's sarcasm.

Q: Did you personally happen to witness any kind of abuse of detainees down there? Even by accident, by happenstance?

Dratel: I'm thinking.

Q: There's been abuse of lawyers, obviously.

Dratel: Yes, there was, but that's easy. Anytime you can go home it's easy, when you think about the alternative. First hand, I don't think so, no. You have to understand, Hicks was not at Delta at that point. He was already at Echo. We saw him at Echo, which is a very different facility than Delta. Echo is a single unit occupancy facility. It also known as solitary, but the fact is, for David it was not such a bad thing at that point, for a couple of reasons. It was not a good thing in other ways, but you know, it balances. You try to maximize the advantages that you can get out of something like that.

Q: It was isolation?

Dratel: Yes. They had these bungalows, these huts, where they would house one detainee in each. They had about a dozen of them all told. Echo was a different place. You wouldn't necessarily see any other detainee during the course of a day.

Q: That's where lawyers routinely met.

Dratel: Yes, although I have been to Delta and I have seen David in other places. Although, now that I think about it, I'm trying to think whether I ever saw him at another block, but I think that was still part of Echo.

Q: Well, Delta was a number of camps, isn't it? I mean it's a number of camps.

Dratel: Yes, it's sprawling.

Q: That's right. It'd be 1 through 6 or something like that.

Dratel: Right, Camp 4 is like a dormitory.

Q: This may sound terribly simplistic, but in other words, you were never walking around somewhere, for example, and heard some screaming going on, or saw someone punched or anything of that sort?

Dratel: No.

Q: Nothing like that.

Dratel: I would say that by and large, my interactions with the military people were usually uneventful and I don't have any suspicion that they were not professional. They were mostly professional. The ones that were not professional stand out. The couple that were not professional in either their interactions with lawyers or their interactions with David—where he specifically had a name for people who had written him tickets or things like that, of that nature—where we felt that it was unfair and it was gratuitous.

Q: Now, he arrived in 2002 as detainee number two, but in effect number one, really. You went down there in January 2004 for the first time. Now, your vice president, Dick Cheney, on CNN in June 2005, said, with regard to Guantánamo Bay, "There isn't any other nation in the world that would treat people who were determined to kill Americans the way we are treating these people. They're living in the tropics. They're well fed. They've got everything they could possibly want." And your former president George Bush, in his reason book *Decision Points*, says that "At Guantánamo detainees were given clean and safe shelter, three meals a day, a personal copy of the Koran, the opportunity to pray five times daily and the same medical care their guards received. They had access to exercise space and a library stocked with books and DVDs. One of the most popular was an Arabic translation of *Harry Potter*." Donald Rumsfeld, in his new book, *Known and Unknown*, says virtually the same thing in virtually the same words as President Bush. Let's talk about how Hicks was treated over the years down there.

Dratel: My response to those remarks is it sounds like these plantation owners describing how wonderful the life is for a slave. “We give him three meals, he’s got a job, and he’s got a roof over his head, and his kids are taken care of.” By the mid to late part of 2004, by the time the lawyers started to go down there en masse, there was a definite sea change in the way that detainees are treated. Before that, detainees were completely at the mercy of the interrogators, and, to a lesser extent, the ordinary military guards. When I say “to a lesser extent,” the ordinary military guards, my understanding from Hicks and from others is that the ordinary military guards’ abuse was more of the sporadic, un-coordinated harassment that is common in many prisons.

I don’t want to make Guantánamo sound better than it was, but I also don’t want to minimize the problems and the inhuman treatment that ordinary prisoners get in the United States in corrections facilities. It is abominable. To me, as a veteran of all of that, going down to Guantánamo, some stuff may not have struck me as any worse than I see—it doesn’t make it better, it doesn’t make it acceptable—but to me by degree, a lot of it was familiar in the sense of guards being arbitrary, guards being cruel, guards feeding detainees misinformation to try to undermine their relationships with their lawyers and their families and all of the things that guards do in federal and state prisons across the country. In fact, the military personnel may have been less physically cruel with the Guantánamo inmates as a general matter than ordinary guards are, not in federal facilities but in state facilities.

Q: Are you drawing a distinction between the first couple of years and subsequently?

Dratel: Right, exactly. My experience is from 2004 on. From before 2004, it was the reign of the interrogators. Every detainee knew within a very short period of time that their lives were in the hands of the interrogators, and that the ability to get access to the ordinary things in life was dependent on capitulation and submission to the interrogators and the satisfaction of the interrogators. For example, if you went for a session and agreed to talk to them, you could get fed better. You could get to watch TV. You could sit in a room on a couch for hours and read a magazine, as opposed to being confined to this small cell all day. You could get certain accommodations that were routine and ordinary for a normal person, but for them very special.

To me, you can't minimize the psychological nature of what detention there does to a person over time, being closed off from the outside world, un-charged, with no idea what was going to happen. Many of them thought they were going to be there, and may be there, for their whole lives with no information, misinformation, or mostly disinformation.

My experience with people who are in solitary in federal prisons or state prisons—mostly federal though, my experience—is that in about six months they start to change for the worse and as time goes on they get worse and worse. They begin to degrade cognitively and emotionally. It's very hard to bring them back while they're still in that state. I could see it with David. He manifested a lot of the same things. I didn't know him from before. You don't know many of these people from before, but the fact is David, even in the three and a half years that I was seeing him, had periods of time where he was de-socialized to the point where you could see there was deterioration.

Q: Do you know who did the interrogations of Hicks? Was it military, was it CIA?

Dratel: I actually can't comment on that because I think that is still classified.

Q: Okay. Now, would you agree, I mentioned the other day that Mark Denbeaux—is it Mark?

Dratel: Yes. The son is Joshua, I believe.

Q: Yes. Mark Denbeaux writes that according to the Department of Defense, "Each detainee was interrogated barely once a month," during that first couple of years. Matthew Waxman, who was a Defense Department official for detainee affairs during that period, or after that—

Dratel: And at Columbia Law School right now, so we'd better watch what we say.

Q: Well, I always watch what I say, and then I say it.

He says that, after late 2004, interrogation was restricted to high value detainees, and that by 2005, three-quarters of the then roughly five hundred or so detainees were no longer regularly interrogated. Is that your impression?

Dratel: Yes, but look at the timeline. What's different about 2004 from 2003? The detainees are allowed to see lawyers. That's the difference. That's why the interrogation regime stopped.

Q: Well, as a lawyer, you were in no position to say to the officials at Guantánamo, “Do not interrogate my men,” were you?

Dratel: We were actually in a better position than many others because we had a criminal case going. He actually had a right to a lawyer and a right—not a fifth amendment right according to them but at least a procedural right—to remain silent. I think they would be much more careful about their ability to go in willy-nilly and speak to David than they would people who are unrepresented or did not have cases. And I know that they still do today. They still go in unannounced and do not tell lawyers and just feel like they can go in at their whim and talk to anyone. But they know that they will pay the price for it, if they do it in a way that is unfettered, which is what they enjoyed before.

Now, the second part of that. The first part is the timeline. Yes, that’s correct. But that’s the difference. The timeline is also important in this context. By 2004 and 2005 we are three and four years out from 9/11. We are three and four years out from the capture of these guys. What intelligence value do we think they possibly would have three and four years down the road? And if that is the case, why were they still there and what was the excuse that they could possibly obtain valuable intelligence from these people? So what they say is at loggerheads with each other. I know Matt and I like him, but he was in the government at that time and I see a lot of—

Q: Who?

Dratel: Matt Waxman.

Q: Right.

Dratel: I see a lot of rationalization in that. It's like saying after 1865, "I don't see a lot of evidence of slavery." Yes, but there were still other forms of indentured servitude and all the other things after Reconstruction. It's too complicated. My point is that if you take a timeline and divorce it from the context in which it occurs, of course everything seems rosy. It looks like, "Oh, we stopped interrogating them." Why? Because people were going to court on habeas cases claiming that their clients were being abused.

Q: Well, I don't know so much about habeas. The fact is that you came down there in 2004 and by fall of 2004 detainees already being released.

Dratel: Yes.

Q: And it declined steadily after that to the point that during the Bush administration, some 530 detainees were gone. And in fact—apropos of what you were saying—is it not true that as early as late 2002, certainly 2003, there were people within the CIA and the military who thought, my God, who have we got here? We've got a bunch of nothing.

Dratel: No screening in, no screening out. That was the policy during the Bush administration.

Q: In fact, if you had to say, what's a simple answer to the question of—apart from the relatively few habeas corpus—on what basis were most of those 530 released?

Dratel: Where they were from.

Q: What was the criteria?

Dratel: Where they were from. A lot of them were Afghans, particularly after the Karzai government is constituted. A lot of them were Saudis, Kuwaitis, Brits, and Western Europeans.

Q: That is their nationality, but why were they released, I say? By what criteria?

Dratel: I think it was a constant game of trying to mollify allies who were protesting. I think the British were really responsible for it, because they got the momentum going and then everybody followed suit. So once the Brits got released, then the French, and the Dutch and the Danish and the other Western Europeans such as the Spanish said, “Why are you holding my guy? You let the Brits go. We'll take care of them just like the Brits are taking care of them. We'll interview them when they get here. If we think they have done anything wrong, we'll charge them.”

I don't know to what extent the British were willing to use as leverage their coalition with respect to Iraq, but I know other Western European countries had a lot more difficulty with their own countries sustaining that kind of relationship with the United States, where they could get away with having the United States keep their nationals two and three and four years without

charge, and not to the political detriment of the governing party of those countries. That was the first thing we told David Hicks and that ultimately was the end of the case.

The first time I saw David he asked me, “What do you think about this thing? When will I get out of here?” And I said, “Well look, we’re going to try everything we can do, and the courts and all that, but it’s probably going to be when it becomes politically unacceptable for the Australian government to let you stay here.” Do you know what I mean? Part of our campaign was to keep David in the consciousness of the polity of Australia so that it was always a thorn in the side of the government that we had to aggravate and irritate as much as possible.

Q: But with respect to those five hundred or so released, one could say hypothetically that, “Oh yes, those were people who were brought before a Combatant Status Review Tribunal, and the tribunal said, ‘Let them go.’ And so they went.” I mean, one could say hypothetically, but that isn’t the way that—

Dratel: That’s not what happened.

Q: That’s right. So let me go back to Hicks for a moment here. By the way, you said the other day that Hicks told you that when he was taken off the USS *Peleliu* briefly, before he went to Guantánamo, he was beaten.

Dratel: Absolutely. That is in his affidavit, the one that we talked about. You alluded to that affidavit that he filed in the British courts, right?

Q: Okay. Now I am looking at that affidavit in fact. That affidavit was from December 10, 2004?

Dratel: Right.

