THE BROOKINGS INSTITUTION

# ASSESSING DAMAGE, URGING ACTION:

# REPORT OF THE ICJ EMINENT JURISTS PANEL ON TERRORISM, COUNTERTERRORISM AND HUMAN RIGHTS

Washington, D.C.

Friday, February 27, 2009

ANDERSON COURT REPORTING
706 Duke Street, Suite 100
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190

PARTICIPANTS:

**Welcome:**

TED PICCONE
Senior Fellow and Deputy Director, Foreign Policy

**Moderator:**

BENJAMIN WITTES
Senior Fellow, The Brookings Institution

PANEL 1: PRESENTATION OF THE REPORT

JUSTICE ARTHUR CHASKALSON
Chair, Eminent Jurists Panel
Former Chief Justice of South Africa and first President of the Constitutional Court of South Africa

ROBERT K. GOLDMAN
Professor of Law, American University's Washington College of Law
Former UN Human Rights Commission Independent Expert on Counterterrorism and Human Rights

PANEL 2: WHAT THE RECOMMENDATIONS MEAN FOR U.S. LAW AND POLICY

JOSEPH ONEK
Senior Counsel, Office of the Speaker, U.S. House of Representatives

SUZANNE E. SPAULDING
Principal, Bingham Consulting Group LLC

SCOTT HORTON
Contributing Editor, Harper's Magazine
Distinguished Visiting Professor, Hofstra University

* * * * *

P R O C E E D I N G S

MR. PICCONE: Good morning and welcome to Brookings. My name is Ted Piccone. I'm deputy director of the Foreign Policy program here, and in a minute I will introduce our panelists, but first let me say a few words about the subject we've come here to discuss today.

Our event today brings us to one of the most controversial and challenging topics faced not only by the United States but by all states confronting terrorism. The question is how to reconcile policies and laws to counterterrorist violence with international and domestic human rights norms. Or put another way as it's addressed in the report, you'll hear more about how should state most effectively fulfill their duties to protect their citizens from violence and at the same time guarantee our fundamental rights?

President Obama spoke directly to this question when he said in his inaugural address, "As for our common defense, we reject as false the choice between our safety and our ideals." He vowed not to abandon the rule of law and human rights for expedience sake, yet he also invoked

the language of war. When speaking directly to terrorists, he said that, "We will defeat you."

In his first week in office, President Obama signed three Executive Orders that begin to apply these core principles to concrete outcomes and perhaps reflect this continued tension between the language of war and the language of rights. The decision to close the Guantanamo detention facility within a year, to shut down the CIA's secret prisons abroad, and to require all government interrogators to follow the military's interrogation policies no doubt marked the clear break from the recent past. But there is still a great deal of work to be done.

Interagency reviews are underway on how to resolve the over 200 cases of prisoners detained at Guantanamo, habeas corpus cases await argument at the Supreme Court -- or maybe not, as we learned this morning about the potential transfer of the al-Marri case to U.S. Federal Court in Illinois; the humane treatment of prisoners is again front page news after the Pentagon's contested report of conditions at Guantanamo; and the use of secret state evidence in trial continues to be heavily litigated.

At the heart of many of these thorny issues is a serious dilemma: How should any government handle persons suspected of committing terrorist acts when evidence in a court of law falls short. I'm sure that's one of many topics we will hear more of today.

In the midst of this raging debate, you have before you an important new study of the Eminent Jurist Panel on terrorism, counterterrorism, and human rights. Convened by the International Commission of Jurists, which is our cosponsor today, the panel of eight leading warriors and judges from around the world conducted 16 public hearings held over a three-year period covering 40 countries in all regions of the world. The report offers a powerful accounting of the impact of terrorism on human rights and the rule of law from the perspective both of victims of terrorist violence and victims of counterterrorist tactics.

The United States has much to learn from the experience of other countries in tackling the challenge of terrorism, and this report does a great service in collecting those lessons in one place and reminding us how they can conform to human rights standards. This report

is also notable for its treatment of the full range of questions posed by the threat of terrorist violence from military responses and emergency laws to the role of intelligence services, preventive mechanisms, and basic principles of criminal justice.

In the end, these jurists remind us, as we mark the 60th anniversary of the Universal Declaration of Human Rights last December, that protecting fundamental rights is ultimately the best recourse for an effective response to terrorism.

Let me explain how this morning's program will work. First we will hear more about the report from two of the eminent jurists themselves. The panel's chair, Justice Arthur Chaskalson, former Chief Justice of South Africa and first president of its constitutional court, and American University Professor Robert Goldman from the Washington College of Law, and former U.N. Human Rights Commission, independent expert on counterterrorism and human rights.

After the remarks, I will moderate questions and answers from the floor.

At about 10:45 we will convene a second panel of experts to discuss what the reports recommendations mean for U.S. law and policy with a particular focus on the what now questions facing the Obama administration. That panel will be moderated by Benjamin Wittes, Senior Fellow in Governance Studies here at Brookings. He will be joined by Joe Onek, Senior Counsel to Speaker of the House, Nancy Pelosi; Suzanne Spaulding, a principal with the Bingham Consulting Group and long-time specialist in national security law and politics; and Scott Horton, distinguished visiting professor at Hofstra University and contributing editor at Harper's magazine.

Again, thank you for coming this morning, and we look forward to a lively exchange.

JUSTICE CHASKALSON: Well, thank you very much and thank you for the opportunity to speak about this report. Let me begin by mentioning the other names. Two of us have been identified, but the other members of the panel. There were six other members of the panel: Mary Robinson, who was the former president of Ireland and the former United Nations High Commissioner for Human Rights.

Steffan Trekshor, who is judge on the International Criminal Court for the former Yugoslavia, and the former president of the European Commission on Human Rights.

Hina Jilani of Pakistan, formerly the United Nations Secretary General's special representatives on the situation of human rights defenders.

Justice Raoul Zafaroni, of the Argentine. He's a member of the Supreme Court of the Argentine, which is the highest court in that country, and he was formerly a director of the United Nations Latin American Institute for the prevention of crime and the treatment of offenders.

Professor Jorge Abisaab, from Egypt, an expert on international humanitarian law, formerly a judge of the Tribunal for the Former Yugoslavia for the war crimes there and also a member of the World Trade Organizations Appellate Body.

And Professor Vitos Muntiborun of Thailand, a professor of International Law there, and he's a human rights -- United Nations Human Rights Council, special representative of human rights in North Korea.

So you will see that the eight members come from different parts of the world, each having some experience in the subject of human rights and the rule of law.

The procedure that we followed was to conduct hearings in the different countries which we went to. They involved public hearings which people came to speak to us about their experiences and about their views on the topic. That included private meetings with members of government wherever we went, representatives of security organizations, and we received thousands of pages of written representations.

So the report that runs to 150 to 200 pages cannot possibly capture everything that we heard. It had to be read in the context of that inquiry and together with summaries of each of the hearings which are not included in the printed report but which are available on the ICJ website.

And what emerged from our study is that human rights standards that were brought up painstakingly over the second half of the last century in the wake of the Second World War are being eroded, and that there is a real danger

that if this continues, they will unravel and will undermine the international legal order of the United Nations which is premised on respect for human dignity and for fundamental rights, and also the various conventions which followed the adoption of the Universal Declaration of Human Rights in order to give legal effect to that legal order.

Now, the study which we undertook was a general study. It hasn't focused on the United States, but because of the influence in world affairs that it has, United States politics have been influential in what has happened in other countries and in the policies that have been adopted as counterterrorism policies in those countries, both at the national level and also international level where the United States influence at the Security Council and other organs has been very strong.

A chapter of the report has been diverted to looking at the United States policy, the war paradigm adopted by the United States, and as we are in the United States here, we will give special attention to that in the course of our comments this morning. But let me make some remarks, because I'm going to -- I will start, Bob Goldman

will make some comments, and then I will finish up by drawing attention to some of the recommendations that we have.

But let me begin by saying that we have no doubt that terrorism poses a severe threat to many countries. That is not an issue as far as we are concerned at this day. We also accept without reservation that it is the duty of states to protect citizens and peoples within their boundaries against that threat. But that is a recognized principle of international law; it is recognized by resolutions of the Security Council and the General Assembly, and we should debate whether or not there is a real threat. As far as we are concerned and as far as the report is concerned, everything we say is premised on the seriousness and reality of the threat.

But international law and also the resolutions of the Security Council and General Assembly require that the measures take to combat terrorism be done in accordance with established principles of human rights law and humanitarian law, and be in accordance with principles of the rule of law. And what we heard as we traveled around the world was that this requirement was not being complied

with. There was a familiar pattern showing that at the heart of most of the measures adopted by most countries is an intelligence-driven counterterrorist policy marked by secrecy, lack of accountability, and arbitrary action. And that comes through our report in each of the chapters, I think.

A product of these policies seen in different parts of the world is the detention of suspects who are held incommunicado, often in secret for long periods of time. Inevitably, as the lessons of history tell us, inevitably, this leads to torture and to cruel, inhuman, and degrading treatment; also if you put people out of sight, give them no access to the outside world, given them no access to lawyers, to doctors, friends and family, put them at the mercy of their captors, inevitably, torture follows.

I've seen it myself in my own country. We heard about it in other countries, the product of that paradigm.

We also heard about unfair trials sometimes conducted by military tribunals or special courts and not by the ordinary courts at which secret evidence is relied upon and confession extracted from detainees to secure their

convictions. We heard about the lack of accountability for human rights abuses and for impunity of those who committed them. We heard about administrative action such as detention without trial, immigration detention, expulsions and deportations based often on secret evidence not disclosed to the person against whom the action is taken.

And this, in turn, we heard is affecting attitudes within countries, a lesson of history on which I saw in my own country is that these measures tend to seep into the legal infrastructure. They're not contained, they influence attitudes, they affect people in the security service, they affect people in all different works of life. And your society begins to change. They undermine basic values of democratic societies, and I wouldn't say that South Africa under apartheid could ever be classified as a democratic society, but nonetheless, it had even there a corrosive effect on assembly, on speech, privacy and openness, and on accountability.

And what the report urges us to look at is not at the measures (inaudible) in isolation, but to look at the cumulative impact of the measures internationally and

within our own countries because it is a cumulative impact of those measures which really make the biggest impact and tend to change societies and have dangerous implications for the long-term future of democratic societies. Basically what the report says, that whatever short-term gains there may be through adopting some of these policies, the long-term harm caused by them far outweighs those short-term gains.

Now, I want to stop at the moment, give Bob Goldman an opportunity to speak to you about the lessons learned chapter and the war paradigm in whatever order he chooses to do it. And then I would like to finish off after Bob has spoken by talking about the recommendations which we make and the nature of things. We have limited time. We welcome your discussion which will follow, and I'm sure more will emerge during the course of the discussion.

So, Bob, if you wouldn't mind dealing with those topics.

MR. GOLDMAN: Thank you, Arthur, and thanks also to Brookings for agreeing to host this, and it's nice to see Ted. I don't know why you don't have more gray hair.

We knew each other a long time ago and worked together, and this is very distressing.

But one of the things that we did and which I think is quite unique and why, to the distress of funders and so forth, this project took so long, that we undertook a series of 16 hearings covering 40 countries all over the world. And the look at the current situation and so forth. There was no area of the world that was not covered. We had hearings here in the United States up at my law school for three days. We had hearings in the U.K.; we had hearings in Southeast Asia; we had hearings in Colombia, country with an ongoing armed conflict; we had hearings in the Russian Federation, and the hearings in India. So no area of the world that had not had either ongoing or history of problems with terrorist and counterterrorist violence were excluded.

But one of the things that was fairly clear to us was that terrorism is not new. How did states deal with this before? And indeed the organization, the Commission, the study, the International Commission of Jurists did a very remarkable study back in about 1983, and it was on

states of emergency. And what they did is they looked at prolonged emergency situations that had been brought about, for instance, as a result of terrorism in southern cone of Latin America and so forth that then engendered state terrorism.

They looked at Asia, they looked at the history of Britain and Malaya and so forth and so on, and tried to see the kinds of things that Arthur was talking about, cumulative impact, how did it change the legal structure and so forth? What should have been the lessons learned?

And so we decided to hold two backward looking hearings: one in Northern Ireland and the other in the southern cone of Latin America, and that was in Buenos Aires and so forth where we had participants, obviously from Argentina, from Uruguay, from Chile, and from Paraguay in light of the experiences in the '70s, in the '80s, and what happened. And one of the very interesting things, because this chapter became, then, the predicate for everything else, because if you read the report, we say very much: Ignoring lessons from the past here we go again. Almost every time there has been a history or terrorism, it has

always been viewed as it's unprecedented and it's new, and guess what?

Current legal arrangements are inadequate to deal with it. The tried and tested formulae of the criminal law and so forth are inadequate to deal with this, and, consequently. we have to start varying the model and lowering standards. And this has occurred in the past, also in democracies. It's just not -- I mean our own history on emergencies is not precisely the greatest in the world, going back to the Alien and Sedition Acts, and going back to World War II and what we do with Mariel Cubans and what we did since 9/11. It's not very glorious, and we'll see many democracies, particularly since 9/11 have led the way in the lowering of standards, and in many cases they had been involved before.

Some of the most repressive legislation in the world was used in places like South Africa, in Israel, and so forth and so on, comes from the legacy of Great Britain and it continued to be invoked and to be used. So the threat is viewed as exceptional. The normal laws are not good. And all of a sudden what you start seeing is the emerging

of special courts or the transfer of jurisdiction from civilian courts to military courts to try civilians and so forth.

Lowering standards of evidence. We start seeing the use of or introduction of administrative detention or internment, and I would urge you to see what was reported in the Irish hearings because all of the officials admitted that the internment policy was an absolute disaster that fueled sectarian fires and caused recruitment and so forth. Administrative detention has almost been everywhere and authoritative failure, and it has led to abuses. We give what the law is, and if it is not absolutely prohibited, it certainly is something that has to be highly exceptional and subject also to great scrutiny by the courts.

The other thing that we saw is that not only do you start getting administrative detention, and then this can lead to questions of poor treatment, you see also military responses. In certain cases -- and this is where the Southern Cone hearings were so important -- we saw the launching of dirty wars. The threat was deemed to be unprecedented and not only unprecedented but it was

existential. We had to deal with the enemy, the same rhetoric that we heard in a variety of countries: Everything had changed; the gloves have to come off; the rules are no longer good. And then the state embarks in a policy of lawlessness both at home and abroad.

One of the things that I was particularly struck by and my colleagues who attended the hearing in Argentina was the degree to which people who were in governments now and sos forth were those who had been victims said: The war paradigm that has been adopted by the Bush administration, we've seen this before. This is nothing more than a reprise of the national security doctrine that the military introduced in the Southern Cone countries. They drew analogies between, for instance, Operation Condor where the military services kidnapped, in cases murdered and so forth, people, transferred them clandestinely to policies of extraordinary rendition.

They looked at Guantanamo, and they saw Libertat Prison in Uruguay and so forth with systematic torture and the like, and they saw a mentality of national security that trumped the rule of law and individual liberty.

So these were extremely -- it's a very interesting chapter, and I would urge you to read it. And let me say a few things about the war paradigm.

As Arthur has said, this is a report which is global in scope, but we would not have written this report but for the response of the former U.S. administration to the events of 9/11. Historically in this country, acts of terrorism were treated as issues for the criminal law, and why they did not entirely -- the Bush administration -- abandon a criminal law approach because in some cases people who were designated so-called enemy combatants or whatever the flavor of the day was in terms of the denomination, some were bound over for trial before the civilian courts; others that were reclassified and held. But, by and large, the notion was that this is, again, unprecedented, and it's new. We admit serious threat.

But tell people in Peru with terrorist violence where 70,000 people were killed that things were more serious or worse today and so forth than they were for people in many other countries in the world. But the response was: We need something that is intelligence-driven, and

we want something that can also possibly give the president unfettered powers as commander in chief under the theory of a unitary president who is unconstrained, frankly, by other branches of law.

In the model, as we go through that was propounded to the extent that they even attempted, John Bellinger was about the only person who even articulated any legal basis for this doctrine, but the extent for moving the notion of a war paradigm of being in a war on terror to a war that was more circumscribed against, for instance, al-Qaeda and so-called associated groups in which we know the whole world is a battlefield.

The whole world is a battlefield and in which the United States could invoke itself the rights and privileges of a belligerent, but by virtue of the terrorist links and acts of its adversaries they could not have, not even in a situation of armed conflict, any comparable rights, privileges, or status, and that we would apply the law selectively to them. It was also a paradigm that said that the law of was as we interpret it is the lex speciales to the exclusion of human rights law. Human rights law offers

nothing for them.

And, secondly, we will create black holes. We will create Guantanamos. We're not owned by you. Human rights law will not apply but also domestic law, and constitutional guarantees in, by distorting concepts such as an unprivileged combatant, you get in the position where, frankly, the law of armed conflict didn't even apply. It only applied to the extent that it was consistent with or views of miliary necessity.

Now, we take this on in the report, and what we note is that it is flawed from start to finish because it does a fundamentally incorrect thing legally and conceptually. it conflates acts of terrorism with acts of war. Terrorism can occur in armed conflict, it's been a historic feature of armed conflict: attacks against civilian, launching of indiscriminate attacks, attacks against protected persons and so forth. These are dealt with well by the law of armed conflict, or IHL. They're war crimes. They entail individual criminal responsibility.

But I could leave here after I give this speech

and go to National Airport, and I could hijack an airplane. And that is recognized internationally as being a terrorist act. But there's no war, and I am not a combatant. And when you start using the term "combatant" in situations where there is no armed conflict, you denaturalize the law of war.

The law of war can only apply in recognized situations of armed conflict. Where those do not exist, international or noninternational, or mixed armed conflict, there is no war and there are no combatants, which means that it is positively absurd to state that a person, for instance, in the Philippines who gives money to some charity that funnels that money to, for instance al-Qaeda or whatever, is a combatant, there is no war there, there cannot be combatants.

Could that person be subject to trial and punishment under extraterritorial application of U.S. criminal law? Absolutely. It's criminal. And so we go through and we try to indicate what is wrong with the paradigm: It has terribly distorted the law of armed conflict. We have done terrible damage to the law of armed

conflict. We've even done damage to us down the road because by distorting concepts like "unprivileged combatant," we risk our own troops being denied prisoner-of-war status in future armed conflicts, and we have harmed human rights law, and we know what this has led to. And, consequently, what we have called on the present administration to do is to repudiate the paradigm. This is not a question -- and I'll end with this -- of all or nothing. If an act of terrorism triggers and armed conflict, the law of armed conflict applies. Apply the law and faithfully apply it like the United States historically did, but when acts of terrorism occur outside of the context of armed conflict, the criminal law model is still the single best way to deal with this.

And therefore we urge, not only in the United States, but from lessons from the past the minute you start varying and creating hybrid courts, special courts, military courts and so forth, it starts to send up signals, and rightly so. And they have mostly been failures, and they have led to deep divisions in the societies, deep divisions in the societies in which those things have been

done.

So, as I said, hopefully you'll have an opportunity later to read that. I hope you enjoy it.

JUSTICE CLASKALSON: Well, let me turn to some of the recommendations because the title of the report is Assessing Damage, Urging Action. The damage is spelled out in each of the chapters, and the basic -- the basic message is the time has come to take stock, look at what has happened over the past seven years. Look at the cumulative impact of that and bring back law and practices into line with recognized principles of international humanitarian law, international human rights law, and the mystic laws.

So that is the basic message, but there are other messages which come through. One of the messages is that we must be careful to prevent normalizing the exceptional. In other words, measures which are brought in sometimes as temporary measures, sometimes because an emergency, shouldn't become part of the permanent law of the country. They should be seen for what they are. They should be seen as really erosions into the fundamental principles

of law, and that they should be taken out of the law and the law itself should be brought into line with standards of the country itself, it's constitution, and with international standards.

There is also a recommendation regarding accountability that states should ensure that when human rights violations have been alleged that effective inquiries with proper disclosure should be established, and that accountability should be strengthened on all levels and, in particular, provisions for immunity, indemnity clauses, and limitations on access to courts should be removed. Effective remedies and accountability depend to a large extent upon a strong independent and knowledgeable judiciary, and legal efforts should be made -- and this applies to some countries where their criminal justice system is weak -- should be made to strengthen the criminal justice system of those countries, including the provision of technical assistance where needed.

Let me read you the recommendation on repudiation of the war paradigm to which Bob Goldman referred. It is in these terms: "The incoming U.S. administration should

reaffirm the U.S.'s historic commitment to fully uphold and faithfully apply international humanitarian law, the laws of war during situations of armed conflict, and recognize that human rights law does not cease to apply in such situations." That comes from the fact that the representative of the United States have argued that the human rights law doesn't apply in such situations.

"Accordingly, it should seek the repeal of any law and repudiate any policies or practices associated with the war on terror paradigm which are inconsistent with international humanitarian law and human rights law. In particular, it should renounce the use of torture and other proscribed interrogation techniques, extraordinary renditions, and secret and prolonged detention without charge or trial.

"It should also conduct a transparent and comprehensive investigation into serious human rights and/or humanitarian law violations committed in the course of the war on terror and should take active steps to provide effective remedies to the victims of such abuses. The military's detention center at Guantanamo Bay shall be

closed to the human rights compliant manner, and persons held there should be released or charged and tried in accordance with applicable international law standards.

"Other countries that have been complicit in human rights violations arising from the war paradigm should similarly repudiate that behavior and review legislation policies and practices to prevent any such repetition in the future.

"There is also a strong recommendation concerning intelligence-gathering pointing to the fact that intelligence authorities in many parts of the world have operated outside of legal structures and without regard to the constraints of fundamental rights, urging that where intelligence-gathering is carried out, it should be done consistently with international human rights law and international humanitarian law, and with the basic principles of the rule of law, and that there should be an intelligence structure should not take over, as it were, the handling of all the cases running from interrogation to charging, to questioning, and detention. And there should be kept separate from the policing function which

should continue to be the basic function of bringing people to court.

"That, in the measures that should be adopted, there should be an emphasis on fundamental rights and that the prevention of terrorism should be conducted in accordance with the legal requirements of international law; that the criminal justice system should be the engine for dealing with terrorism, and that human rights violations should be repudiated both nationally and internationally.

"There is also a strong call at the international level, and here the United States has a particularly important role to play and can play in acting internationally at war, urging that this be done. It requires the political will to do so, both nationally and internationally."

We think the time has come to make that commitment, and we hope that will happen. We have been encouraged in recent times by some of the comments made by President Obama. We wait to see how they are going to be implemented, and we hope that our report will give some guidance to those of you who are interested in this, and that you will take

an active role in bringing us back to a state where we can be proud of the law which we apply.

Thank you very much.

(Applause)

MR. PICCONE: Will you just give us a minute to be wired up here, and we will open to question and answers. And I did want to take the prerogative of (inaudible) to actually touch on the subject that we haven't really heard from yet, but since both of you have had direct experience on this topic, I thought I'd start with this, which is the whole question of accountability, truth, and reconciliation.