Q: Now, in this affidavit, he says, among other things, among other problems, "I have been beaten before, after and during interrogations. I have been menaced and threatened directly and indirectly with firearms and other weapons before and during interrogations. I have been beaten while blindfolded and handcuffed. I have been in the company of other detainees who were beaten while blindfolded and handcuffed. At one point, a group of detainees including myself were subjected to being randomly hit over an eight hour session while handcuffed and blindfolded. I have been struck with hands, fists, and other objects including rifle butts. I have also been kicked. I have been hit in the face, feet, head and torso. I have had my head rammed into asphalt several times while blindfolded. I have had handcuffs placed on me so tightly, and for so long, as much as fourteen or fifteen hours, that my hands were numb for a considerable period thereafter. I have had medication the identity of which was unknown to me, despite my request for information, forced upon me against my will. I have been struck while under the influence of sedatives that were forced upon me by injection. I have been forced to run in leg shackles that regularly ripped the skin off my ankles. Many other detainees experienced the same."

Now, let me mention one more. "I have been deprived of sleep as a matter of policy.

Interrogators once offered me the services of a prostitute for fifteen minutes if I would spy on

other detainees. I refused. Failure to cooperate meant the loss of ordinary necessities of living such as showers, sufficient food, relief from the prospect of IRFing [Initial Reaction Force], and other regular abuse visited upon non-cooperative detainees, access to reading material and social contact including receiving mail."

He goes to point out that his conditions changed after he was moved to Camp Echo in July of 2003 and the attorneys started coming.

Dratel: There's also a very important part about July 2003 which we can talk about.

Q: Is it really credible?

Dratel: I wouldn't have written it if I didn't believe it.

Q: No, seriously.

Dratel: Seriously.

Q: You wrote this on the basis of what he has told you.

Dratel: Well, absolutely. It's not very different from what he told me. I just kind of organized it in a way that is presentable.

Q: Of course, but is it credible?

Dratel: Yes. It's credible for a variety of reasons. Number one, it's consistent from day one. There are a lot of things that people tell you in the course of a case—and I say this from experience as a lawyer for thirty years—that go back and forth, that waver, that fail to match in terms of detail, that are inconsistent, that over time are omitted or removed from an account. This was consistent from day one for David. We were very, very careful in terms of what we presented in that affidavit. Only that which we had confidence passed muster.

The second reason why is that it was corroborated by others in the sense of either similar things, or the same things happening to others during the same timeframe.

The third thing is that it was corroborated by the fact that there were worse things that were happening to others. David never claimed the worst type of abuse. Frankly, the reason is that David wised up pretty quickly. David was conditioned from the very first few interrogations, and his period on the *Peleliu*, that he was not going to get beaten for lack of giving information. He was going to cooperate, he was going to submit to interviews and do that and not endure physical abuse and end up having to do it anyway. He heard screaming on the *Peleliu*. He heard people being rammed into walls and smacked around and when he got to the interview session he was not going to be the punching bag. He just gave it up.

Q: Is it not fair to say you are taking his word for it?

Dratel: What he told them was completely accurate.

Q: You're taking his word for it.

Dratel: No, no. We had sufficient evidence of corroboration.

Q: All right. When he uses that term IRFing, do you know what he means by that? Explain that.

He himself doesn't claim to have been—

Dratel: That's correct.

Q: I omitted, when I read this, I omitted what he said he had seen of others.

Dratel: That is all corroborated. Since he submitted this affidavit, the incident he talks about of a guy getting his head smashed on the ground has all been corroborated.

Q: Why don't you explain what the IRF was.

Dratel: Sure. The Internal Reaction Force, I think it was called.

Q: They call it by different things, but it always has the same initials.

Dratel: It was called by different things. Sometimes ERF, Emergency Reaction Force. It was never clear to us. We used IRF because that's what we were told at the time that that's what it was.

Q: It was a team.

Dratel: It was a team that was like your SWAT team—what you might see in a riot squad. They wore shin guards, helmets, face guards, chest protectors, and the whole nine yards of protective riot gear with shields as well and batons. They would march very loudly, almost like a futuristic prison movie, through the cell block. They were very loud, with boots in lockstep and they would subdue someone who had been designated for IRFing. Now, IRFing was not because someone had been necessarily acting out. There were a variety of reasons for IRFing. Some were arbitrary, some were security oriented, some fell in between. It was a physical subduing of someone in a manner that was conducive to injury. Did you ever read the account of the guy who was IRFed at practice and had his neck broken or something? All these things are so easy to do right and they're so easy to do wrong and they're so easy to explain in a way that people who don't have experience will say, "Oh well, it sounds reasonable." If you look at it this way, I can make the case for IRFing being an extreme event which is when you make the decision to IRF somebody. Let's say they need to be IRFed according to your security protocol—

Q: Why would you think that?

Dratel: Because you can't go in halfway.

Q: No, no. I mean, what would set it off that a person would be IRFed in his cell?

Dratel: Let's say if someone is continually destructive in their cell in a manner that threatens security on the block, such as throwing feces all the time, spitting, attacking a guard.

Let's say a medical professional goes in there and he gets attacked by the detainee. Let's say the detainee refuses to leave the cell for some reason. He's supposed to leave the cell for some medical reason, maybe because he's got some infectious disease that threatens the security of the cell block. He has to be removed.

When you go in there, you can't do it in a half-assed way. It's more likely that he'll get injured if you go in there in a half-assed way than if you go in there with extreme force that subdues the guy right away, so that there's no chance for any ambiguous behavior to occur. That's the theory behind it. It's not an invalid theory.

Q: No. But in fact, people were IRFed for doing a lot less than you describe.

Dratel: Of course. That's what I am saying. No, it was completely arbitrary most of the time.

Yes, that's what I'm saying. It was IRFing for IRFing's sake. It was IRFing to intimidate the cell blocks. It was IRFing to punish inmates who were not cooperating, who were not submitting to interrogation, or who asked questions about their Koran being pissed on.

Q: All right. There's been a question about whether medical or behavioral experts or physicians even or psychologists were used down there by the government to gather information and pass it on a good many times. Do you know whether Hicks was ever subject to that, or experienced that?

Dratel: I can't say either way because I don't recall. I don't want to say no, because it's possible that we did discuss it. But I don't recall it being yes. Even if it was yes, it wasn't something dramatic. If it was, someone may have visited him and viewed him from outside the cell or something like that. Someone may have walked down the cell block and he may have been aware of it. I can't recall specifically.

Q: But did you personally ever observe anything of that? Did you ever have a case of this?

Dratel: No, but I spoke to the guy who did it. We interviewed him.

Q: Who are we talking about?

Dratel: Dr. [Daryl] Matthews. From Hawaii. When I say I don't think he was involved, what I mean is that judging by his attitude, he didn't strike me as the type of guy who would go down there and deliberately try to assist interrogators in extracting information from unwilling people by ways of psychological pressure or psychological methods, in other words, designed to break down. I think he was brought in to review the procedures that were being used, to comment on

whether they were effective, and to analyze and evaluate the procedures that were being used.

We interviewed him in 2004 in my office at 14 Wall Street. I remember it clear as day.

Q: Well, I mean, have you any reason—

Dratel: I remember him because he was from Hawaii but he was wearing all black. I thought it would be very hot.

Q: Other than him, have you any reason to believe that doctors and psychologists or other behavioral experts in fact passed on information that would ordinarily be held to be confidential to interrogators?

Dratel: Yes. Now, having read too much about this whole thing, and been exposed to too much information about this, I can't segregate it for you—and it's not so much because I can't do that in other ways, because I can, but because with David it was not an immediate issue. You read a lot of things and the stuff that you apply to your case is very different than the stuff that you read. You go, "Oh well, that's fucked up, but you know, I'm going to move on."

I'll tell you my feelings about it. One, it's clearly done at the black sites. You know, the Mitchells and the Jessens and all those guys. There's no reason to believe it was not done at Gitmo just as well, if not by them by others. There are innumerable reports from people who are supposed to be independent, impartial professionals who were asked to do the same thing, like interpreters and medical professionals. There's no reason to believe that other people didn't do it

and accede to the requests by the government. I may have read about it too—I just can't separate it out of my mind—but it strikes me as something that I have incorporated as something that occurred down there.

Q: Do you know whether Hicks ever went on a hunger strike? Or was ever force-fed?

Dratel: I don't believe David was ever force-fed. I don't believe he was. No, he wasn't. I can tell you that. I will say that there are several contexts and factors that influence that. The first is that as his lawyers we always counseled against it, for reasons that had to do with our overall strategy in the case. If you want, I could go into some of those.

Q: That's alright.

Dratel: Well, no. It's not privileged; it's sort of more abstract. The second is David was isolated most of the time. He was isolated from 2003 on. He was aware that there were hunger strikes, but information was not as free flowing as it is in some other prison situations, particularly for those in solitary. I don't know that he ever quite knew who or how many people were doing it. The solidarity that develops to do it on a unit did not exist for him because he was isolated.

Q: But when you use the term isolated, define it.

Dratel: Living alone. Not seeing any other detainees ever during the day.

Q: And being let out of the cell for how long?

Dratel: An hour to go kick a soccer ball in a cage about the size of this room, outdoors. If the guards could time it right they would do it at three o'clock in the afternoon when it was 107 degrees, so that you would go outside and say, "I'm not kicking a soccer ball around. I'd rather go back to my cell than wilt out here."

Q: Do you know whether, at any time before or after that affidavit was signed, he himself was exposed to loud music or noise or strobe lights?

Dratel: No, because David was not a resister. That's why. The first time David was interrogated it was at the point of a semi-automatic hand gun by a guy dressed in black, out of uniform, in Afghanistan, by the U.S. The second time was with a guy at the point of a shotgun sitting at an open window. They said, look, that guy is there to make sure you behave. The third, maybe not the third but a subsequent time, while still in Afghan custody, he was menaced with a weapon by a guy who David believed was ready to shoot him, just out of anger—purely out of anger. It had nothing to do with the interrogation. The guy pulled his sidearm on him in the Afghan cell and was literally shaking with anger, but fortunately did not pull the trigger.

David was then on the USS *Peleliu*. David was then beaten at this unknown place where he was blindfolded on dry land in either Pakistan or Afghanistan. David was not a resister. He was conditioned by that point that he was not going to wait around to be beaten before allowing interrogation to ensue. That was, I think, an understandable philosophy on his part.

That's why nobody said, "Hey, this guy Hicks is not cooperating. Let's turn on the music." David was perfectly happy to have a cheeseburger with these guys. If that's what you got out of talking to them, that was fantastic. Watch TV, eat a cheeseburger, sit around with women—what could be better for an Australian guy at Guantánamo than that? I'm really serious. David was a very a different kind of jihadi. He really was. He is not a jihadi.

Q: Also, as we said earlier, he knows how to bone a chicken.

Dratel: That's right. Look, not to make it pejorative, but just to make it descriptive—I'm serious it's really not pejorative—David was a biker before he got into Islam. He was probably the only guy in Afghanistan with "love" and "hate" tattooed on his fingers. He was a redneck kid who hung out with bikers and stoners in Australia. That was his crew when he was back in Australia.

Q: You came into the case in 2004. Describe for me the progression of the case. The time you came in was actually months before the Supreme Court decision in *Rasul*, in June of 2004. Tell me, in a tight kind of fashion, your experience with the case, including whether he had a CSRT [Combatant Status Review Tribunal], then he was charged before the military commission, and it proceeds forward. Just follow that line.