Of course, South Africa has a very important experience in this process, and Bob is very familiar with all the work that has taken place in Latin America.

In this country, this is a very sensitive, touchy issue. There is legislation pending in the Senate and the House to develop some kind of investigative body that would look at the period of time in which we've been addressing the post-9/11 threat, and I'm wondering what you think the United States can learn from the experiences you've studied

and you've lived with on this particular question where, in this case you don't have an end to a conflict, necessarily, if you want to use that terminology.

There is, unlike other places where there was a war, the civil war ended, and there was a reconciliation and an agreement to do some kind of fact-finding of abuses. We're not at that point yet, nor do we have a clear body of victims that are putting political pressure on the systems to see such an investigation.

So I'm wondering if you could touch on that topic before we open it to the floor.

JUSTICE CHASKALSON: Well, let me begin. There is a call for accountability in our report, and it is the principle of -- I think it's a principle of international law, the breaches of human rights that people who have engaged in breaches of human rights shall be held accountable for those breaches. And so accountability becomes important, and you can't have accountability without necessary and proper investigation.

Now, you know each country has its own problems and its own concerns. What happened in South Africa was,

I think, absolutely essential to the transition to democracy in South Africa. It was absolutely necessary that there should be a proper investigation and accounting for the wrongs committed under apartheid which were a mess at every level affecting every aspect of society, not just the security source but the whole way society was organized.

The model which was adopted in South Africa was to have an inquiry which would carry with it the right of people who had engaged in human rights breaches to apply to an amnesty commission which was part of the Truth and Reconciliation Commission for an indemnity. That indemnity would only be granted if there was a full disclosure and it were truthful.

So the truth and reconciliation proceedings were conducted at different levels. There were people who came forward and talked about what had happened to them. There was investigations into what had happened in the professions, what had happened in the media, what had happened in all aspects of society, including the security forces. That was conducted separately. Those who sought amnesty would go before the Amnesty Committee and would give the evidence,

saying what had happened. Torturers came forward said, "We tortured." And they were ultimately given an immunity.

It was part and parcel of the political settlement which was reached at the time. It was important, it's not entirely accepted by everybody, and there are many people who still feel that people who are guilty of the gross abuses of human rights should have faced penal sanctions. But it was a political settlement, and I think it has been extremely useful and important because it has settled what has happened. It's not a matter of dispute, cannot be a matter of dispute. It's been out in the open, everybody knows that that has happened, you can come to terms with what has happened and build your society for the future on the basis of that knowledge and, hopefully, because of that not repeat it.

The amnesty hearings would done partly because it was always difficult to prove cases where there's a conflict. They're long and they're protracted, and the people tend to deny it. But given the inducement of an amnesty people came forward and spoke openly and in the situation with (inaudible) told their stories.

I know many people think that that was wrong. Many people say that you should never give an amnesty. You know, that's a very complex, long, and difficult debate which depends upon the situation existing in each country. There may be differences between foot soldiers and people who give orders maybe; but the important thing was it served a process of getting information out and gathering it. And I think it was valuable.

MR. GOLDMAN: Could I just -- obviously, this isn't a comparable experience. When you talk you look at South Africa, and it was very unique, and those who would look at the Latin American experience would probably come to a different kind of outcome. You weren't dealing with a 40-year period of everyone involved in what amounted to be a system of government that was a crime against humanity and an abomination. And you had tens of thousands of victims in many of the Latin American countries and so forth.

Here the number of victims, frankly, unless for purposes of truth, I would differentiate victims of human rights violations are violations of IHL. That is the law of war. And let's be very clear: What happened in Abu

Graib were war crimes and serious war crimes. We're not talking about classifying people as unprivileged combatants and so forth and so on and having them in black holes. These were people who were accorded protective status either as prisoners of war or as civilians under the third and the fourth Geneva Convention, and obviously the intellectual authors of these policies.

We know it was not just these hayseeds from Cumberland, Maryland, who decided to carry out you know, unattractive acts with these people. Higher ups set this in motion. And if we're serious and we say that war crimes are something that the international community will not tolerate, one needs to have some investigation.

We can't forget either that the United States is a state party to the U.N. convention against torture. The United States is a state party to the international covenant on civil and political rights, and having been a member of the Inter-American Human Rights Commission, the United States is subject to the jurisdiction of the Inter-American Human Rights Commission by virtue of being a state party to the OAS charter and the binding nature

of principal Articles of the American Declaration.

And when there is a serious human rights violation, the remedies are clear: 1) There has to be effective access to court, and we are seeing individuals like Mr. Alar and so forth, who were being precluded in what happened the other day in the Boeing subsidiary case, not even the possibility of a civil remedy because the government which undertakes acts which it knew were illegal now tries to plead state secrecy.

Now, there's a bill, I understand that's been reintroduced again by Senator Kennedy and so forth to try to curtail this. There are other things that the government itself can do to mitigate against this. But this is utterly inconsistent with human rights law.

And the other thing that is rather traditional when there are violations of human rights, even with the body that is dealing with state responsibility as opposed to individual criminal responsibility, is the need to undertake a thorough and impartial investigation to identify the perpetrators and the sanction.

But I think there is a need for truth-telling

for the American people because things have occurred that have affected all of us as citizens, and we need to be aware of it. And so I wold differentiate in that sense victims that are a limited group of people in terms of war on terror policies who have been subject to extraordinary rendition, who have been subject to torture and so forth, and what the law requires versus as some good need for truth-telling and so forth about this period of our history.

MR. PICCONE: Thank you. We have microphones that will come to you. If you could raise your hand, and I will call on you. And if you could please identify yourself and keep your question short so we can get around the room. We have about 15 minutes at this stage.

Yes?

MS. KIATONI: Good morning. Deborah Kiatoni from Childhood Without War. I'd like to thank the speakers in Brookings Institution for bringing this issue to light in a community that is being exposed to information and access to policymakers with Brookings that is un- -- well, let's just say of a quality that has been lacking for the past eight to eighteen years.

Your question, Mr. Piccone, on the relevance or the importance of the issue as it hasn't been brought up in the past eight years to this magnitude of exposure as being urgent. To that question I'd just like to point out that mass media control and monopolies might have contributed to that fact, The push from the high-end community, the narcotics community to sustain a high end with everybody's energies and efforts, the rich and the poor have, I believe, contributed to the fact that this issue hasn't been brought up within the administration, the Bush administration, and is now coming to light. As the speakers have pointed out, it's taken 13 years to do a review.

The question I have for the speakers is on the international scope of the issue of whether or not your panel has had conference with participants from Japan who have complained about the use of the word "war" and "war on terror," and the other issue would be concerns on the use of your commission in exposing the information and the atrocities, the sexual nature of the activity, the terrorist activity that hasn't yet included armed conflict.

MR. PICCONE: Thank you.

MS. KIATONI: Your exposure to the -- my concern is to the exposure of the information promoting more acts of terrorism and more narcotics activities.

MR. PICCONE: Bob, did you want to say something?

MR. GOLDMAN: Yes. I could only deal with part of the question, and it's something that we had no direct talks with the government of Japan. But we did have, by the way, discussions with other major U.S. allies concerning the war on terror. And while it was popular to use this term and we saw it used throughout by the media and so forth, it's important to note that not a single U.S. ally, while they would use this in a rhetorical sense, ever accepted the paradigm as propounded by the Bush administration.

And let me give you an example. When the terrorist attacks occurred in London, in Madrid, in bulk, they didn't say: We are at war, we're going to grab these people as combatants, we're going to hold them administratively, and we're going to subject them to trial in military courts.

We met in London during the Blair period with the head of public prosecutions and who said, "London is

not a battlefield. We are not at war. These are criminals and they will be tried as criminals." In none of these cases were special or military courts used. So the actions of states repudiated even the closest U.S. allies, repudiated the paradigm in that particular form of the notion of a worldwide battlefield, or anyone who in any way aids, abets, or would otherwise we'd call the terrorist a suspect, could be deemed to be a combatant and subject to being grabbed, attacked, you know, or targeted anywhere in the world, no one else accepted.

MR. PICCONE: Kate Martin in the corner over there.

MS. MARTIN: My name is Kate Martin, and I'm the director of the Center for National Security Studies, and I have a question for Mr. Justice about your observation that's been an intelligence-driven response to the terrorism, which I completely agree with and have worked on for a long time.

But I'd be interested in what you would say to those in the United States government who include both democrats and republicans, that intelligence is the most

important weapon that we have in the conflict with al-Qaeda. And that, in fact, it has some benefits that because it's not the use of military force on the one hand, and on the other hand it's not opening criminal investigations or treating as criminals a vast population inside the country. And that's kind of the defense, and I'm wondering your response to that and what you found about that.

JUSTICE CHASKALSON: Well, there is a chapter of our report which deals specifically with intelligence, and we accept that intelligence is essential n the overall picture of policies to address the threat of terrorism. That is not something with which we would have any quarrel at all. And wherever we went we heard about the importance of terrorism [sic.]

The problems that arise are not from the use of intelligence or the importance given to intelligence, but from the powers which have given to intelligence organizations in different parts of the world the method used to procure intelligence and also from the sharing of intelligence.

Now, what we found is that intelligence bodies

are getting increasing powers, but they don't have structural limitations upon them; they don't have adequate oversight mechanisms; there are not -- in some countries, there are not laws which actually regulate the functions and powers of the intelligence authorities, and that they have gone beyond mere getting intelligence but using it as investigating officers.

In the course of that, frequently torture has been applied. And what has happened is that in the sharing of intelligence, countries are becoming recipients of the product of torture, and the intelligence then circulates around the world. Sometimes it's accurate, sometimes it's inaccurate, but it can have very serious consequences.

One of the consequences, one of the cases to which we draw attention, and the report is a well-known case of Mr. Arar of Canada who is a Canadian citizen. He had dual citizenship with Syrian, but his home was in Canada. He was called back to his home for work purposes while he'd been on holiday. His root home was by J.F. Kennedy Airport. At J.F. Kennedy he was picked up on the basis of some intelligence which had been gathered from the Canadians,

or seems to have been picked up on that basis, and he was held for some days by the Americans and then sent by the Americans -- he was rendered not sent home to Canada but sent to Syria via Jordan where he was held for almost a year and where he was tortured and subjected to terrible experiences.

Subsequently, when he was released and he came back to Canada, the Canadian authorities established a commission of inquiry provided over by the Deputy Chief Justice of Ontario, a very highly respected man, who was given access to all the information that the security authorities had to see every witness. He had a huge staff at his disposal. Nothing was withheld, no evidence was withheld from him. He could decide at the end of the day what to disclose or not.

The conclusion of the Arar commission was that Mr. Arar was not a threat, that the intelligence had passed on by Canada to the United States had been grossly exaggerated to be inaccurate, and that he had been a victim of gross violations of human rights. Terrible for him, not only the experience but the family. He was characterized

only as a terrorist. Now, that is the danger of the secrecy and the covert nature and the exchanges in its theory, and without any control.

And one of the recommendations we made was that there ought to be some protocol, some at an international level to deal with the exchange of intelligence and to deal with the -- with methods to be adopted in securing intelligence and how it should be used, because at the moment there's very little control over you get it from A, it passes to B, it goes to C, it goes to D, it changes on the way possibly like a broken telephone call, and it can have very serious consequences.

And, of course, countries are becoming recipients of torture -- information secured by torture. And so the whole international standard of CATs treaty, Convention Against Torture, is in a way being eroded because people are taking intelligence -- and one can understand why -- but, in fact, there is this trade in intelligence.

Now, we take the view that intelligence is important; we do take the view that intelligence should be shared, but we say that there should be care taken in

regard to the methods used to gather intelligence, the use to which it is put, and that really, if we're going to take action against people on it, it must be done appropriately, and that they ought not to be -- you oughtn't to have action, very serious action, based on secret intelligence which people don't know.

MR. PICCONE: Let's see if we can take a couple more questions. The woman with the scarf, who I -- yeah, I meant to call on before.

MS. TAGALITCH: Thank you. My name is Ceely Tagalitch. I come from Solvenian Embassy. I have two short questions: Firstly, a point of explanation actually.

Mr. Goldman, you were talking about special tribunes. As I understood, you do not support idea of special tribunes, for example, for former Yugoslavia or Rwanda. Do you --

MR. GOLDMAN: No, I was talking about --

MS. TAGALITCH: -- do you believe that it should be more effective when --

MR. GOLDMAN: No, no. That's not what we were talking about. We were talking about at the national level

instead of trying someone who has committed a criminal act in your normal domestic court, what you do is you create special tribunals. In other words, you're deviating. This is not like the special court for or an ad hoc criminal court, no. That's an international court, courts established pursuant to Security Council resolution. We're talking about at the domestic level.

Either, for instance, one of the things we frequently said is that you saw around the world was for national security offenses, is the transfer of jurisdiction to military courts, civilians who would commit these offenses would be subject to military courts, the establishment of things like military commission or the use of some kind of special or other kind of hybrid courts. We recommend against that because the lessons learned show that the record is not particularly a happy one.

MS. TAGALITCH: Okay, thank you for that. Just for short question about U.S. and ICC, do you believe that in the future, in the near future United States will joint eventually ICC?

MR. GOLDMAN: That has nothing to do --

MR. TAGALITCH: What is your opinion of that?

MR. GOLDMAN: That has nothing to do with our report, I'm sorry. And I don't know. I have nothing to say on that.

MR. PICCONE: I have a question here in the second row.

MR. CHEN: Cha Chen, Freedoms correspondent. Whom in the White House and Congress you have briefed? And second, is would three have some activity in U.S. campus, and if there is a (inaudible), should there be one particular? When I heard that, Robert, your eloquent speech in the very end, I think future generation have to be informed and educated.

And, Ted, you talk about reconciliation. In the U.S. case, who and how to do that reconciliation? Thank you.

MR. GOLDMAN: Well, in terms of people whom we saw when we had our actual hearings, here in the United States they were over three days. And from the administration, the legal advisor of the State Department -- the previous legal advisor, Mr. Bellinger -- saw us.

We saw Mr. Seratay. I think with the Security Council. We saw people in Homeland Security. We also saw people with -- the Congress had done a reorganization and the new security czar and so forth out of that office. So -- and plus we had other people like Brad Berenson and so forth who was quite influential in the designing of policies.

JUSTICE CHASKALSON: We also saw Mr. Hayes, I think is his --

MR. GOLDMAN: Oh, right, we saw Mr. Haynes of the Pentagon.

JUSTICE CHASKALSON: And some Judges Advocate General.

MR. GOLDMAN: Yeah. And we saw some former as well, Judge Advocate Generals who were quite vehement in their opposition to Bush administration policies. As you know, this government has been -- it's hard, I'm a Washingtonian -- and it seems like the government with its amount of money and so forth, and the figures has been on already for three years -- it's hard to think in terms of the news what's happening that, you know, you have the government that's only been in for a month. And you have

many key positions, particularly at Justice and so forth that haven't been filled.

But we have met with the counselor to the President. We met with various people from the Senate. We will continue to meet with some people at Justice, and we're hoping to be able to have some participation with some of the groups that the president is establishing to deal with some of the problems we address through his Executive Orders. So we've had very, very good access under, frankly, under Bush as well as under this administration.

MR. PICCONE: On the question --

MR. GOLDMAN: Well, at the university we offer a lot of courses, and I guess my students are going to be captives. They're going to have to read some stuff.

MR. PICCONE: We, on the question of reconciliation here in the United States there are various proposals afloat. You know, you could create a congressional commission; you could create -- the President could on his own authority create a commission, or you could have a hybrid where Congress and the President together work on an independent commission that's composed of people

that each side appoints and you begin the process that way. I think that might be a better way to go, procedurally.

There are many, many questions that flow from that, and we might hear more about it in our second panel, which we now need to turn to.

I want to thank you very much for your questions. I'm sorry I didn't get to everyone, but there will be an occasion for our second panel, and thank you very much to our guests from ICJ.

(Applause)

MR. PICCONE: I invite second panel to the stage. Please, if you could keep your seats, and we'll just be a minute.

MR. WITTES: Okay, why don't we get started. There's a lot to chew-over here, and I think what the way we're going to handle it is each of the panelists is going to give a brief -- and I emphasize the word "brief" -- set of comments on the implications of the report for the American, current American political environment, at which point I will ask several questions and then give the probably previous panel a chance to respond a bit to the comments

of the panelists. And then we'll take questions from the floor. So it's a lot to go over, and if we can keep both questions and responses brief, that will facilitate it a lot.

I would like to start with Joe Onek, who currently serves as Senior Counsel to the Speaker of the House, Nancy Pelosi, but is here in his private capacity. Mr. Onek has a distinguished career in both private and public service. He was special counsel to the Constitution Project and to the Open Society Institute in earlier iterations of his career.

I'll turn the floor over to him.

MR. ONEK: Thank you. As Ben said, I'm speaking here in personal capacity, and, of course, as we meet here, we're all concerned about what positions of the new administration will be taking on these issues. Ted pointed out some of the changes that have already occurred, but we know that there are going to be a lot of issues and battles as the days ahead.

But before we get to those, I would like to mention one thing which is, of course, that the process and the

atmosphere has changed dramatically. During the transition, many members of what I will loosely call civil liberties and human right community both on the Hill, as I am, and off the Hill. I did have the opportunity to meet with transition officials at great length, and many of those officials, of course, I now hold high at positions in the administration. Once the administration started and after the somewhat difficult period of trying to figure out new people's e-mail addresses, we once again had the opportunity and continue to have the opportunity to discuss issues with the administration in a way that was never possible previously.

Personally for me, the other day I went on the Metro to go to work, and there was David Barrone, principal deputy of OLC, and I was there with the lobby to him right then and there in the Metro. So it is a dramatically different atmosphere.

Now, does this new atmosphere, I think a new sense of dialogue, necessarily mean that there will be total agreement on all issues? The answer, obviously, is no. It has to be no because, among other things, there is not

even agreement, I think, in the civil liberties end and human rights community on many of the issues that we're discussing. To take one, of the issue of detainees and who can be detained, I think there were some people who have taken the position that there are only two categories: You either are tried criminally for war crimes or later defense, or you have to be released and that there is no third category of enemy combatants.

Others -- and I include myself in this -- do believe that there is such a thing as a combatant, or that people, for example, who were captured on the battlefield in Afghanistan and who were members of the Taliban forces and also, I think, the self-proclaimed leaders of al-Qaeda can be held without trial for the duration of hostilities. And the fact of the matter is in Afghanistan those hostilities are continuing.

Just a few days ago four Americans soldiers were killed there, so that I think there is this third category.

Now, many of those people I think were entitled to POW status. Certainly, members of the Taliban forces I believe were entitled to POW status despite the decision

of the Bush administration not to accord that to anybody. And all of them in my view, of course, are entitled to the protections of common Article 3. But that doesn't mean that there isn't a category of people who can be held even without criminal trial.

Now, there will be a big issue, and I'm going to end on this note of how broad that category is. If you listen to the testimony of Eric Holder, he seemed to make it much more broadly. I'm not sure he went all the way to the woman in Geneva who sends a check, but he did certainly seems to have it broad enough to cover Algerians and Bosnians, to pick a group at random, and others who were captured far from any typical battlefield. So that issue, I'm sure, is going to be debated.

I think the administration is foregoing the opportunity to make the broadest claim that even somebody legitimately in the United States like al-Marri can be held as an enemy combatant because, as we've read, they are not going to move that to the criminal court. But that, like so many issues, remains to be debated.

The one group thing, as I said, among other group

things is that I believe that members of the community, including, of course, our eminent panelists who already spoke will be able to participate fully in that debate, and that is a dramatic, dramatic change.

MR. WITTES: Our next speaker is Suzanne Spaulding, who is currently a principal at the Bingham Consulting Group, and she's an expert on national security related issues, who has served as the executive director of two congressionally-mandated commissions and was also minority staff director to the U.S. House of Representatives Permanent Select Committee on Intelligence, and deputy staff director and senior counsel for Senator Specter on the Judiciary Committee, and she also was an assistant general counsel at the CIA.

MS. SPAULDING: Thank you, Ben. And I don't have a watch, so please, you know, give me a high sign. I don't want to take too much time. I really do want to have a discussion in Q&A, and I'll stop in mid-sentence.

I approach these issues not as a legal scholar but more as a practitioner, and it's in that context that I think about the challenges that we face. I want to start

by applauding the panel. I think it did some very important work and clearly a great deal of effort and a very thorough review that went behind the final report. And there's a lot of good things in this report.

I'm not prepared to accept all of the conclusions. I think these are some very difficult and challenging issues, but I have been an opponent of the war on terrorisms long before the war was declared. I started working terrorism issues in 1984 as senior counsel for Senator Arlen Specter, and there was a very strong consensus then that we should not give terrorists the status they so desperately sought, the status of combatant.

In those days, the phrase and the challenge of sort of defining terrorism was: One man's terrorist is another man's freedom fighter. And there was a strong consensus among policymakers, the decision-makers, and the government that we were going to treat these people as criminal thugs and deny them that sort of glorified status that they sought.

We were encouraged in this approach by the fall of the Berlin Wall and the fall of the Soviet Union, and

a renewed confidence in the ability of the rule of law to deal with some of these transnational challenges. And that was the approach for a very long time. And it began to sort of unravel, the consensus began to unravel. The consensus began to unravel, I think, over the next 10 or 15 years. It did not suddenly pop into people's minds on 9/11, oh, gosh, we should treat these people as combatants. This is something that had been building up for some time, and one in which there had been, you know, consistent push back.

When the Pan Am 103 flight was shot down over Lockerbie, for example, and the decision was ultimately made to take a law enforcement approach to that, to seek an international consensus around bringing the perpetrators to justice, that was, I think, a key point of debate and argument on those who thought the law enforcement and criminal approach was mistaken because they said this will never get to, and at the end of the day did not get to Kadafi, who they held ultimately responsible.

The flip side of that is that it did lead to a very strong multilateral consensus behind sanctions against

Libya, which achieved, I believe, the results of having Libya withdraw its support for acts of terrorism, which was ultimately the real objective there. And I think it was a consensus around those sanctions that we could not have gotten but for it being based on a law enforcement criminal justice approach.

So I think it's, you know, even as you look back, it's a little bit of a mixed bag there. But I think that is not occasion that makes the case for those who reject entirely the law enforcement approach.

I remember arguing very strongly throughout that period that this was not a dichotomy between, you know, between a law enforcement approach or what we then called a national security approach but, in fact, terrorism was clearly a national security threat for which law enforcement was one of the most important tools. And we had a pretty good consensus about that, as I say, beginning with some push back until 9/11 when, of course, it all changed.

And I was very concerned when I realized we were moving into this war on terror, the global war on terror for a number of reasons which have been well articulated

in the report and by lots of others. Collateral damage is acceptable in wartime in a way that it certainly isn't in the normal course of events and certainly isn't in the criminal justice system, but I was particularly concerned the skewing of our normal system of checks and balances. A president has significant power in a time of war and in a war context. Congress and the court are fairly deferential, and I think that is one of the most damaging consequences of our having taken this very broad global war on terror approach.