Dratel: Okay. Ultimately what happened was Steve Kenny and Dan Mori came back up to New York. It was obvious that day we met at CCR that there really was a conflict. The conflict existed not just in terms of defendant versus defendant—in other words that David might have a conflict

with the other detainees who Joe represented in the civil case—but also, as I recall, this was right at the time that the Supreme Court granted cert in *Rasul*. It was no longer something abstract. It was very real because Joe was now going to have this case in the Supreme Court.

I think it worked out better for everybody, frankly, that Joe decided to stay with that case. I think it was a good decision because he really in many ways was the principal architect of that, even though he did not get to argue the case. They put a figurehead up to argue. There are all these issues that we could talk about for days. I think it was good for the whole cause of rights that Joe stayed with that, but that meant that Joe couldn't do David's commission. Then it fell to me. They said, "Do you want to do it?" People always ask me how come it was me, and it was because I'm the only person who knew Joe and Mori. I was the only person they knew in common.

Q: Mori?

Dratel: Dan Mori. Remember, I'd met him in October. Joe I knew. I am the only guy in the criminal defense community they both knew in common. So I'm in it. The circumstances of my agreeing were sort of quick and it just was one of the things I could not pass up. It's why I became a lawyer, even though I knew I probably was never going to get paid.

Q: In tight fashion, what happened over the next—?

Dratel: David is the first guy referred. We start visiting him. We start getting prepared for the military commission proceedings and there is no real sense of what the timeframe is going to be. We're starting to investigate. We're starting to develop our legal theories. We're starting to contact expert witnesses. We're doing all the things that you would do in an ordinary situation of preparing for a trial, motions, trying to learn international law and law of armed conflict. We're also involved in the habeas because we knew that *Rasul* was going to be a watershed event, so we had to wait around for that. Abu Ghraib coming out in April of 2004 changed the dynamic about treatment. If you asked me about believing David, David never alleged that he was maltreated in the worst way like some of the other guys were, but some of the other guys' descriptions that I might have taken with a grain of salt, after Abu Ghraib came out—

Q: Well, you know there's some people who argue that what was going on at Guantánamo in the first couple of years migrated to Afghanistan with Major General Geoffrey Miller, maybe. There are other people who say, "No it migrated from Iraq," which makes lesser sense in the timeframe.

Dratel: Yes. They Gitmo-ized. That was Miller. Time frame doesn't make sense.

Q: That's right. But nonetheless, the exposure of what was going on in Abu Ghraib had an impact.

Dratel: On the Supreme Court. It had an impact on the whole dynamic. We finally had a talking point.

Q: And pictures.

Dratel: Yes, right, but we had a talking point that put the government on the defensive. It was very useful, so we concentrated on that. We also had a three-pronged approach from the very beginning. One was the commissions themselves. We had to defend the commissions. And for me, that was always the foremost—

Q: Defend at the commission.

Dratel: I'm sorry?

Q: You used a lawyer term. You had to defend before the commission?

Dratel: The prosecution. We had to defend the commission prosecution. We had to defend David in the commission prosecution. We had to prepare the defense. To me, that was always my primary responsibility because of my background as a lawyer, litigating, but also because I knew that that's where he could suffer the most damage. In other words, he could get a life sentence. So, that was always the priority for me. However, it was a first among equals, so to speak, because the other prongs of our three-pronged approach were equally important. Nevertheless they were offensive rather than defensive. I was always, obviously, more concerned about what might happen to him in the commissions than losing the habeas or not getting the Australian government on board.

The second part of it was the habeas, which we took over from Joe. After *Rasul*, we filed an amended complaint that attacked the commission process as well, *Hamdan* ended up getting to the Supreme Court ahead of us because Judge [James] Robertson and the District Court of D.C. decided *Hamdan's* motions before Judge [Colleen] Kollar-Kotelly decided ours. It worked out fine because *Hamdan* was a winner. So that was fortuitous as well.

But the third was to continually explore political and legal options with respect to Australia, so by the time David pleaded guilty and was released in 2007, we had litigation in four places and three continents. What's Cuba? What continent is Cuba part of, would you say? Is it North America or South America?

Q: That's a good question. It's out there in the water.

Dratel: Yes, so we had three continents and Cuba. We had litigation in the U.S. for David's habeas. We had the commissions that we were defending David. In Australia we had recently found some lawyers who were innovative and imaginative and aggressive and they had filed an action seeking to compel the Australian government to bring David home. This is after a long period of time of trying to find the right people and trying to find a hook, of trying to find a legal basis. This is probably not an action that would have had any legs in 2002 or to 2003 because there was not enough time, but by 2006, the passage of time was such that the question was, "Why is he still there?"

Q: Well, actually, isn't it true that the Australian judge refused the government's motion to dismiss it?

Dratel: That's right. So that was coming up too. That was coming up supposedly in April or May 2007. That was ready to be argued. We were looking forward to that because it was a win-win situation for us, either way. If we won, then we could maybe have an avenue in the Australian courts. If we lost, it put more pressure on the government because we would say, "The Australian government is the only arbiter now that can get David's release. The courts have said it is up to the government. Everybody's said it is up to the government. The British government has done what it has. Look at what the British government has done. Look what all these Western governments have done. Australia is the only one holding out." We also had litigation in England and the UK on the citizenship issue.

Q: At some point didn't he get a combatant status review?

Dratel: Yes. I'm going to guess.

Q: Well, it was after *Rasul*. Didn't they create these Combatant Status Review Tribunals to circumvent the *Rasul* decision?

Dratel: Yes, the *Rasul*, *Hamdi* decisions. It was probably more for *Hamdi* than *Rasul* actually, because *Hamdi* was about pure detention. *Rasul* was more about habeas rights.

Q: But you believe that to be a fair interpretation?

Dratel: Absolutely. It came right after.

Q: And what were they?

Dratel: You know everybody made fun of it when you would say David was subject to a kangaroo court, but it was a kangaroo tribunal designed to validate the continued detention.

Q: By determining—

Dratel: —that they were enemy combatants.

Q: Now, is it not true that everybody was found to be—

Dratel: No. I think some people weren't. They were called NLECs—No Longer Enemy Combatants. There were about two or three people.

Q: Really? I thought those cases were reversed in Washington.

Dratel: I don't know. Maybe they were.

Q: I don't know. There may have been. Maybe a couple got through.

Dratel: There were a couple guys who got NLEC.

Q: But the vast majority?

Dratel: Yes. There was rubber-stamping of the prior detention.

Q: And he had that kind of thing?

Dratel: Yes. Now, to understand, you did not have a lawyer. You did not have a right to a lawyer. You had what's called a personal representative who is a uniformed officer with whom you did not share a lawyer-client privilege, but who would present your case and call witnesses for you if you wanted.

Q: And often reported back to the government what you were saying.

Dratel: Yes. Most of the evidence against most of these guys was deemed classified so they were not permitted to confront it. I'm pretty sure it was fall of 2004 when David's CSRT was conducted. The reason I don't remember exactly is because we were not there. We were not permitted. We wrote letters. We made motions. We did everything we could to try to get him the right to at least have a lawyer who wanted to be there, not that you had to appoint him a lawyer, but that he has a right to a lawyer if he wants.

Q: But he did not have a right to a lawyer, did he?

Dratel: No, no he did not. They wouldn't let us participate. So what we told David was not to cooperate with his personal representative and not to participate in the Combatant Status Review Tribunal, on Fifth Amendment grounds and other grounds having to do with the nature of the proceeding. We didn't want him speaking and having it be held against him in the commissions. We wrote letters and took our position and that was that. They, of course, sustained the finding of enemy combatant for David, which was a foregone conclusion.

Q: These were determinations that had been made before, that they were now called unlawful enemy combatants or enemy combatants. Virtually everyone was decided to be still an enemy combatant. The reason they had to start these was because the Supreme Court in *Rasul, Hamdi* said what?

Dratel: They said that you cannot keep them indefinitely without some process.

Q: Exactly. They thought this was a process that would be valid without a lawyer, without the government calling witnesses, without seeing any classified evidence.

Dratel: Yes.

Q: Now, in November of 2004, there was some sort of hearing with regard to the military commission for Hicks.

Dratel: Yes, at the very end of October.

Q: That's right. That's right. And you were there now?

Dratel: I was.

Q: And you caused a commotion, did you not?

Dratel: No, that was later.

Q: Oh really?

Dratel: That was March of 2007. Wait, which one was this? If I caused more than one commotion, I didn't consider it a commotion.

Q: Well, you caused a commotion in late October 2004.

Dratel: I think I remember what you're talking about.

Q: Didn't you have the effrontery to suggest that there's something wrong with the Combatant Status Review?

Dratel: Yes.

Q: The *New York Times* said you erupted in anger.

Dratel: Yes, I did. Well, you know when I erupted in anger? I forget what the guy said now, but the prosecutor said something so stupid.

Q: Well, did he? Was it a question of the court considering information from the C-R—?

Dratel: CSRT? Maybe that was it.

Q: Right, and did you not shout, “This man is on trial for his life?”

Dratel: Yes. But I think it had something to do with the prosecutor saying something so casual. It was really the kind of opening that every defense lawyer loves because it shows how little regard they have for the humanity of the defendant. I did say something to that effect, yes. To me, it was not a big deal. It was just an opportunity.

Q: Continuing forward though, just in summation, over the years, late 2004, 2005, 2006, 2007, what happens of significance that he gets out?

Dratel: The hearing we just talked about was a motion hearing, and there was a lot more to me that was significant about appearing in front of that first military commission and their attitudes

about legal—they were not lawyers except for the presiding judge. It wasn't even a presiding judge. It was just a member of the panel. Brownback was the only lawyer on the panel. Their ignorance of legal concepts and their refusal to acknowledge them was pretty frightening. As I told the press afterwards, "I came here to defend a case, not to teach law school to these people. It's not my job. It is preposterous that they don't know anything about everything from jurisdiction to ex post facto."

When I explained ex post facto to them—that you cannot criminalize on Thursday what someone did on Tuesday. If it was legal on Tuesday and then you passed a law on Thursday, you can't penalize him for what he did two days ago when it was legal—the response to me was, "So he gets away with it?" That's what we were dealing with. That was the kind of atmosphere and the kind of mentality. The day after that hearing, Judge Robertson stayed Hamdan's commission. Hamdan was supposed to go the next day.

Q: Judge who?

Dratel: Judge Robertson. James Robertson in D.C. District Court. Hamdan's habeas. He stayed the commission process, which put the commissions completely on hold, and *Hamdan* went up to the D.C. Circuit. In late July or early August of 2005, the D.C. Circuit reverses Robertson, vacates the stay that Robertson had imposed, so that the commission got back on track.

Q: Vacated the stay?

Dratel: Yes.

Q: And is it not true that one of the members of the three judge panel in the D.C. Circuit who overruled Judge Robertson was none other than John Roberts?

Dratel: Correct.