So I was very gratified to see now President Barack Obama make what I think what had to have been a very conscious decision to not use the term "war on terror," to remove that from his lexicon and to talk about the seriousness of the threat and our determination to go away the threat, but to not talk about the war on terror. And I think that was really important. And he's clearly ordered a review of the legal basis and all of the legal opinions that flowed from this war paradigm.

Having said that, you know, I think we have to be careful as we move forward. There is an impatience and

an understandable and appropriate impatience to see change after all of these years. And I see Tom Wellner, who's done such important work on behalf detainees. My brother represents Guantanamo detainees. I was with him yesterday, you know, strategizing about, how can we get things to move faster? But I think it's important to distinguish between policy and law. I think we should be very impatient with pushing for changes in policy. I think they ought to move very quickly on getting habeas cases through the court system and not delay those. There are a number of things they can do with respect to detainees. We ought to immediately bring the WEGER into the United States under supervised, under a supervised release, you know, under the care of WEGER communities and churches, et cetera, which would open the doors, I think, to put more of the detainees in other countries, and we ought to move forward very quickly on those things.

Those are, I think, to be distinguished from coming out with new pronouncements with regard to the law, and so I am more sympathetic than some with the approaches that have been taken so far in terms of, for example, moving

al-Marri out of the Supreme Court system into the criminal justice system, and I suspect they will not -- they will argue that the Supreme Court should not hear that case rather than take it as an opportunity to come in and say, you know, this approach was all wrong and, legally, it could never be done, et cetera.

You know, I think, to temporize at this point in the ongoing legal struggles, let's face battles what they say is the appropriate thing to do, frankly. They should take their time, they should carefully think about what legal framework they want to support and put in place. And they will want to maximize the flexibility of the president, which I think is also appropriate.

Having said that, a word of caution for those lawyers who are facing this challenge in the administration: You want to preserve flexibility; you want to be careful not to block (inaudible); you don't know what might come at you down the road. But in four or eight years, there will be new occupants of that office. We have seen what happens when, you know, broad authority is assumed by an occupant of that office. And so I would urge those lawyers

just to think carefully about their responsibility to impose limits, legal limits, process limits, institutional limits as appropriate, not thinking about how wise they would use that authority but thinking about the next occupant of that office.

MR. WITTES: Thank you. Our final panelist is Scott Horton, who is a contributing editor of Harper's Magazine, who specializes in human rights and international law. Mr. Horton lectures at Columbia Law School and is a distinguished visiting professor at Hofstra Law School. He's a member of the Board of the National Institute of Military Justice and the American branch of the International Law Association.

MR. HORTON: Thank you, Ben. I want to start by suggesting strongly to all of you that you actually pick up a copy of this report and read it. We heard, I think a very, very skillful summation of it, but it was only a summation. And there's a lot more detail and valuable information contained in the report that's worth some study and reflection.

I found in reading it two aspects particularly

interesting and I think suggestive of good modes of analysis of our problems. One was the discussion of the experience of the troubles in Northern Ireland because, in fact, we saw the British government come in there and wade in with a regime with special courts, with heightened interrogation measures. In a way, it was just remarkably similar to what happened in the United States, and you see a uniform conclusion by all the participants, including senior officials of the British government. It was a disaster, it was a complete mistake.

Likewise, I thought the experiences reflected from the Seven Cone in Latin America, the same sort of experiences, more brutal, more harsh actually, and I think a much more impressive exposition of the way this poisoned the entire rule of law environment in the country.

And that leads me to come back to a focus on the accountability question. In the last panel, we talked a little bit about getting the truth out and having a truth commission, but in the end of the day I think there's no -- there's no getting around the question or criminal law accountability here. It's a powerful question, it's

something we should be dealing with head on in a much more direct way than we are.

And, in particular, over the last seven years there are three areas relating to torture where we saw government policies fomented and implemented that directly clashed with the criminal law, that was the regime of highly coercive interrogation techniques -- that is torture -- that John Yew refer to as "the Bush Program" -- I think it's an appropriate name.

Then we have the extraordinary renditions program that included black sites, so it was a system of indefinite detentions of individuals without charges outside of legal accountability and including with it a torture-by-proxy system where these people who were held were turned over to cooperating foreign police and intelligence services, who would use techniques that even the Bush administration would not authorize.

And third, we have the military commission system established in Guantanamo in connection with which we had six prosecutors, prosecutors resign or request reassignment after stating concern that there had been efforts to

manipulate or falsely rig the proceedings in which they were involved. Most of those allegations focusing in fact on torture at the bottom.

There is no open criminal investigation in the United States with respect to these matters. That's an amazing fact, and it's amazing particularly because of two things: One is an interview that Susan J. Crawford, who was the convening authority at Guantanamo, that is the senior-most official of the Bush administration with responsibility for oversight of this Guantanamo system, and interview she gave to The Washington Post, to Bob Woodward in which he asked why one detainee had not been charged, why she had declined to authorize charges.

And she said, "After extensively reviewing his case, I concluded that he was tortured," no euphemism, that conclusion. And moreover, she went on to spell out in some detail the basis for her conclusion that he had been tortured, and in fact showing an absolutely correct application of the criminal law standard under 18 USC 2340 to the case.

So we have a quasi-judicial determination made by a high-level official of the Bush administration that

torture occurred. Moreover, the detainee in question was the subject of a report prepared by Lieutenant General Randall Schmidt. and in his report and in his testimony he was asked about the level of oversight and preparation and approval of this program of torture that was used on this detainee, and he testified that this had in fact been reviewed and approved by the Secretary of Defense Donald Rumsfeld, who had been briefed regularly on this interrogation program as it went forward.

So we're not talking about a case where it was some kids from Cumberland, Maryland, out on a lark; this was a closely supervised program of formally-approved interrogation that was torture, a felony under American law. No pending criminal investigation, and yet Eric Holder testified in connection with his confirmation that he believed that waterboarding was torture, and we have statements made by both the President and Vice President of the United States on their way out the door, principally in interviews with Larry King on CNN in which they acknowledged that the approved waterboarding, but no criminal investigation.

The Convention Against Torture in Articles 4, 5, and 7 obligates states' party, including the United States, to make torture a crime. U.S. supports implemented this with the anti-torture statute, but not that alone -- there are other criminal statutes -- and it also obligated the United States to open a criminal investigation in any case in which credible allegation of violations of the law or the Convention are present. So a conclusion, a quasi-judicial conclusion by the senior-most official of the administration in this area that torture occurred, but we have no pending criminal investigation.

Ladies and gentlemen, the United States is in breach of its obligation under the Convention Against Torture. There is simply no explanation for it. And I'm talking about one specific case involving one detainee, but there are many, many others. And I think the administration's got to come to grips with this problem, there will have to be investigations, and it may very well be that it can't be investigated through the normal Department of Justice process because of the Department of Justice's own deep involvement and decisions underlying

these steps.

One further thing I'd like to address is the question of state secrecy which is addressed, is an important part of the report, and it seems to me is a matter that we should be paying more attention to than we are right now. Of course, every administration invokes the doctrine of the State's secrets, it's entirely appropriate. Every government has military and diplomatic secrets to protect, but we should be cautious. This doctrine should not be invoked to protect politicians from being embarrassed. I think our Constitution guarantees us the right to fully embarrass politicians for their foolish acts of which there's been no shortage in the last seven years. But we're dealing with a fundamentally more serious problem than that.

When I look deep into many of these cases, the Merrill law case, for instance, the Jefferson case and some of the telecommunications cases. It's clear to me that State secrets is not being invoked simply to avoid embarrassment; it's being invoked to cloak evidence of criminal conduct And that is worse than bad judgment; that invocation of State secrecy is itself a criminal act, and

the Obama administration, while it's reassessing this problem has not yet pulled back its continuing with these invocations. So I think we need to be pressing ahead aggressively with a spotlight in this corner.

Thank you.

MR. WITTES: Thank you. I'd like to start with what I take to be the central recommendation, or at least a central recommendation of the report, which Suzanne addressed in her remarks, which is the question of whether one can repudiate the war paradigm, and what would that look like if you do that? Since taking office, the Obama administration is not a complete catalog but it's a start, has launched -- continued the policy of launching predator drone strikes in certain parts of Pakistan against terrorist suspects which is done -- I think could not be done under a criminal justice paradigm, certainly, and is a reflection to some degree of certainly a very emphatic use of a war paradigm for counterterrorism.

The attorney general, as Joe pointed out earlier, as well as the solicitor general have both publicly embraced detention authority as lawful under current law. In a much

less noticed but I think very significant court filing, the administration has taken the position, as did its predecessor, that habeas jurisdiction does not run to Bagram, thereby continuing a certain view of the judicial function in these areas that is predicated to a certain degree on this not being a sort of judicialized set of processes.

And finally has floated the idea of a kind of mend-it-don't-end-it approach to the military commissions which are frozen but have not been stopped. And so my -- I would like

-- let's start with just rundown the panel. I'll start with Suzanne, but I'm curious, is it realistic to talk about ending the war paradigm in its totality? Or are you invariably talking about retaining some significant aspects of it going forward?

MS. SPAULDING: Well, I think you need to make some distinctions. I was a little bit amazed at some of the members of Congress during some of these hearings who were simply asked to open at a question: Are we at war? Clearly, we are at war. We are at war in Iraq and Afghanistan. And I think there's very little debate about

that.

Are we engaged in a global -- you know, should we continue to think that we are engaged in a global war on terrorists with the breadth and scope that the Bush administration claimed? I think there's a fairly strong consensus that that is also not appropriate.

Having said that, the Congress of the United States authorized the use of military force against those who -- individuals, organizations, and nations who perpetrated the attacks of 9/11 and gave them support, et cetera. And so, but Congress -- two words that have not gotten nearly enough attention in that authorization for the use of military force are "necessary" and "appropriate" force. And I think that brings in to play international law among other things. As you interpret, all right, where are we authorized to use military force? And what does that use of military force bring with it? And so, for example, the authority for military detention, it seems to me, is directly connected to legal authority for the use of military force.

I don't think there are easy answers to that

question, but I think that's sort of where it starts, which is to say Congress has authorized the use of military force beyond just the geographic boundaries of Iraq and Afghanistan where necessary and appropriate.

MR. WITTES: So just to follow up, if you embraced -- if the new administration were to embrace your vision of, you know, the extent to which there is a war going on, the extent to which, you know, authorities under the laws on conflict as well as restraints under the laws on conflict, how -- what are the list of things that the Bush administration did that you would not -- that your vision of a war on terrorism would and would not allow?

MS. SPAULDING: Yeah, and I'm not prepared to answer that question. But I do -- you know, and that's why I said I would go slowly in this area. I think these are difficult and challenging questions and issues, but I do think that international law has to play a significant role here. I think you have to take into account the heightened prospects, significantly heightened prospects for mistakes being made when you're going after somebody who we may think is a member or active member of al-Qaeda

versus someone who's a member of the uniformed military. And so I think how these laws apply is something that's going to be difficult and challenging to work through.

But I -- but I'm not prepared today to -- to -- to repeal, effectively, the AUMF. I think Congress could think about that. Congress could consider that, but it hasn't done it yet, and so it continues to have legal force.

MR. WITTES: Joe, how do you think about this question?

MR. ONEK: Well, as I'd already said, there is a war going on, and so I agree with Suzanne that the use of military force in Afghanistan and in the nearby regions of Pakistan, including drones and other, uh, are certainly legal. Whether they make sense politically, whether the collateral damage may be so great even in Afghanistan itself that these are self- defeating is a different issue. But, you know, they may -- I don't think that they're illegal. They may in some cases be not wise.

But as you expand, geographically, I don't think it's possible. I do not think we could have used to take famous Algerians in Bosnia, or when they were acquitted

by the Bosnian court, I don't think that we could have shot them on the spot, even though that is the logic of these administrations' position. So I would have to take the position you couldn't shoot them on the spot, and you can't hold them on Guantanamo either. I think that they did have to be treated by a criminal model; that is to say we could have arrested them, and we could have rendered them to the United States or to any other country that doesn't torture and that has due process to have them tired for material support or whatever.

So I do think there is a line between war zones and not war zones It's not absolutely clear because Pakistan fits. And I would also make an exception because I'm not politically crazy, indeed, because I think it is legitimate with respect to those people who are the self-proclaimed leaders of bin Laden. We can kill bin Laden anywhere. If he somehow was on Bosnia, to take an example, and we could kill him, we can kill him. Because, you know, if you go all the way back and it was in Scalia's opinion in one of early decisions, but the reason you have these rules which say you can hold soldiers without trying them is

because the due process problems are usually not there. Typically, you capture soldiers and they're in German uniforms, or Japanese uniforms. If you capture a Taliban fighter on the battlefield in a tank, he is a soldier, and so you don't have due process problems.

With bin Laden you don't have due process problems. I don't think we have great due process problems, by the way, with Ramsey Bin al-Sheeb or Khalid Sheikh Mohammed. I believe we can keep them without trial, although I think we should try them. But we could keep them without trial a long as the conflict -- I won't use the word (inaudible) -- but the conflict with terrorism exists.

But the number of people who fit in that category of bin Laden and KSM and so on is very, very small. With other people they're not sure, and with other people I think you have to prove it. And the way to prove it is in criminal court. Certainly we have not made it super difficult to do that, given the breadth of some of our statutes, particularly in material support and other statutes. And, by the way, whatever the status is of conspiracy law under military law, conspiracy is a crime under nonmilitary law,

so we can use conspiracy, material support, you know.

I think that with these other people who were not in the war zone, I do think the criminal model is the appropriate model.

MR. WITTES: So you would draw, I mean if I can just push you a little bit on this, you would say you would accept the idea of repudiating the war paradigm except within the sort of geographical and territorial confines of the area in which the AUMF is most obviously operative.

MR. ONEK: Right. And there is again and except for self- proclaimed, if again if you go back to a real war in the olden days, if you're fighting in wherever you're fighting in Europe but a Nazi general happens to be somewhere else, you can kill him. Because again, he's a Nazi genera. The due process issues don't exist, so that if a Nazi general happens to be in Africa in the middle of the war -- I mean Southern Africa where there's no -- you can kill him.

MR. WITTES: But if --

MR. ONEK: You can both kill him, or you could seize him and hold him.

MR. WITTES: But the --

MR. ONEK: Depending on the circumstances.

MR. WITTES: But you wouldn't -- but you wouldn't --

MR. ONEK: You shouldn't kill him, you should capture him.

MR. WITTES: But you wouldn't consider, just to be clear, you wouldn't consider somebody like al-Marri, who is, you know, short of alleged to be, anyway, somewhere in the order of Mohammed Atta on the al-Qaeda hierarchy as the sort of general who you can seize wherever he is.

MR. ONEK: No, because he's not a self-proclaimed leader. All the due process rights exist. Now, it may be that the evidence against him is overwhelming, and so that we feel in our hearts both militarily and (inaudible), is he guilty? So try him. and, you know, but the reason I -- and we discussed this earlier -- I think the reason we didn't try

al-Marri initially was not because we didn't have evidence, even unpainted evidence that we could try him on; it was probably because we wanted to use interrogation methods

that we felt, well, we couldn't use if he was tried, which is a different issue which we could get to.

But al-Marri should be tried as he is now finally being tried under criminal -- and the idea that somebody legally in the United States can be held as an enemy combatant is just terrific.

And to go back, I think, you know, there have been so many court decisions, and the landscape has changed. We forget the breadth of the administration's original claims. In the Hombi case, and remember Hombi captured in Afghanistan turns out, although a Saudi National, that he was born in the United States and therefore a U.S. citizen. He was brought back to the United States. So Hombi, at the time when he filed habeas was an American citizen in the United States, the Bush administration took the position he was not entitled to habeas. The courts could not even look at it, could not look at the case of an American citizen in the United States. That was the breadth.

Now, even the 4th Circuit just laughed at that, and it went on and in the end they did say he could be held

without -- they said you can bring a habeas, they did say he could be held without a hearing, and, of course, that was reversed in the Supreme Court. But the point is you have to remember the extreme -- extreme craziness, insanity of the Bush administration. We forget it because over time, by force of what the Supreme Court or other courts have done, they have to push back.

But that position was so contrary to any notion of law as to be extraordinary. And yet that was their position. I really urge you to read, if you really want to see what the position was -- and, luckily, this, unlike some of the Yew memos and so on isn't classified, it's just there -- read the brief that they filed in the original Hombi case, and then you'll have a sense of where possibly this nation could have been heading had not the courts intervened.

MR. WITTES: Scott, what's with you? How much of the war paradigm could you actually repudiate, and how much of it is necessarily organic to the confrontation with al-Qaeda?

MR. HORTON: I like the analysis that's presented

in the EJP report here, which is to say, first of all, that in a sense it's false to talk about a conflict. I mean there clearly is a role for criminal justice and a role for the laws of war in military setting, and it's simply a matter of understanding of the boundaries between these two systems and applying them.

And I also embrace fully the criticism that emerges from this report that there has historically been a rush to grab the military paradigm not out of any interest to apply law of armed conflict but rather to evade the war entirely, to move into some sort of legal black hole where government can do whatever it wants. I mean that was really a clear experience of what happened in Chile and Argentina, and I think the upshot of what we've seen over the last seven years is a lot of that.

I think certainly, when we see these memoranda that come out of the Office of Legal Counsel about establishing Guantanamo when the considerations, they're put through, it's: Let's avoid the wall; let's avoid legal review; let's find a black hole. That's an abomination. It's shocking that a government like ours would proceed

to do that.

That being said, of course, there is a war going on, and there are areas where the law of armed conflict applies and should apply. And, you know, to look at some of these examples you cite, you know, the predator drone, it strikes me that, you know, that this is authorized activity. I mean, literally, under Executive Order 13222, we can be authorized also under laws of armed conflict. It's traditionally understood this could be authorized.

We run into problems consistently with detainee treatment. I think that's been sort of the festering wound over the last few years, and there I think Barack Obama's orders he issued in the first day, you know, provide us some sense that what I've identified as the biggest concerns are being addressed. But I think we need to be a little skeptical about that and wait and see.

Finally, the issue of --

MR. WITTES: Can I just clarify something? Are you as comfortable with the predator drone strike if it takes place in Yemen?

MR. HORTON: Am I as comfortable? The key

consideration with respect to the -- well, of course, you know, you're moving away from a traditional battlefield. The key consideration is, is it actually a strike against a person who's involved in a command and control position of an enemy that we're at war with. That's the key consideration.

MR. WITTES: But it's unreviewable judgment in any case because you don't have sort of due process before the --

MR. HORTON: No, but if --

MR. WITTES: -- before the strike happens.

MR. HORTON: But it's a question of whether they have reliable intelligence to suggest it's right. I mean I think that would be the law of armed conflict standard. They could be wrong, but if they have intelligence that suggested there were -- but we ought to come back and talk about this habeas issue, too, because I think this is an area where maybe our civil liberties tradition in the United States is leading towards a long solution. That is, there has been a rush to sort of project American law and American constitutional standards around the world to fill the void.

The void needs to be filled with law. I'm not convinced that it's American constitutional law, and arguing that American constitutional standards provide the regime for protection of prisoners at Bagram is ridiculous. That itself is a violation of international law, specifically the Hague Conventions which say that an occupying country is not to be projecting its law into a foreign setting. We have international conventions, we have the law of Afghanistan. That should provide the protection. So I think we've gotten a little bit off of the way that we should be approaching resolving these problems.

MR. WITTES: And is that -- I mean is that simply a function of deciding these things in the course of, you know, common law adjudications in which, and, you know, which takes place under sort of whatever, you know, whatever -- whatever the habeas counsel in question, whatever statute or treaty or constitutional provisions he or she can muster on behalf of a client rather than, say, as I take your comments to be heading, through a more diplomatic channel in which you kind of define, you know, define through perhaps

new treaty law or new perhaps customary international law, you know, what the rules should be.

Why are we headed in that direction?

MR. HORTON: Yeah. Well, I guess I could answer that simply by saying I do not believe that federal district courts have the solution to all problems that plague humanity today. But, you know, litigators who present their petitions to federal district courts present them in language, and they seek remedies that those courts are used to issuing. So I understand what's going on. I'm even sympathetic to it to a degree.

I think it spotlights a problem, but I don't think it presents a rational course for resolving all these problems. Rather, I think a lot of that needs to come through international venues through negotiations between the United States and the government, and through the United States I think more rigorously respecting and upholding international law standards to which it is bound.

MR. WITTES: So I'd like to turn this back to our -- to the first panel, the authors of the report and just ask you if you have response to, particularly on this

issue how much of the war paradigm are you actually advocating the repudiation of? And, you know, and how plausible is that, given the fact that there is an ongoing war, according to all three of the panelists?

Wait for the microphone, please.

MR. GOLDMAN: I think a careful reading of our report, and I think Scott has done that, that there's nothing inconsistent. What we have said, this is not an either/or situation. When you have armed conflict, and there has been armed conflict and there's ongoing armed conflict in Afghanistan, with cross-border elements going back and forth just like Colombia has had with Ecuador and other places, and you've had an evolution from an international armed conflict to a noninternational armed conflict, just as you have in evolution in Iraq and so forth, what we call for is, you can detain, but guess what? Apply the conventions appropriately and the safeguards.

In other words, I don't disagree with Joe at all. I don't think it's a third category. When you have an international armed conflict, you have prisoners of war, and they're held in detention for the duration of the

hostilities. And it's only because of the kind of extreme positions of which Hombi was one and where, frankly, there was absolutely no oversight by the legislative branch that the courts were forced to take cases and start issuing law in my view that they never should have had to do had we applied correctly the law of war.

Had we given, for instance, the Taliban prisoner of war status, I can tell you, I debated some of the people who helped to design the policy. They had no idea because they wouldn't listen to the law of war, experts at the Pentagon or at State, because they felt they were part of the problem, they had no idea that you could have tried these people for precapture offenses, even if they had the status of prisoners of war; that you could have interrogated them.

You couldn't torture them, you couldn't disappear them, you couldn't put them in black holes; that we could have with, for instance, the al-Qaeda groups and so forth who were fighting as independent on behalf of the Taliban, they could not have met the standards of 4A-2 and we could have convened right there the Article 5 proceeding, found

that they were not going to get prisoner of war status, and because of their nationality, guess what? They were not going to be able to be protected under the 4th Convention.

But we still would have to have applied the fundamental protections of Common Article 3 to that. And this was an administration that did not even want to have Common Article 3. They said, we'll use it as a template subject to military necessity. Well, guess what: Common Article 3 is nonderrogable. So in my view they could have gotten as many of the results they wanted, but not to torture, not to effectively disappear and so forth by the faithful application of the law. It was not an obstacle to doing justice.

It was an obstacle to setting up kangaroo courts, which these military commissions were in their original guise, most certainly.

So what our report says is where there is no war, we believe the criminal justice model is the appropriate thing; where there is armed conflict, faithfully apply the law of armed conflict. So I don't think that we're taking

a doctrinaire position in terms of it has to be one and not the other and so forth.

MR. WITTES: Let's take questions from the audience.