Q: A few months later to be nominated to the Supreme Court of the United States as Chief Justice?

Dratel: That is correct. Then the commission is back on track again in the fall of 2005, but because the commissions really can't get back on track and they can't stop tripping over themselves, nothing happened for four to five months. Just when they were starting to put pressure on us to have appearances in late 2005, the Supreme Court grants cert in *Hamdan*. Once again, it's shelved. All of this is while we are still pursuing all of our Australian options and our UK options. Now the citizenship thing has now arisen, which was not present at the beginning of the case because they changed the law in Britain in 2004 or 2005. We're still pursuing the habeas. We are trying to get our own stay from Judge Kollar-Kotelly or to get her to rule on the merits, but she is not going to do it while the Supreme Court is holding it. In June 2006, they invalidate the commissions.

Q: The Supreme Court?

Dratel: Yes. Now we figure it's an opportune time to try to get David back to Australia.

Q: The reason they invalidated the commissions in June 2006 in *Hamdan* was—?

Dratel: I would say the principal reason, legally, was that the president did not have the authority to do it unilaterally, that he had to have congressional delegation to him to institute the commissions. I think there are other issues too.

Q: There certainly are.

Dratel: The court also addressed those, such as *ex parte* proceedings.

Q: So they're knocking out the commissions again.

Dratel: Well, we're trying to get David back. We're trying negotiating with the Australians. We're trying everything we can to get them to do something that will save their face. We've got to give them a politically palatable way. We wrote letters where David was trying to be conciliatory, just short of obviously admitting the crime. We changed lawyers in Australia because we wanted more insiders who could negotiate with the attorney general's office. Steve Kenny was more of a gadfly. He would have never been able to do that.

Q: At this time, and for a couple of years now, you represented David Hicks as a civilian lawyer and at the same time he was represented by a military lawyer, Dan Mori. And did Dan Mori go to Australia?

Dratel: Many times.

Q: Is that a fact?

Dratel: Yes.

Q: I mean, on vacation?

Dratel: Oh no, no, no, no. Dan went many times. I went once.

Q: Who was paying Dan Mori to go to Australia?

Dratel: The government was. He was going as part of his representation. He was going on an investigation and we went together once.

Q: Dan Mori is representing him as a military lawyer. Not to be in the military commission proceeding, which, as you say, has dragged on and been overthrown, but it's in the military commission. In the CSRT thing, there was no lawyer.

Dratel: That's correct.

Q: So now, Dan Mori, he says, "My God, I've got all this money they're throwing at me to go to Australia on vacation, I will go."

Dratel: We had witnesses over there. We had experts. We had a variety of things that were directly relevant to the commissions, but while he was over there, he marshalled a lot of other types of support. He was setting the stage for our legal challenge in Australia. He did a lot of the leg work of gathering political and legal support. Then I went for a week.

Q: He was a lawyer, Dan Mori?

Dratel: Oh yes. JAG lawyer. Different. In other words, he was first an enlisted Marine who then went to college and then law school. The Marines, I guess, paid for some of it. I don't know if they paid for all of it. Then he came back as a commissioned officer. So he was a different kind a guy, which was good. I really was happy with that, and Marines are a little different.

Q: Well, he couldn't wear his uniform in Australia, could he?

Dratel: He did sometimes. I think he did. Wait, did he? There was a column written about him by this woman who said he was the sexiest man in Australia, in his Marine uniform, criticizing the president of the United States. It was great. And when I say great, you could not have scripted it. The kind of publicity he was getting was phenomenal. He was a hero in Australia. I went one

week in April of 2006. Dan had one case. It was easy for him to go wherever we needed him to go. I had a lot of stuff going on. I was not getting paid, so it wasn't like I could just take a week off and do this. You know, and I'm going to Gitmo fourteen times.

Q: Oh, you were not being paid? You were doing this pro bono?

Dratel: No. After I put out most of the money for my trips, I ended up getting paid expenses by a foundation that picked up expenses. They also paid for some of our additional expenses, such as when we would have the Australian lawyers come.

Q: The government didn't pay you to represent him?

Dratel: I didn't get a penny from the government. Australians paid the lawyers for David and they paid for some of their trips. Sometimes they would only pay for one guy and we had two guys, so the second guy would come on the dime of this foundation, which was very, very gracious of them.

Q: Did you say you went to Australia?

Dratel: Yes, for a week in April 2006. We did a lot of work there. We would have these press briefings and impromptu press conferences out on the sidewalk, and we'd go to these Fair Go for David functions. That was the support group for David that was established there. People would say, "Who are you?" They knew Dan. He was the star. And they said, "And who are you?"

He deserved it in the sense that he really was a fantastic ambassador for David. It just astounded people that a United States service member would criticize the president of the United States and the United States system of justice. Of course, he got threatened by the prosecutor months later for violating rules where you are not supposed to, in the vernacular, disrespect the commander-in-chief.

Q: Well, but they dropped that, didn't they?

Dratel: Yes, but it lingered. I'm not saying that it had an impact on him and made him pull back. It was not idle is what I am saying. It was not an idle threat.

Q: Hicks was released in May 2007.

Dratel: He was sent back to Australia. He did a few months more in Australia. He was released by Christmas.

Q: Now, to get released, as far as the government's concerned, after *Hamdan* in June of 2006—

Dratel: Yes. That is where we were stopped there.

Q: After that the government had also passed the Detainee Treatment Act [DTA], had it not?

Dratel: Well that was 2005, right? That was the end of 2005.

Q: And in your opinion, what did it have to do with habeas corpus?

Dratel: Oh, it totally emasculated habeas corpus for the detainees. That is what *Boumediene* [v. *Bush*, 2008] declared unconstitutional later on.

Q: But was that the intent?

Dratel: Yes.

Q: To stop the habeas corpus stuff again?

Dratel: Oh sure. Well, there were two things, to stop habeas corpus and to completely water down the [John S.] McCain amendment so that while torture was not permitted going forward, the prior torture was grandfathered in without accountability for the torturers.

Q: Well, did it absolve the alleged torturers?

Dratel: Essentially, yes.

Q: Of legal—of possible prosecution?

Dratel: No, not in so many words, but in effect it did. In certain legal effect, it had of essentially endorsing it as valid evidence—

Q: But the dual thrust of that was that, on the one hand, “Let's put it on the books that we are against cruel and inhuman torture and treatment, and let's also cut off the habeas corpus proceedings.”

Dratel: That's right.

Q: Now back in 2006, after *Hamdan*, when Justice Stevens and the Supreme Court had just said, “You did not go to Congress and for that reason and for a variety of other reasons, we are throwing these military commissions out.” Now the Congress passes a new Military Commission Act of 2006. What did that achieve, or what did it attempt to do?

Dratel: That was an attempt to get the commissions back on track and to reconstitute them. That was in the fall of 2006. We had a few months interregnum where we were really trying desperately, racing against time, to get the Australian government to intercede on David's behalf and get him out of there. It was not successful. I think that we closed the gap, but we just couldn't make enough progress. But, at the same time, the administration was suffering by then. The Bush administration was suffering dramatically. It was probably at a nadir of popularity in terms of its Guantánamo policy. The Military Commission Act was faltering in Congress, so they decided to bring the high value detainees—the Khalid Sheikh Mohammeds and the Ramzi bin al-

Shibhs—to Guantánamo, as if to say, “If you don’t pass the Military Commission Act, what are we going to do with these guys?” And so it passed.

Then Rumsfeld resigned and the Republicans got wiped out in Congress in the midterm elections. That was a watershed moment. Psychologically, it was a real different attitude and atmosphere when I got involved versus two years later. When I got involved, there were no editorials complaining about Guantánamo. There were no editorials complaining about habeas corpus. There were no editorials. There were no courts doing anything. Everybody lost every case until it got to Abu Ghraib, when it started to shift. By the end of 2006 we really had a lot of momentum and we tried to exploit that. Now these new commissions are coming up. The government of Australia sets a deadline. If Hicks is not charged by February 15, 2007, we’re going to have to reconsider our position. We’re hoping that they can’t make the deadline. Of course, on February 14 or 15, they refer charges. They don’t actually institute the charges, but they do the precursor to that. The prosecutor refers charges, meaning that he sends them to the convening authority who then has to approve them. The Australians say, “Well, that’s good enough for us. Even though they’re not actual charges, they’re good enough.”

All throughout the winter of 2006 into 2007 we are putting on as much pressure as we can. It’s getting a lot of traction in the Australian press. Our citizenship litigation in the UK is actually succeeding, in the sense that the House of Lords reversed a lower court and found that David indeed was a citizen of the UK, and so the Home Office had to make him a citizen. Five hours later they revoked it, they said, because of his conduct. We had to sue on that, and we were in litigation on that in the spring of 2007.

Now interesting things started to happen in the beginning of 2007. Reports started coming out of Australia through someone you probably know well. I don't say this in a way that is designed to disparage him in the slightest because I know that he is a fine reporter. Ray Bonner starts reporting that the Australian government is saying that Hicks would be home if it were not for his stupid human rights lawyers in the United States who are using him as a cause and holding up his repatriation to Australia. He would get time served if he just plead guilty right now, and they are not letting him do it because they've got this idea about detainee rights and they're using him as a cause célèbre. There was an article in either January or February of 2007 to that effect.

Q: In the *New York Times*?

Dratel: Yes. I sit down with Dan Mori and I say, "Dan, I'm going to write a letter to the convening authority." The convening authority is Susan Crawford at that point. She is Cheney's person.

Q: Convening authority of?

Dratel: Of the commissions. She is the administrative head of the entire commissions, essentially with the prosecutorial functions.

Q: Military commissions?

Dratel: Correct. So I write her a letter and I say, "You know, I'm reading in the newspaper that I'm the obstacle to David Hicks being sent back to Australia. No one has made me an offer of time served or anything like that. I'm open to any offer to resolve this case." Now, the reason I wrote it to her is for two reasons. One is that under the military system, she is capable of making a plea agreement. It's not just a prosecutor who can negotiate an agreement. She is actually capable of making a plea agreement with the defense. She has authority that would not be similar to what a federal judge or a state judge in the U.S. ordinary criminal courts can do, where you need the prosecutor on board. We could make a deal directly with her. One of the reasons we did so was also because we knew the prosecutor was a hardliner who was taking unreasonable positions on a lot of things. The prosecutor was Mo [Morris D.] Davis, who has since become much more moderate and ACLU actually represents him because he got dismissed from a position, he felt, for speaking out against the commissions, but ultimately for complaining about the undue command influence of General [Thomas W.] Hartmann.

At the time, we had no confidence that we were going to get a fair deal from Mo Davis, so we wrote directly to Susan Crawford to put the pressure on her. It was something that we could publicize to say, "Look, we are not the obstacles to a resolution here. It's the government." They called me and they said, "You should be hearing from the prosecutor soon." Apparently she told the prosecutor to call me and try to engage in plea discussions. So the prosecutor Mo Davis calls me.

Q: Colonel Mo Davis?

Dratel: Yes. We had a conversation, very short, where I said, "So what's your offer?"

He said, "Twenty years."

I said, "Well, we'll see you at trial." That was a worse offer than the initial one we got in 2004. The offer we got in April or May of 2004 was twelve years, which was too much. I thought there was air in that offer too, if we really wanted to pursue it, but we didn't think that it would get down to where David would find it acceptable, so we didn't bother to pursue that. Anyway, I said let's go back to the drawing board.

That's when Cheney went to Australia and met with [John W.] Howard, who was having trouble because he was facing reelection in August and his poll numbers were bad, and, for whatever reason, Hicks was an issue. Every day in the newspaper we had an article or a column. There was just a lot of currency in David's story. We tried as much as possible to exploit it with, for example, the *New York Times*. This is a great story about journalism. We heard from David that there were pictures of Saddam Hussein hanged and dead in the recreation area saying, "This is what happens when you lie to the United States of America."

Q: You mean the government had put them there?

Dratel: Yes. David told us this and we were astounded. They were in Urdu or Arabic or whatever, and we wanted confirmation so we spoke to some of the other detainee lawyers. One of the military lawyers confirmed that her client had seen the same thing and he was an Urdu

speaker. He could confirm what they said. We felt comfortable with it, and we called the *New York Times*. Now, Neil Lewis was no longer doing the story because he was doing the Scooter Libby trial.

Q: In Washington?

Dratel: Yes. They referred us to the new person on it, David Rohde. He said, "You can't confirm it." I said, "No, we have confirmed it. We can put you in touch with another military lawyer who says the same exact thing." The *New York Times* wouldn't run it because the government didn't say it. The government has to say it for it to be true. Whatever the government says gets printed.

Q: Will the record please show that you are smiling when you say that?

Dratel: Yes, but I do believe that reporters give too much credence to the government and don't require corroboration, because if the government says something, that is news in and of itself. It never has to be corroborated. We decided to give it to the Australian papers after the *New York Times* turned us down. Of course, the Australian papers ran it because it was about David and it was true. Then, the *New York Times* runs a story the next day, because the government is forced by the Australian papers to acknowledge that at one time that was true. But they've taken the posters down, probably the afternoon the story came out in the Australian papers.

Cheney goes to Australia. All of a sudden, Dan is speaking with someone in the office of the legal adviser to the convening authority, who is a gentleman by the name of General Thomas

Hemingway, an Air Force general who had been with the commissions from the very beginning. He is the guy who I negotiated with about Annex B, so I knew him to be a reasonable person. He had a sense of institutional memory, a sense of continuity that was useful, and a sense of perspective. From what I have been told, he was not a political person in the way that some of the other guys were. Someone who was working in his office mentioned to Dan Mori, "Hey, I heard the convening authority said that you guys should negotiate with the prosecutor on this, that they directed you guys to get together and talk about this."

Dan said, "Yes." She asked what they offered and he told her they offered twenty years.

She said, "I hope you told them to shove it."

He said, "Oh yes, we did."

Dan reported this to me and I said, "Does that express the position of the convening authority, or of Hemingway, since she is on Hemingway's staff? Or is she just speaking to you privately?"

He said, "I think the former, that it's an encouragement to take a harder position on our negotiation and that there is momentum within the administration to do better, or that we should try to go around Davis in some way."

We are preparing for the first proceedings of the new commission in front of Colonel [Ralph H.] Kohlmann, the Marine. We are preparing the *voir dire* to question him about his conflicts and his

background. This is a guy who wrote an article objecting to the commissions when they first came out in 2003 in a Marine publication. Of course, when he got the job as chief judge, then they're okay. It was real naked ambition as far as I could tell.

He was the first judge in the 9/11 cases too. He claimed to be a stickler for rules, yet began acting as the judge in the case before he was actually appointed by issuing orders to the party. Dan says, "There's some material that General Hemingway's office has made available to us about Kohlmann's background and service record that we are entitled to as part of the *voir dire*. I can go pick it up as opposed to having them send it over by inter-office mail, and see if I can engage a conversation with someone about where we should be going with this."

This is literally the Wednesday of the week before we are due. Our first court appearance is going to be on a Monday, March 30, I think. I say, "Go, go, let's see what comes up." So Major Mori goes over to General Hemingway's office, and low and behold, General Hemingway is there. Major Mori engages him in a conversation and Hemingway says, "How's this? He goes home in sixty days and then does another three months in Australia and done." I forget—it may even have been better than that when he offered it first. Dan comes back to me and he says, "Let's get it in writing. You know, if we can get that in writing, we've got ourselves a ballgame here."

That was Thursday night. I was going to go down Saturday because we had a conference with the judge on Sunday. When I get there, we have an agreement from the government in writing.

Now it's not the same. It's a little bit more time. And, "I have never been tortured. I will never speak—I won't speak about it for a year," and all these other things. We had the two Australian lawyers there, and we had Dan and myself.

Q: The long and short of it is, you worked that out.

Dratel: Yes.

Q: And Hemingway was of big importance there.

Dratel: Absolutely.

Q: When you refer to Judge Kohlmann, you are speaking about a judge in the military commission?

Dratel: Correct.

Q: What Hicks pled to in late March of 2007, that he has never been illegally treated by anyone in U.S. custody and that he is an unlawful enemy combatant, I assume those are conditions for his release?

Dratel: Just to give you an idea about that, after the group reading of the proposed agreement that we had on Saturday night, we had ten material objections. I communicated them to Hemingway

the next day in a telephone conversation. We had a long telephone conversation where I was on the phone with him, to close the deal, and I related all ten of our objections. He said, "I'll get back to you." He got to me about three hours later. They agreed to nine of them. The only one that was non-negotiable was that paragraph.

Q: Now, in short, what was he pleading guilty to?

Dratel: He pled guilty to material support. He did not plead guilty to attempted murder. He only did specification one.

Q: Okay.

Dratel: I was not there for the plea.

Q: Okay. But he got out. For the record, where is he these days?

Dratel: He's back in Australia. He's married and living his life, trying to stay under the radar on a certain level. He did publish a book, but he's not out there on a speaking tour. He's not like Mahmoud Habib, the other Australian, who had a different experience.

Q: When we spoke before about this Detainee Treatment Act, not only did it prohibit cruel and inhuman, degrading treatment, which had—at least as far as Gitmo goes, I'm not talking about black sites or Bagram—diminished.

Dratel: I would say this. I would say that by the time I was there in January of 2004, and certainly by June of 2004, which is when other lawyers began to go—

Q: And after Abu Ghraib.

Dratel: Right. Exactly. That it was no longer the policy at Gitmo for there to be detainee abuse. If detainee abuse occurred, which I'm sure it did on some level, it was individual and unauthorized at that point.

Q: But, the Detainee Treatment Act—

Dratel: When I say abuse, I mean physical abuse. There were other things that were policy oriented that were abusive. But that's another thing.

Q: The Detainee Treatment Act stripped the federal courts—U.S. federal courts—of jurisdiction to hear habeas corpus petitions from Gitmo. Is that correct?

Dratel: It attempted to do that, yes.

Q: But the *Hamdan* decision in 2006, which invalidated military commissions, that did not—

Dratel: Invalidate the DTA?

Q: Address the issue?

Dratel: Correct.

Q: Well, no. Did it not hold that the Detainee Treatment Act of 2005 itself could not bar the federal courts jurisdiction of pending habeas corpus petitions?

Dratel: Right. But Hamdan was in a different situation as well because he had a pending commission. There was always a pending military commission in which he was a defendant. You could always challenge the jurisdiction of a court. That's just one of the things that you can always challenge.

Q: But my point is that, is it correct that it was not until the *Boumediene* decision in 2008 that the Supreme Court finally said no? What did it say?

Dratel: It said that the DTA was unconstitutional to the extent that it barred habeas.

Q: And therefore?

Dratel: Therefore, Guantánamo detainees could challenge their detention through habeas corpus. However, they provided very little guidance, which is why the D.C. Circuit has had a field day in basically circumscribing the ability of detainees to get released.

Q: Okay, but didn't it also lead to yet another iteration of military commissions with the new Military Commissions Act of 2009?

Now your man Hicks is gone. So we can forget Hicks. In 2009 there's a new military commission, right?

Dratel: It proved the wisdom of Major Mori's remark to me. We were debating about David's situation. I always believed that, ultimately, the military commissions would, and still will be, invalid and there will never be a valid military commission conviction under the system that we've had, or the system that we have right now. I was always ambivalent about David pleading guilty to an illegal system and having that stigma, although I understood the advantages to him personally. I always wondered whether we shouldn't stay the course.

Dan Mori said, "What we'll do is we'll win the commissions, and they'll have another commission and David will still be in Gitmo, whereas if he does plead guilty and gets home, he will be home. Then when they invalidate the commissions, none of the commission stuff will matter anymore because it will have been invalid in the first place. So it's a win-win." And he was right, because if David hadn't plead guilty, he'd still be there awaiting the next iteration of commission proceedings.

Q: I want you, again, to treat this as the good lawyer you are, and fairly describe in its essence, what the difference is between the military commissions that George Bush authorized on

November 23, 2001 and the military commission that exists today after the Military Commission Act of 2009?

Dratel: Obviously there are a lot more rules. Some of them are too many. It's almost as if they try to regulate the color socks you wear, and you can't do that. That's more of a practice-oriented complaint than substantive. The nature of what is admissible evidence has been narrowed somewhat, on behalf of the detainee. The detainee's protections, in some of the important areas such as self-incrimination and the right not to testify, have been moved closer to the constitutional level of protection that we enjoy in the United States in criminal cases. There have been substantive reforms, particularly in the 2009 edition, which was Obama's attempt to keep military commissions while at the same time pretending that he was adhering to his campaign position of being against them. It was as if he were saying, "I was against the ones that we had there. But now these are new and improved."

Q: Well they are new and improved, aren't they?

Dratel: Yes, but they are still not legitimate. That's the problem. They still have ex post facto problems. They still create liability for offenses that are not crimes under the law of war, and particularly at the time that they were committed.

Q: Such as material support?

Dratel: Yes, and conspiracy itself, which is what people get charged with. They still do not address the fundamental question of what is a prisoner of war versus what is a war criminal. They still have some fuzzy language about coerced evidence that really is going to be done on a case by case basis—judge by judge. They do not have an iron clad prohibition on evidence generated by torture.

The practice of the commissions is really the dangerous part. Because in the 9/11 commissions as a model, the military commissions and the judges in the military commissions—I won't put them all in the same basket—and the Department of Defense as a whole has gone even further in the last few months in the direction of, “If the rules are going to be made fairer, then what we have to do is emasculate the defense function so that the detainees don't have real lawyers and don't have the ability to mount a defense.”

There is a proposed protective order that came out about two weeks ago by the convening authority that applies to all lawyers which says that you have to get preapproved every document you want to bring in to show your client preapproved by a team at the Department of Defense. That means the government reads it and approves it. There are all sorts of transparencies that are one-way towards the government. Even if that privileged team has integrity, which in my experience is not always the case, you can't rely on it. There is no self-policing mechanisms. There is no mechanism for policing it or supervising it or oversight. It is all on the honor system for the government.