JUSTICE CHASKALSON: I would just add one comment.

MR. WITTES: Oh, sorry. Sorry.

JUSTICE CHASKALSON: There is not a war on terror; there's a war in Afghanistan which at the moment is a noninternational armed conflict because the international armed conflict was resolved with the appointment of the new Afghanistan government which is recognized internationally. There's a noninternational armed conflict there. The same is happening in Iraq, but there's not a war on terror.

MS. SPAULDING: But among those are adversaries in both Iraq and Afghanistan are members of al-Qaeda. Well, I don't know, but I think it is not irrelevant; I think it's relevant.

MR. WITTES: But wait a minute, there's --

MS. SPAULDING: It's like the Axis Powers.

MR. WITTES: There's more than that, too. There

is an authorization to use military force against the people, individuals, getting to Joe's hierarchy point. Organizations is specifically -- so there is a -- so there is a congressional authorization to use military force against certain organizations.

Now, that -- and is that simply irrelevant for purposes of the --

JUSTICE CHASKALSON: No, but it's not in accordance with international law.

MR. GOLDMAN: Let me give you an example, for instance. Again it deals with the precapture of (inaudible). I tried using this example before when they started to propound it with certain people in the administration. If you have a person who, for instance, was a French citizen who was a serial murderer in the United States, and he escapes the United States and he goes back to France, and the United States goes to war with France, and it's an international armed conflict. And he is the member of the French armed forces, he is captured now by the United States. Is he a prisoner of war? Damn right he is. Could he be tried for what he did before he was captured? Absolutely

amenable to trial. There is nothing inconsistent, and that's where you get the fact.

Even if you had an al-Qaeda person who was part of regular armed forces of the Iraqis or whatever, he was entitled to prisoner of war status, but they would enjoy no immunity. You'll get him on membership offenses; you could get him on any number of criminal things. They failed to understand this because when you get amateurs interpreting the law of war, and you displace people who have years and years of experience, they could have told them this. But they isolated those people.

MR. ONEK: I'm not sure it was such a failure. I think it was something else at work. Of course it is true that you can interrogate a prisoner of war. I mean I know people say, oh, well, they're just name ranks, of course. You can interrogate anybody you want. However, when you interrogate a prisoner of war, you can't take lots of things away from him if he doesn't answer. And I think that what was driving this was not naivety about the law of war, although that may have, or ignorance that may have existed; it was the interrogation imperative, and that they

did not want to be constrained in the interrogation methods, even methods short of torture that you cannot impose on POWs. It's hard to interrogate POWs. It's hard to interrogate POWs, as I understand, because you can't take things away from them. They're entitled to their toothbrush.

So it's not just that you can't make them stand up for 24 hours ala Rumsfeld or whatever; you can't take away very much from them. You can interrogate them nevertheless, and you may make gains, but I do think it was the interrogation imperative that forced this.

I don't agree with the calculus or the decision, but I don't think it was simply ignorance of the law, although there was a great deal. But they wanted to interrogate people without the constraints that POW status would have provided.

MR. WITTES: I'm going to push you on one point. I understand the idea that there is areas of armed conflict in which you apply the laws of war faithfully understood. And for everything else there's the criminal justice system. But the AUMF talks about something broader than that.

It talks about an authorization for use of force against groups, and it does not limit that, geographically.

And so my question is, it seems to me that the -- if you're talking about repudiating the war paradigm except in the geographical locations of armed conflict, you're talking about a substantial repeal of a major aspect of the AUMF. And I'm just trying to figure out if that's actually what you're advocating.

MS. SPAULDING: Except again --

SPEAKER: Can I be your lawyer?

MS. SPAULDING: -- I would point you to those words "necessary" and "appropriate" in the AUMF.

MR. GOLDMAN: Well, think about World War II for a second, you know. The U.S. was at war with Germany. That didn't mean that the war went on only in certain theaters; it went on against the armed forces of Germany wherever they were, including submarines right off the U.S. coast, including saboteurs and spies who were landed in the U.S. So the law of war paradigm doesn't have this concept of strict territoriality to it.

MR. WITTES: But if you accept that, then why

do you not accept the detention of someone like al-Marri or Bin Saeya in the --

MS. SPAULDING: Because al-Marri is not necessary and appropriate for a wide variety of reasons. Application of other U.S. law, legislative history of AUMF, aside from really bad and dangerous policy.

There are legal -- there are legal arguments using that necessary and appropriate language for saying that the AUMF does not authorize that. And I think that's appropriate.

MR. WITTES: Do you have a question from the floor, Tom?

MR. WOLMER: Mr. Moderator, may I interrupt you, because --

MR. WITTES: Please.

MR. WOLMER: -- I'm not a theorist, and I'm not an academic, and I don't know these things. So it's very difficult for me to understand the issues.

MR. WITTES: Introduce yourself, Tom.

MR. WOLMER: My name's Tom Wolmer, and I'm a lawyer in Washington.

(Laughter)

I think the distinction isn't really one of territory, and what made me help me understand it is what are you accusing the people of doing? And I think this is what people are saying. If you're accusing someone of just fighting against you in a conflict, you have the right to hold that person if you capture them and you're sure that, you know, you're fairly sure he did it, to the end of the conflict.

If you're accusing someone of doing more than that, but engaging in terrorism, terrorist acts, terrorism is a crime under domestic law, really in most places around the world under international law. And whether that person does that in uniform or does it in Switzerland and Bosnia, and purposely engages in terrorism, that's a criminal act that is dealt with through the criminal laws and adequately dealt with through the criminal laws.

Now, I may be messing that up a little bit because I see Bob wincing a bit.

(Laughter) But that's how -- it's not a question, so if you've got somebody in Switzerland who really is

purposely aiding and abetting and, you know, encouraging terrorism, that's a criminal act, you know. And you can do that, and there's a necessary and appropriate way to do it.

So I think if you distinguish it by what you're actually saying they are doing, it helps understand this.

MR. WITTES: Let's go to the gentleman over there. Wait for the mike, please.

MR. SCOFIELD: Jerry Scofield from Global Concern. The president only a couple of days ago said that from now on interrogations will be done in adherence to the Army Field Manual, the only exceptions to that being himself and the attorney general. And, of course, that field manual does contain paragraphs from the Geneva Convention.

Why shouldn't we be completely happy with that? Is there something that we have missed that seems like a big change. Is it too early?

MS. SPAULDING: I think the concern that's been expressed -- and I think we should be very gratified by that

-- but the concern that's been expressed is that at the

same time the president ordered a review, a group to look at interrogation -- what our interrogation policy should be. And so there is some nervousness that that leaves the door open for some retraction of this initial strong position, you know.

I think we should withhold judgment till we see where that goes.

MR. WITTES: Yes, in the back.

MR. MAYER: My name is Burt Mayer. My question is for Suzanne Spaulding. My question's about al-Marri. I was wondering if you would be willing to comment on the prospects of al-Marri actually going to trial, given a reasonably intelligent and objective federal judge, in view of his seven years of detention and, among other things, his right to a speedy trial.

MS. SPAULDING: Yeah. Well, you know, those are very difficult issues, and I don't, you know, I don't have access to the information that would actually answer that question.

I will say that I think the decision to move him into the criminal justice system in the United States as

opposed to, for example, sending him for prosecution in another country that might have had a basis for jurisdiction makes me think that the very smart lawyers who've looked at this inside the administration have concluded, you know, that there is a decent chance that they can bring forward a prosecution and get a conviction. Otherwise, I think they probably would have tried to find some other way of resolving this.

So, but that's the only basis upon which I can make that conclusion.

MR. WITTES: Yes?

MS. KEGAN: My name is Kegan, and I'm with the Charity and Security Network. I have a question about imagining the world beyond the war on terror paradigm.

Currently, our material support laws make it illegal for humanitarian aid groups to provide anything other than actual medicine and religious materials, which in the view of many is a violation of human rights law or international humanitarian law.

I'd like to get your views on how we might fix that situation.

SPEAKER: Well, I would say to start with, I think turning the material support law restrictions into violations of the laws of war and having them tried in a military commission was a crazy idea, because these material support laws, the way they've been argued and the way they're been presented tug at basic notions that underlie international humanitarian law, the principle of distinction, for instance.

It seems to me it's a clear-cut case where, you know, if that charge survives, it's something that would have to be done in a civilian court, and the criminal justice system and not in the military commission. And as I understand it, you know, that is one of the issues that the Obama administration is looking at, specifically. And I think it's one of the considerations that's going to govern this decision as they put cases in different baskets which ones go in the military commission's basket.

And with that consideration, I begin to wonder if there are really going to be any cases for military commissions at the end of the day. I'm skeptical that there will be any, in fact, because all the cases I've seen, you

know, material support winds up being a critical element of the charge.

SPEAKER: And you don't think at the end of the day a material support charge is defensible as a war crime?

MR. ONEK: I think it very clearly is not, and I think it was crazy for it to be charged as a violation of the laws of war. It is not a violation of the laws of war. It can be a crime under -- and it can be charged as a crime, but not a violation of the laws of war.

MR. WITTES: Anybody have anything to add to add to that? Yes, in the way back.

MS. ELMA: Hi, Laura E. Elma, freelancer for --

MR. WITTES: You're going to have to speak up.

MS. ELMA: Laura E. Elma, freelancer for Deutsche Vella Radio, and I guess I'm wondering first of all for Scott Horton, if U.S. did, assuming you're correct that the U.S. did violate all of these treaties or the torture conventions, the Geneva conventions, then -- and you say that the U.S. is obliged to prosecute, if the U.S. does not prosecute, so we violated the treaties, what sanctions are there for the U.S. for violating these basic treaties?

And in terms of, also for the other two members of the panel, my understanding of what happened when the Bush administration decided to expand the wiretapping program, there were congressional members who were called up there. They were informed about the program, and then if they had any objections, there's nowhere to go. I mean you can't even talk with staff about what this program is because you've now breached the secrecy laws in informing people about this supersecret program that no one's supposed to know about.

So are there going to be laws put in place by this Congress, or are people talking about some other procedure so that if there is some sort of a program that is proposed by any administration which appears to violate constitutional rights or they think is stepping way over the line, that there's somewhere that they can go for recourse without violating secrecy laws?

MR. HORTON: Shall I start with the --

MR. WITTES: Yes.

MR. HORTON: Yes, so just to be clear about what I said, I was focusing on one specific concrete case where

credible evidence, you know, a judicial determination has been made that there was violation of the anti-torture statute, and there is no investigation. I did not say the U.S. is obligated to prosecute that case; I said the U.S. is obligated to open a criminal investigation of the case.

Now, and I think, you know, that has to be followed rigorously, and a professional prosecutor has to go about examining the facts, bringing in the evidence, and making a determination as to whether or not a case can be brought and won before a jury, has to look at the question of affirmative defenses and so forth, and would have to make an independent professional judgment about charging that case. That's my point, the investigation has to occur.

And, you know, what's the downside? What happens to the U.S. if it doesn't do this? I think President Obama answered that question. It's about the United States's reputation, its image as a leader in the human rights field. It's a commitment to be a leader in the world in the counterterrorism struggle, because all of this undermines the position of the United States in a serious way.

And I think, also, it introduces a sort of sense

of impunity, that is, it's not really viewed as a crime anymore in the United States, and if the U.S. takes and sustains that position, well, the prohibition on torture is dead in the world.

MR. WITTES: And, Scott, let me just follow up on that, if I may. I take it your view is that it is not adequate for purposes of that treaty obligation for the attorney general who is, after all, the nation's top prosecutor, to take the view as a blanket matter that, you know, that an OLC opinion on point, on the specific questions, however objectionable that OLC opinion may be immunizes the conduct of people acting pursuant to it, and therefore that no criminal case is possible, and no further investigation is therefore warranted.