Even assuming that privileged team has integrity, can you imagine your client is a detainee at Gitmo for seven to nine years, and you're a uniformed United States officer, lawyer, going in to represent him? You say, "I'm a member of the military that has imprisoned you for the last eight years without charge. In your military commission, as a condition of my representation of you, everything I bring to show you has been read by the other side. But don't worry, it's a privilege team and they haven't looked at it and given information to the prosecutor." What kind of relationship is that between a lawyer and a client? It's no relationship at all.

The Department of Defense has sent a directive to the Office of Military Counsel Defense saying that they take a position that they have the authority to electronically conduct surveillance on all of your electronic phone and email communications regardless of whether it is privileged, regardless of whether it is lawyer-client. "Please sign here to acknowledge that you agree." This is what's going on.

Convening General Susan Crawford had millions of dollars at her disposal for purposes of resourcing these cases. She granted one defense request for experts—out of thirty to fifty—denied all the rest. She regularly denied defense requests for experts and mental exams. She would rule, "That's not necessary. That's not relevant."

Q: When? At what point?

Dratel: 9/11 cases, the [Omar Ahmed] Khadr case, all these cases. All the cases that were going on. You know, it's funny. Obama said in January 2009 the military commissions should be

stayed. Well, they just kept going on, some of them, as if he never said that. I don't know who's in charge. Really. It's like a little shadow government. It's like Pakistan.

Q: Perhaps this is a good time just to point out that Hicks was the first person who took a plea deal and was convicted in a military commission. Hamdan, who had been a driver, supposedly, for Osama bin Laden—

Dratel: He went to trial.

Q: He went to trial and was cleared of conspiracy, was he not?

Dratel: Yes.

Q: That was again military commission. He won, would you say?

Dratel: I wouldn't say he won because he got convicted of other charges. I would say that he did real well. He was sentenced to time served.

Q: Yes, he won but then he was convicted for providing material support. Now he won and he lost?

Dratel: Yes.

Q: He was cleared of conspiracy,

Dratel: It was a mixed verdict.

Q: Convicted of material support. And that was in 2008.

Dratel: The win is the sentence.

Q: I'm talking about George Bush's period. Al-Bahlul, he didn't even mount a defense, right?

Dratel: Right. He said, "I'm Al-Qaeda. Thank you very much." I was there when he said that.

Q: All right, are those the only three?

Dratel: No. Khadr. Well, Khadr never went to trial. Khadr ended up making a deal.

Q: Were those the only three that went to trial that they were convicted during George Bush's administration?

Dratel: Yes.

Q: Three military commission decisions.

Dratel: Yes.

Q: Three.

Dratel: Yes. Correct.

Q: In President Obama's administration so far, [Ibrahim] al-Qosi, who was the sometime chef for bin Laden—

Dratel: He was one of the original four. The original four arraignments were Hicks, Hamdan, al-Bahlul and al-Qosi in August of 2004.

Q: Okay. Al-Qosi, he also took a plea, right?

Dratel: Yes.

Q: And Khadr, who was fifteen, I think, at the time when he was captured, he also took a plea.

So there is a lot of pleading going on here to get out of that place, right?

Dratel: Just like there is in every criminal justice system, but yes.

Q: But can it be that these are the only five in all this time?

Dratel: Yes. It's funny because after Hicks I got about a half dozen phone calls from lawyers representing guys in habeas who have not been charged saying, "How do I get my client to get charged and plead guilty so I can get out of here?" They said, "My guy would plead tomorrow if I could get him out of here."

Q: Look, they had 779 people at Guantánamo Bay at the height. They got five convictions in this military commission, so maybe all this jawing about military commissions—even including what's in today's news—is just much ado about nothing because nothing really happens.

Dratel: Only because we jawed about it were these people not railroaded en masse. That's like the anti-affirmative action argument saying, "Look at all the progress we have made. What are you getting all upset about?" Well, if people didn't get upset about it in the 1950s and 1960s, nothing would have happened.

Q: All right. Do you know who Robert Chesney is?

Dratel: Yes.

Q: Robert Chesney, professor of law at the University of Texas, is he a smart guy?

Dratel: Smart guy. I would consider Chesney a moderate.

Q: Moderate. That's what I'm getting at really. When he says that the 2009 iteration of the Military Commission Act brings it closer to conformity with the standards associated with court martials and civilian criminal trials.

Dratel: I can't argue with that.

Q: It is just that there are plenty of things that still bother you?

Dratel: Yes. There may not be plenty, but the few that do exist are core issues. That is the problem. We've just kind of whittled it down now. We've eliminated some core issues but we still have some core issues left.

Q: Now, since we are laying it now on the Obama administration, we might as well remark that today Attorney General [Eric H.] Holder [Jr.] announced that Khalid Sheikh Mohammed, who is widely described as the mastermind of 9/11, is going to be tried before a military commission at Gitmo. He and four others, right?

Dratel: Yes.

Q: Now, I have the impression that he has already said any number of times, "I am the mastermind. I did it." Right?

Dratel: Yes?

Q: Isn't that enough?

Dratel: For?

Q: Well, the guy's admitted it, right?

Dratel: Well, I don't represent him and I'm not speaking for him. I will speak in the abstract. If someone called me tomorrow and said, "Would you represent this guy? And what's your strategy for the case?" it wouldn't be the first time that I have represented someone who was alleged to have confessed about something that they did not do. They confessed either because of the treatment received or because of the psychological abuse. To the extent that he has done it since then, either in the clean team FBI interviews in early 2007, or what he said in court in the military commission process already.

Let me put it to you this way. Given the cultural issues that are involved in Islam and modesty and martyrdom, is it possible that after what he has been through in the context of his treatment at the hands of the CIA and at black sites, at the United States as a whole, he would rather die than defend himself in this case? I have to tell you, in the United States, in capital cases, defendants say that all the time. There has not been a capital case that I have been in that was a serious capital case—meaning some prospect of the government seeking the death penalty, or in cases where the government has sought the death penalty—where my client has not said, "I'd rather just die than plead guilty and do life in prison. I'd rather die than put my mother on the

stand in a penalty phase hearing.” Maybe he would rather die than go through reliving the treatment that he went through.

Maybe he’s admitting it because he’s protecting others. Maybe he’s admitting it because he’s self-aggrandizing himself and that’s what he’d like to be. Now, to take it out of the abstract for second, he said it on Al Jazeera before he was ever apprehended. You don’t have to give a guy Miranda rights before he goes on Al Jazeera. All this hubbub about Miranda is a joke because he and bin al-Shibh gave interviews to Al Jazeera. He had already had an indictment for Bojinka. They could convict him six ways to Sunday.

Q: All right. But look, Hicks said, “I am an enemy alien and I did this and that,” so he could get out of there, right?

Dratel: Right.

Q: Right. Now Khalid Sheikh Mohammed, if he says that—?

Dratel: He doesn't get out.

Q: It's not the same.

Dratel: Maybe he'd rather die than sit there his whole life or go through that anymore.

Q: Yes. That's interesting but there are different categories of people down in Gitmo. When Obama took over, it was down to 170—two hundred and some. Now it is down to like a hundred.

Dratel: 179, I think.

Q: 179 people down there. Now, in one category you've got people who are approved for release.

Dratel: Oh please. It's the great scandal that is so under the radar it's really an abomination on the United States and its moral authority.

Q: What's a great scandal?

Dratel: That there are eighty-nine people cleared for release who sit there. It's as if you got arrested and you were put in jail and they put your case in front of a grand jury, and then they decided there was not sufficient evidence and they did not release you. That's what's happened. DOD, DOJ [Department of Justice], FBI, CIA, DIA [Defense Intelligence Agency]. All these intelligence, military, and law enforcement agencies have cleared these people and they are there at Gitmo. Why? They are hostages. They are kidnapped effectively. They are kidnapped by Republicans and Democrats who have now made the cause celebre the notion that you cannot repatriate fifty guys to Yemen, as if that bends critical mass towards jihadism in Yemen, which is a joke.

Q: The point you're making, though, is that Congress has made it more difficult for these people to be released.

Dratel: Yes, but the president says it's not constitutional. He had the authority to act for a year and didn't do it. He still has the authority to act. If we woke up tomorrow and he said, "By the way, I just sent the fifty guys back to Yemen," what are they going to do? Bring them back? He could have done it the next day. Even after the Christmas bomber, even after the Underwear Bomber [Umar Farouk Abdulmutallab] and all that nonsense. That's why, because he came from Yemen. So we can't send anybody back to Yemen now. It's really a joke.

Q: Most of these are Yemenis, are they not?

Dratel: I think fifty. Some are Algerians.

Q: So that's one category, people approved for release. Then you've got people who are going to be designated for these military commissions.

Dratel: Right. That's about two or three dozen.

Q: That's right, three dozen or so. Then you've got another category of people who've been designated, during the Obama administration, for indefinite detention, right?

Dratel: Correct.

Q: First of all, this is beginning to sound a lot like the Bush administration, no?

Dratel: Of course. It's Bush lite.

Q: Jack Goldsmith?

Dratel: He's so happy he's beside himself. The *Wall Street Journal*—Bush wins. It says, “Obama validates Bush.”

Q: But Karen Greenberg says basically the same thing, does she not?

Dratel: I'm not disagreeing. I'm not disagreeing, it's just painful. It's painful, given the hopes.

Q: I'm a novice at this. A guy like Khalid Sheikh Mohammed, now he's going to go to a military commission trial.

Dratel: You know what the irony is, but go ahead, I'll tell you.

Q: Then he's going to lose and he'll be held forever, or whatever. Even if he won though—

Dratel: He would be held forever.

Q: He would be held. Now who—if it isn't Khalid Sheikh Mohammed—is in this category of indefinite detention?

Dratel: It's guys for whom the evidence of their involvement is predominantly their own statements produced by coercive, torture interrogations. For example, there's Mohamedou Slahi, who won his habeas, and it's being argued in the Circuit. I think they may have lost already. I don't know. It did not go well in the D.C. Circuit. Nobody expects him to win. They may have already lost in the Circuit, I can't remember. He is a Mauritanian who is just held there. They know they can't try him. There was a big story in the *Wall Street Journal* three years ago. Have you ever heard of Colonel Stuart Couch?

Q: Yes.

Dratel: He's a guy who refused to prosecute this guy because he was tortured. He said he wouldn't do it, so they're in limbo about it. There's [Mohammed] al-Qahtani, who even Susan Crawford said was tortured, and the distinction that most people point to—

Q: Said could not be prosecuted.

Dratel: Most people say, "Why him and not Khalid Sheikh Mohammed?" It's because al-Qahtani was tortured by military officers and she is military. She was not going to discipline the CIA or the intelligence agencies that committed the torture, but she did feel a compulsion to discipline the military people who did so.

Q: But why not bring these kinds of people also to military commission? Have them appear before something?

Dratel: I think they feel that, even under the new military commission rules, they couldn't sustain a conviction because they don't have enough independent evidence to even make a case.

Q: And that is not true of Khalid Sheikh Mohammed, who was water boarded how many times?

Dratel: 183. He literally did confess on Al Jazeera. There was other evidence that may or may not have been coerced that puts him in the mix. There may be other evidence with respect to Khalid Sheikh Mohammed. There was also his interrogations in 2007. The thing to try to get in is not the fruit of the interrogation.

Q: Now, Josh, look.

Dratel: I don't think they could. I don't think politically they could, because of 9/11 and the families and the exploitation and the reopening of that scab every fifteen minutes by the newspapers or the politicians. They couldn't withstand the bad publicity from 9/11 families and their fellow travelers if they didn't try the 9/11 people somewhere, because they want the death penalty. But of course, putting them in a military commission, you're almost guaranteeing that they won't be put to death because if you plead guilty in the military commission they can't put

you to death. You can't get the death penalty under the current rules if you plead guilty. These guys want to plead guilty, but they also want to die, so what do you do?

Q: If it were true that so far, despite his campaign pledge to close down Guantánamo, these critics say that what has happened now at Guantánamo is in effect Bush lite. Why has that happened?

Dratel: I see four factors at work. I will dispense with the first one because it is giving the devil his due. It's more complicated than just saying it. There is no doubt that the logistics of repatriating people and what to do with the ones you do not repatriate is problematic. The fact that it didn't take a year didn't surprise me, and it didn't affect my confidence in the decision making ability. When January 22, 2010 came around and Gitmo was not closed, I didn't say that was a complete failure of policy. I realized it's a little harder than it looks.

Q: Like governing is harder than campaigning.

Dratel: Yes. Factor number two—I'm going from most charitable to least charitable excuses—the second one is one issue of many that are important to this country—"I'm not going to expend the kind of political capital on Gitmo that is going to render me incapable of the other reforms that are vitally important. Mr. Citizen, Mr. Democratic Voter, or Obama voter, Independent voter, and you who think that Gitmo is of paramount importance, I'm going to ask you this—do you think if I spent all my time closing Gitmo and didn't get health care passed, and didn't get a

financial monitoring bill passed and the economy was still down the tubes because I was concentrating on Gitmo, is it worth it to you or not? Tell me where I make the choice.”

However, there is a third reason which is basically he is not an executive by training, and he has not really acted like an executive for most of the time. And by that I mean by acting. For example, when there was a hubbub about Yemen and Umar Abdulmutallab, everybody should have awakened the next morning and all those guys should have been in Yemen. There is nothing that anybody can do about it and it's a one week story a year and a half before the midterm election. Who cares?

They also made a terrible mistake by announcing the 9/11 case in New York before they were ready to move them here. They should have announced it the day after they moved them here. They should have said, Khalid Sheikh Mohammed and the other four defendants in the 9/11 case are in the MCC [Metropolitan Correctional Center] or in a secure location, whether it is Stewart Air Force Base or Otisville, somewhere where they feel more secure. I don't care where. That's immaterial. But they would have been saying they have already been transferred to the United States for trial. That would have been the end of the story. There would never have been this outcry last January and February because they would have been here. It would have been okay. The sky would not have fallen. Just like the sky was not going to fall because [Ahmed] Ghailani got prosecuted in federal court in New York.

They had problems acting. They had problems exercising. To me, the irony is that we went through a president who, for eight years, exercised authority he did not have. Now we have two

years of a president not exercising authority he unquestionably does have. He lets Congress pass a law that is clearly unconstitutional, and when I say, "let them," they opposed it half-heartedly at the very last minute. There was no groundswell of twisting arms. You know, it's not Lyndon Johnson time. You sometimes yearn for the Lyndon Johnsons of the world who know how to exert leverage on people in their party to get things done. I'm not going to say that that's not an effective way of governing.

Q: What's the worst way of looking at it?

Dratel: The worst way of looking at it is part number three, and it's the idea that it's a craven attempt to satisfy the far Right and the near Right and those who have a shrill opposition to federal trials, the hysterics, the fear-mongers, the Peter Kings, and all those people. It's a cynical, calculated, political decision that says the following—I can't say it's inaccurate, but it's still cynical and calculated and wrong—that there's no constituency for doing it the other way. In other words, who am I going to vote for? Am I going to vote for Sarah Palin or Tim Pawlenty in 2012 just because Obama did this? He knows that and so he won't fight for it. He doesn't have the will. He figures he can't be weak on national security. He'll be pilloried for it. The only thing that could happen if he stepped into federal court on political is bad.

Q: Would you say that outside the issue of Gitmo, per se, but related to the War on Terror, as was mentioned—

Dratel: Same thing.

Q: For example, in the Jeppesen Dataplan case where the Obama administration has also argued for state secrets, so that lost in the Ninth Circuit. The ACLU lost because they could not go any farther.

Dratel: Right.

Q: The wiretapping?

Dratel: Now that is back up again from the Second Circuit last week. I was a sub-plaintiff in that first one in Michigan that got dismissed for standing in the Sixth Circuit affirmed two to one, the dismissal on standing grounds.

Q: But would you say the Obama administration's position with regard to warrantless wiretapping—

Dratel: It's no different in practice. They're not saying, "We don't have the authority to do it." They say, "We will use it judiciously. Trust us because we are better people than the people before. We are not as extreme as they are." I think that affects courts, by the way. I think one of the reasons why Gitmo litigation has not been successful, by and large, in the Supreme Court during the Obama administration, while successful in the Bush years, is that the judges really had a sense that they were the court of last resort in the Bush administration. Here they feel like,

“The president's reasonable. We don't have to worry. He is nuancing the policy. They're releasing people. They're making decisions based on the merits.”

Q: Well, but speaking of the Supreme Court.

Dratel: The composition has also changed, obviously.

Q: But there's something here that's a little more nuanced, perhaps the general public as you alluded to it before. I was reading Colonel David Frakt's testimony before Congress in the summer of 2009 in which he makes a very interesting point. Frakt, who was a defense attorney before in the military, says that if he were to bring the charges against the people that were up for military commissions, ninety-nine percent of them do not involve recognizable war crimes and virtually all the defendants are charged with non-war crimes, primarily criminal conspiracy, terrorism, and material support to terrorism, all of which are properly crimes under federal criminal law, not laws of war.

Dratel: Correct.

Q: So what does that mean? Does that mean that they are trying these people for military commissions on invalid charges that ultimately end up in the Supreme Court somehow?

Dratel: Yes.

Q: And the Supreme Court will have to decide, was this all a waste of time?

Dratel: Yes. We are back to where we started in 2004.

Q: It's hard to believe.

Dratel: It is hard to believe, but yet we are seven years down the road.

Q: But can they not charge them with some things that are?

Dratel: Not most of them, because most of them are not close to war criminals. They didn't kill civilians. They weren't even on the battlefield. Remember we had the battlefield conversation last time? They weren't on the battlefield by any stretch. There are other technical aspects to the law of war. They can't be tried out of a theater. There are a thousand little things.

Q: The point is that these people were here before the military commissions and one of them did not defend himself while the others made plea bargains, so this issue did not arise in those cases.

Dratel: No. We never appealed. Hamdan's got an appeal, al-Bahlul too. Al-Bahlul's was just argued, I think, or it's going to be argued.

Q: In other words, this is a live issue.

Dratel: Yes, but by the way, since Hicks—just so I’m not speaking solely based on my experience with Hicks because—I have been a consultant for the John Adams Project, which was the ACLU-NACDL joint effort to find civilian lawyers to help the military commission in the military lawyers' defense in the high-value detainee cases.

Q: Right.

Dratel: So the 9/11 cases, al-Nashiri—not Abu Zubaydah—does not have a commission but he’s got his own lawyer. I’m intimately involved with a lot of stuff that has gone on in the past two and a half years as well, three years.

Q: Is Frakt off the mark? Or am I misreading it?

Dratel: No. No, no, no. You’re reading it correctly.

Q: This could all blow up in the Supreme Court over the wrong charges.

Dratel: Yes. The Military Commission Act of 2009 even alludes to that, in the sense that there is a passage when they talk about conspiracy. It's either the legislative history or the conference report that says, “We are putting this in there and it’s up to you guys to decide whether this is really a crime or not under military law. We'll give you the option.”

Q: Make the case for the advantage of trying these people in civilian courts, like Ghailani was.

Dratel: For who? For defendants or for the government? I'll do it for the government.

Q: Advantages of civilian courts.

Dratel: Okay. Transparency. There are two advantages of transparency that are under-appreciated unless you've actually been at trials and understood what happens in them. The public doesn't understand what it's like to not have them because they're so used to having that. They don't understand. And you were a court reporter, right? You know what I mean, a courthouse reporter or a crime reporter?

Q: No, I wasn't.

Dratel: Well, something got you involved. [Laughter] You were a metropolitan reporter? What were you? What was your beat?

Q: General investigations.

Dratel: Really? But in any event, it took you in this direction a fair amount of time?

Q: It certainly did.

Dratel: Transparency is two-fold. One is process so that you can hold it up to the world and say, “This guy had his day in court and we proved his ass guilty in a fair way,” that should give you confidence that the verdict is correct and that the punishment we mete out is proportional. The second part of the transparency is the facts themselves. I absolutely believe—and no one has ever been able to challenge me on this because it’s true, because I was there—but on the eve of the embassy trial, when it was gearing up in the latter part of 2000, to be tried in the beginning of 2001, we had a lot of reporters coming up and talking to us. They were preparing to cover it. There were not as many as would cover it today, but there were enough. Many were skeptical about the notion of Al-Qaeda at all. That Al-Qaeda existed, that it was not a figment of the U.S. imagination, that it was not a creature of the U.S. designed to create a substitute for the Soviets now that there was no superpower enemy. They were skeptical.

After that trial, no one could say there was not an Al-Qaeda with a straight face. No one could say that there was not an Al-Qaeda that was dedicated to the destruction of the United States, that was anti-western, had an extreme ideology that it was willing to support by terrorist violence. When 9/11 happened I believe—this is the part that is subjective but I believe it is true—that 9/11 would've been a very, very different outcome in, let's say, the two months after 9/11. From the Authorization to use Military Force through the invasion of Afghanistan. Right?

Q: Right.

Dratel: That final third, the final quarter of 2001, would have been very different without the embassy trial as a template, a public template, for assigning responsibility to Al-Qaeda and Osama bin Laden.

Q: But you're saying that's a civilian trial.

Dratel: That's a virtue of a civilian trial because they are open, they are clear, they are public. In the military trials, they've done everything they can to keep the press from reporting them in any meaningful way.

Q: The press can go to those trials?

Dratel: No, but they can't report on stuff. Carol Rosenberg, she mentions a guy's name who has been mentioned in public twelve times and all of a sudden—and also they turn off the thing, you know, when they don't like what's going on in the court room. They turn off the sound. There's a delay mechanism. I once was talking to a reporter casually outside one of the camps and they came up and they whisked her away. They had to remind her she was not allowed to talk to me.