MR. HORTON: That argument is absolutely ludicrous, and it embarrasses me that my former law partner and friend of 20 years made it, and I'll tell you I don't believe that he, deep in his heart of hearts believes it's true. That was an argument that was presented and made for political reasons only, as a reason for blocking. And, in fact, we previously had a criminal investigation opened

after FBI agents came back from guantanamo reporting what they saw, a political decision taken by Alice Fisher closed that criminal investigation.

So we've seen consistently political intervention to shut down criminal investigations that should have occurred.

But coming back to the OLC opinion, there is no provision of the convention against torture that says after it's -- except when the attorney general tells you, you can torture and then it's fine. If we had that exception, the entire convention would be vitiated. Likewise, in the anti-torture statute itself, there's no exception that says except when there is an opinion rendered.

We do have an introduction of the Nurenberg defense, and the detainee abuse act -- Detainee Treatment Act, excuse me -- freudian slip -- of 2005 in which they said: Those engaged in the use of these interrogation methods are entitled to rely on opinion. It did not provide a defense to those who formulated and implemented the policy, but to the bottom echelon, the people at the CIA and the military who are actually doing it, notwithstanding which

24 of the military people who were using these techniques wound up being prosecuted, which I think is sort of interesting coming out of the Bush administration.

So but in any event, even as that defense is stated, it says: Good faith reliance on opinion, and when all the facts surrounding the issuance of these opinions are revealed. as I believe they will be within a month, because we have the Office of Professional Responsibility's report about to be issued, and I believe we're going to learn that these opinions were specifically commissioned to provide a shield against criminal prosecution. And if those are the facts, they are utterly worthless.

MR. WITTES: Please.

MS. SPAULDING: I'll answer the gang of 83 question, but I will also tag onto the conversation about investigation of torture allegations. And I guess I fall somewhere in the middle there, which is to say I do think that a legal opinion from coming out of the Department of Justice is very relevant in terms of a criminal investigation and prosecution -- I'm sorry, in terms of a criminal prosecution.

The investigation is necessary to determine if the activities were in compliance with that legal opinion. So to say that there will be no investigations because there was a legal opinion that justified some forms of coercive interrogation strikes me as what is, you know, really hard to sustain, because it's important to determine, even if there's a legal opinion, whether it was complied with or whether the activities went beyond the scope of that legal opinion. And you can only do that through investigation.

Gang of eight things which you refer to which happened apparently in the warrant list surveillance activities where only eight people in the leadership of Congress get briefed and can't talk to their staff, extremely problematic. I don't expect to see a legal change as a response to that because the law is actually pretty clear and pretty strong.

And I think these briefings violated the law. The National Security Act in 1947 says you have to keep the committees fully and currently informed. The committees, the oversight committees of intelligence, except with

regard to covert actions in extraordinary circumstances, the president is authorized to brief this gang of eight. And this was not, from everything I know so far, the warrant list surveillance program was not a covert action. So they did not have the legal authority to do that.

I do think there should be process changes to the gang of eight even when it is used in compliance with the National Security Act. I think Congress ought to seriously consider pushing back to say we need to have a staff person accompany us who understands this area of the law. There's a whole series of safeguards that I recommended that I think could be put in place to make the gang of eight meet the national security imperative, but still allow for effective oversight.

MR. ONEK: And the Speaker of the House just, I guess two days ago, said that she was dissatisfied with the current procedures and would be making suggestions for change.

MS. SPAULDING: We should talk.

MR. WITTES: Bruce, you had a question?

MR. BRUCE_____: Well, I've heard some

breathtaking doctrines announced here. I think Mr. Horton's comments leave me slightly gasping. Is it the logic of your position despite your little waffling about, well, let's just open an investigation, not necessarily a prosecution? Do you seriously contend that we ought to be investigating President Bush, Vice President Cheney? Because after all, you said they seemed to condone waterboarding.

I mean the ludicrousness of this kind of position shows that lawyers somehow, sometimes depart from good sense and rationality. There's political logic which is a little bit higher than some of your legal -- but let me go to another point here.

MR. WITTES: No, no, let's actually stop there. You've put a very interesting question on the table?

Scott, have you departed from good sense and logic?

MR. HORTON: Absolutely, I have placed the law above political logic. I confess I have done that.

MR. BRUCE_____: You're so (inaudible). We don't need --

MR. HORTON: And it's silly to place the law above politics, absolutely, I -- yes, I agree.

No, I believe that this country, that the law is king in America, as Thomas Paine said, and it should continue to be so, and that the president cannot be above the law. And there should be a comprehensive criminal investigation of credible allegations of torture. And, of course, that investigation needs to follow every step along the way, and a prosecutor is going to have to make decisions at the end of the day about whether he can charge and whether he can prevail before a jury on the charge.

And I'd say right now, just with respect to the facts, if we know 30 percent of what happened, I'd be surprised. I think there's a lot still to be uncovered, a lot we don't know.

MR. WITTES: Scott --

MR. BRUCE_____: (Inaudible) -- the country to stand up and say, Well, we've investigated Bush; we've investigated Cheney; we've investigated Rumsfeld. Now we can't quite try them, but they're guilty as hell. How is that going to serve the United States of America?

MR. HORTON: I think it would serve the interest of the United States for us to take our commitment to enforce the ban on torture seriously. And there are a number of other people who I think would be the targets quite rightly of an investigation.

In fact, if you look at the exit interviews of both Bush and Cheney, they both set up what their defense to a charge of torture would be. They said, "We relied on lawyers." In fact, President Bush said, "We settled the policy and then I went and got an opinion from the lawyers," which I think quite literally is what happened and which is the reason why those opinions aren't worth anything because they were procured after the fact, after the policy was settled.

But, you know, would as prosecutor necessarily charge Dick Cheney or George Bush? I don't know. I haven't even begun to think that through, but I think crimes occurred, and I think there are a lot of people who were involved in the fomenting of policies that led to those crimes, and I think all of that has to be investigated.

MR. WITTES: Scott, I'm curious to reframe that

question just a little bit. There is a long tradition in this country of administration's choosing not to investigate and prosecute the crimes of their predecessors, and there is no tradition in this country of prosecuting your predecessors in office. It's actually -- in fact, I can't think of a single example.

Is there no place in this discussion for the idea that Barack Obama has articulated on, without ever saying he won't investigate it, but he's articulated it pretty clearly that he means to, you know, look forward more than backwards. Is there no place for that as a political compromise with the principle that the law is king?

MR. HORTON: No, there's no --

MS. SPAULDING: When the Justice Department strikes a criminal investigation, it's secret.

MR. HORTON: Yeah, they don't announce it.

MS. KATE (?): And the targets of the criminal investigation are secret. And if they don't bring indictments, it's a secret that they investigated certain people. And so I think this --

MR. HORTON: It should be.

MS. KATE: -- conversation needs to reflect those -- yes, should be, that's -- as civil libertarians we support that secrecy.

AUDIENCE SPEAKER: (Inaudible)

MR. WITTES: I mean the case point is very well taken. If they conducted the investigation that you're asking for, how would you even know if they decided not to bring the case? And when you say there's no open investigation on the following matters, how do you even know that's true?

MR. HORTON: Empirically, I think I don't. And if there were an investigation opened into torture involving Bush and Cheney, I have a fairly high level of confidence I would be reading about it on the front page of The Washington Post within the matter of a couple of weeks. But everything Kate says is true.

MS. KATE: Always.

SPEAKER: I have a question about -- which may be more relevant for the previous panel than the present one -- but the report indicates that the legal basis for detention in a noninternational armed conflict is domestic

law and international human rights law, and as such it requires judicial oversight. And if we agree that our (inaudible) Afghanistan right now are both noninternational armed conflicts, I wondered how judicial oversight was going to impact that.

And a follow-up question is whether or not in an international armed conflict under detentions under a GC-3 and 4, those detentions were (inaudible) allegations.

MR. WITTES: Bob, do you want to take that, or --

MR. GOLDMAN: Yeah. Certainly, in a situation of international armed conflict within the meaning of Common Article 2 of the Geneva Conventions, that is, war, armed conflict between or among states, detention is clear and the authority to detain And detention for the duration of the hostilities and so forth is the norm, even though, optionally, you could release people who are ill or whatever and so forth. You can have exchanges.

The issue is a little bit more tricky than noninternational armed conflict, and there's still some disagreement, for instance what has happened in Afghanistan.

It was my belief that Afghanistan was a noninternational armed conflict between the Northern Alliance and the Taliban. We intervened on the side of the Northern Alliance, and that triggered the international armed conflict of things, and we misapplied -- in my view clearly misapplied the 3rd Convention and the 4th Convention and so forth. And then we deliberately distorted the notion of who was a unprivileged combatant to get exactly what we wanted to do: to get people in a law-free zone, and they'll be treated with a template.

Then when the Karsai government fell, most people feel that it became a noninternational armed conflict in which the United States and various NATO partners and so forth had been invited to help put down the rebellion, the insurgency, whatever you want to call it.

Humanitarian law, Common Article 3 is really silent on issues of detention. What it makes very clear, the person who do not or no longer participate in the hostilities have to be treated in a different way. Additional protocol to also inferentially envisions detention or internment of persons related to the conflict,

but it's not like international armed conflict with a clear-cut authorization.

And so most authorities would take the position that the grounds to detain would be under Afghan law and as informed by human rights law and so forth. This is not very well developed and, by the way, the International Committee of the Red Cross has been holding conferences on the interrelationship between, for instance, human rights law and the law of armed conflict.

There is no such thing, unlike in international armed conflict, of a requirement for prisoner of war status. In other words, the government can treat each and every dissonant who it grabs, subject them to trial, even though they otherwise complied with the laws and customs of war applicable to the noninternational armed conflict.

But many of them will want to hold them and not try them because they're worried about reciprocity on the other side, that their troops which don't -- there's no requirement that they get prisoner of war status. So there is an absence of clarity, but the right to detain that the United States has, for instance, I mean at least under

humanitarian law, would be no greater than the rights that the Afghans had to detain. And indeed, there are a whole variety of status of forces agreements that have been made by the Canadians, the Dutch and so forth with Afghanistan concerning the arrangements for internment, and they were very concerned also about people being turned over to the U.S. and ending up in Guantanamo and things like that.

So as I said, we're dealing with an area of the law which is not as clear as in international armed conflict. The bottom line is this, however: There is no circumstance, however classified an individual, whatever the nature of the armed conflict, that they are placed beyond fundamental protections of either human rights law or international humanitarian law. Common Article 3 has to be the minimum, and if you violate Common Article 3, you're in the area, internationally, of criminal activity.

And just to make another comment on some of the things you said, the U.S. can pass whatever legislation it wants to do. We had tried to see if a holding treaty through the United States that the world itself, that the U.S. played a leadership role in, and it's a fundamental

principle that almost anyone in the first month of taking an international law course learns that you can't plead your domestic law as an excuse for noncompliance with a norm of international law. That includes your own constitution. That's international law.

How you go about doing those things, but if you want to look at the international legal implications and so forth, no state can unilaterally set aside Common Article 3. You can't do it. Now, it may operate as U.S. domestic law, but those who do that do so at their peril. International law does not permit that.

And the other thing is we saw no state practice whatsoever acquiescing, tolerating in the emergence of other norms that would permit, for instance, set aside of these things.

MR. WITTES: We're going to leave it there. I thank you all for coming.

(Applause)

* * * * *

CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that

the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

Notary Public # 351998
in and for the
Commonwealth of Virginia
My Commission Expires:
November 30, 2012