Q: Right, I hear you, but listen. People say look, they say Ghailani was acquitted in federal court here in New York the other month of 284 counts and convicted of only one count.

Dratel: Right. Why don't you think that that's a reflection on the evidence rather than on the system? It's a reflection of the evidence. Do you really think that if those twelve people believed

that this guy was responsible for killing 224 people, they would not convict him? Do you think they are all Al-Qaeda sympathizers? It's crazy. I've said about Khalid Sheikh Mohammed—they'd say, "What if Khalid Sheikh Mohammed gets acquitted?" If Khalid Sheikh Mohammed gets acquitted, he must be the most innocent guy ever if he got acquitted. If you can't convict him in front of a jury of New Yorkers, I don't know who you can convict.

You know, Stanley Friedman had an eighty-nine percent negative recognition factor when we were going to try that case. That's part of the reason why we moved it to Connecticut, which was probably a mistake in the long run, just looking at it in retrospect. The point being that Khalid Sheikh Mohammed's got to be one hundred percent.

There are other virtues of civilian trials, such as resourcing, My position is that when you have the most serious charges with the most serious stakes for the defendant, that's not where you dilute the protections so that you might get it wrong. That's where accuracy and reliability are most important.

Q: You know, speaking of resources, the curiosity that in March of 2007 there was a hearing for your client, David Hicks, in Gitmo. And more than ninety, according to Colonel Dwight Sullivan, who was a chief defense—

Dratel: He was the chief defense attorney. Yes.

Q: In the Gitmo proceeding, more than ninety people had to fly from Washington to Gitmo aboard at least three different military flights to take part in and observe the hearing. The only trial participant who was at Gitmo already, who did not have to fly anywhere, was Hicks himself.

Dratel: Right.

Q: That doesn't sound very economical.

Dratel: It isn't economical. The money they've wasted at Gitmo is crazy. It would cost less here. Civilian trials would certainly cost less too. Frankly, from a government perspective, the sentences in civilian cases have always been longer. Sentences are much more severe in criminal cases. An individual lawyer might find that the military commission is better for their client because a military jury may be less inclined to give the death penalty for a variety of policy and other reasons. I'm not talking about 9/11 guys necessarily, but in other cases. Reciprocity is a very important issue for the military. Nobody wants to be out there subject to the same kind of arbitrary treatment. Nobody wants U.S. soldiers to be treated the same way as we've treated combatants in this conflict. For example, if they caught a Special Forces guy, he's not in uniform. He's an enemy combatant. We can just hold him forever and not try him. We can execute him or whatever we want to do with him. We don't have to worry about the Geneva Convention because the United States doesn't abide by it.

Q: Speaking of these convictions, there have been five people convicted by military commission in Guantánamo, most of them pleading out. We've already said that. Since 2001, there have been

nearly four hundred terrorism convictions in federal court, but actually, most of those are like terrorist-related kind of charges.

Dratel: Yes. They are put in the terrorism bin for a variety of reasons, both bureaucratic and political as well as legal. In other words, bureaucratically, you get more money. They throw money at terrorism cases, so if you can make your case a terrorism case, it's good.

Q: What would you say is the terrorism conviction rate in real terrorist cases that have been tried?

Dratel: In federal court?

Q: Since 2001.

Dratel: It probably so closely resembles that for ordinary cases that it's probably not distinguishable on a statistical basis. In other words, there are some acquittals. It's just hard. The ordinary prejudices against defendants are multiplied dramatically. When you talk about New York, it's one of the worst jurisdictions to try a terrorism case, where it might be one of the best jurisdictions to try many other types of cases.

The ninety people that went down to Gitmo, it reminds me of Bull Run, where all the people went down in their carriages to watch the war. Then they had to come scurrying back when the

Union was in retreat. A lot of it is voyeurism, that the ninety people that they needed down there all wanted to come and watch the entertainment.

Q: Right, I see. You have to admit, there have not been any attacks on U.S. soil since 2001, right?

Dratel: That's correct.

Q: Well, credit Bush?

Dratel: For that?

Q: Credit the government?

Dratel: Some credit goes to the government. However, it's like the old days of chemotherapy where we killed the cancer and the patient too. But, you know, we killed the cancer. We were successful in killing the cancer. So it comes at a very, very high cost. Think of the overkill factor of it. We criminal defense attorneys always joke about the proportionality of punishment and the offense. Not all lawyers know this but it goes back to Cesare Beccaria, the philosopher, in terms of proportionality and how you look at that. If gridlock were a capital offense, there would be a lot less gridlock, but should gridlock be a capital offense? I mean, besides when you're actually driving your car, in which case you would say, yes, it is a capital offense. But you know what I mean.

Q: I do.

Dratel: The overkill part of it is what's the problem, and also the innocent people that get swept up in it, and the enduring stain that it has. I will say that as far as torture is concerned there is zero evidence, and in fact the credible evidence is all to the contrary, with respect to what you said about no attacks since 2001.

I would say there are some real hardcore, identifiable improvements in U.S. security that have nothing to do with any of these controversial methods. One has been immigration enforcement, in terms of stopping people from coming here, and not giving out visas to people, and doing conduct profiling. This means examining people whose travel history is suspect, examining associations or people who come in with a clean passport because they've lost their passport. In many ways, that was a sign that they have been to Afghanistan or Pakistan and didn't want to show it on their new passport or on their visas when they came to the United States.

Q: Although, a few years ago you had this guy flying from Africa who tried to blow up the plane near Detroit?

Dratel: Right.

Q: I think in 2005.

Dratel: No, 2009.

Q: Now that plane would have blown up, except the fact that he was incompetent or had incompetent materials? That would have been an attack on American airspace, would it not?

Dratel: That's part of why, when I say the government gets credit partially, one of reasons government does not get credit is that is hard for people to understand this because Al-Qaeda and terrorists have been made to be these supermen with magic powers, who can chew through hydraulic lines. The fact is that my version of Al-Qaeda is the phrase "even a stopped clock is right twice a day." Al-Qaeda will achieve successes, not because of some underlying competence, but because of sheer persistence.

Despite all these great things that they put into place, somehow that Detroit guy got through, even though his father was trying to give him up. Part of that is the circle is too wide. In other words, they said, "We have to expand the no fly list." No, I say reduce it, because by reducing you'll find guys like that instead of losing them in this giant mass of people who don't belong on it. People don't realize it's a finite world with finite resources. People think you can wiretap everyone every day and get all this intelligence. Bullshit. They can't listen to half the stuff they have. They were fifty thousand hours of Arabic conversations behind in 2005. Where do you think they are now?

Q: In this whole discussion of Gitmo, what is lost is the fact that there are thousands of people still being held in Afghanistan and other places, perhaps under equal conditions.

Dratel: Or worse.

Q: As tough as the ones at Guantánamo, right? And that still goes on.

Dratel: Yes.

Q: For those people, one of the courts recently ruled that they do not have any right of habeas corpus in the U.S. courts. Isn't that true? Finally, having put you through all of this for hours on end, I'm going to make you president of the United States. I think that's only fair and I have that authority.

Dratel: Do I get a say?

Q: So you're president for a minute and you can do something about Guantánamo. What would you do?

Dratel: I can't go back in time, right?

Q: No, no. We just made you president.

Dratel: Certainly more could have been done two years ago than can be done today. Still, today, you would wake up tomorrow morning and you would find that we have repatriated all eighty-

nine people somewhere. We've found a place for them. They're not in custody anymore, period. You would wake up tomorrow and find that the 9/11 defendants, plus anyone else who we were going to try, would be in the United States designated for indictment in the criminal courts of the United States, with the exception of persons who committed actual war crimes. For example, there is a case for al-Nashiri being a war criminal, for attacking the USS *Cole*, a military target, by showing up in disguise with the intention of killing military personnel. That is perfidy, a classic war crime. You would also wake up tomorrow to find out that there was no military commission system that was created ad-hoc. It would be the UCMJ [Uniform Code of Military Justice], period. The court martial system would be applied to the military commission system, one hundred percent. Then there would be no question of legitimacy. There would be no question of what do we do now because there would be rules and ways of practice that existed. It wouldn't be a hodgepodge of systems like one of those horses or like old Volkswagen commercial with the car that was—

Q: Right.

Dratel: Whatever it was, I forget. The Kenyans describe a wildebeest a spare parts animal. It wouldn't look like a wildebeest. It would be the UCMJ. Let's see, what else what I do? I would revoke this whole Miranda exception that just came out last week.

Q: Close the place?

Dratel: Yes, as soon as I could. I would run the Defense Department. I wouldn't let the Defense Department run itself. I would make it part of my government, not a separate sub-government of its own.

Q: But then someone spews forth isn't going to happen, so "Obama should embrace Guantánamo." Embrace it and make it an example of how things should be done there.

Dratel: It can't be done. That's like saying, "Make Love Canal or Times Beach the perfect community to live in." It's toxic. It can't be done. It has too much baggage already. If you wanted to do it in Puerto Rico, you would have a better shot. Guantánamo is a word now. It's not a place anymore. It has a meaning. It's too late. We forfeited that opportunity.

Q: I gave you an opportunity to be president for a minute. You recall, what was the name of the first president? It was George, another George, Washington.

Dratel: Oh, you mean George Washington. Here's what else I would do. I'd prosecute torturers tomorrow as well.

Q: But would you prosecute people like John Yoo and Jay Bybee?

Dratel: It depends. I'm not sure.

Q: I mean you've been writing about—you've been after them.

Dratel: I'm not sure. I've never said categorically that I was in favor of prosecuting people for reaching the wrong legal conclusions. There would have to be more evidence of deliberate, but I'm also against over-criminalizing intent-laden crimes and post hoc.

Q: Yes, but you're not happy with the way they functioned.

Dratel: No. They shouldn't be professors and judges. Why would we reward them for this? Do you know what George Washington's first military order was as commander-in-chief of the United States?

Q: What was it?

Dratel: I shouldn't even say the United States. It was for the Continental Army. It was for humane treatment of prisoners.

Q: That's right. But also, he okayed military commissions, did he not? He had military commissions.

Dratel: In its day, they probably conformed with the due process that was consistent with the times. People will say [*Ex parte*] *Quirin* was 1942. Do you treat cancer the same way you did in 1942? Is that what you want to do, for example, bleed people because that was done in 1500? We

have made progress. The UCMJ was revamped twice since then. The Geneva Convention was ratified after that.

Q: The UCMJ, what makes you think they have authority? They handle courts martial of American citizens.

Dratel: I would go to Congress to get that. No, they've already authorized military commissions and they've given me enough discretion to do it the way I think is fit. I would have to make the rules. I'd be a little bit like Lyndon Johnson, which is to say, "You have two choices, Congress. Military commissions the way I want them, or no military commissions at all because I will shut them down. You either give me what I want or I will shut them down. And when you wake up tomorrow and the fifty Yemenis are back in Yemen, you'll understand that I mean what I say and that I will do it."

Q: You want a lot of sunlight thrown on this process. Maybe more than there is. I thank you, Josh Dratel.

Dratel: Oh, you are welcome.

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