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"Detention and Interrogation of Captured 'Enemies': Do Law and National Security Clash"

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A G E N D A

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P R O C E E D I N G S

MR. TAYLOR: If everybody's ready, I guess we'll start. Is everybody ready? Speak now or forever hold your peace.

You've all seen the announcement I assume. In a nutshell, this panel is about locking up suspected terrorists and seeking intelligence from them, sometimes potentially life-saving intelligence, through coercive interrogation, with the questions of torture and quasi-torture that that raises with the clash between some people's perception of our security needs and other people's perception of our legal constraints and probably more important than the legal constraints, what's the right policy about how tough you can be in interrogating people when the information you're seeking from them isn't just about trying to convict someone of a crime. It's about trying to prevent perhaps a bombing.

Now, President Bush, of course, has been saying "we do not torture." But some people don't think it's that simple. And if just a survey of recent headlines, before we get into the panel, Condoleezza Rice, the Secretary of State, was followed around Europe last week by people angry about reports of secret CIA prisons in Eastern Europe, where high-level Al Qaeda suspects are questioned. There are long-term negotiations going on between Senator McCain and his allies on the one hand, and the Administration on the other hand, including Vice President Cheney.

Senator McCain wants to have a new law that limits interrogation rules more than current law does. It's often been misreported in the New York Times and other papers as being that McCain is trying to ban torture.

In fact, torture is already banned by criminal law and international statute.

This is about a category of interrogation techniques that's classified as a little bit short of torture, but not very nice, called cruel, inhuman, and degrading treatment or punishment.

The British House of—and that, the action in Congress this week is that probably the Defense Department Authorization bill will go through this week or soon, and the McCain Amendment, which has great support, will probably be on it, and another amendment in which Senator Graham has—Senator Lindsay Graham has gotten support, made a compromise with Senator Carl Levin, called the Graham-Levin-Kyle Amendment. Senator Kyle that doesn't deal with questioning; it deals with detention and what sort of procedures are necessary to justify long-term detention of suspected Al Qaeda people.

The British House of Lords last week had an important decision in which they said basically torture is never right and information gleaned through torture is never admissible in our courts.

There were further reports last week about a captured suspect named al-Libi, who said, while under interrogation in Egypt, to which he

had been transported by the CIA I think, he said that he was the main source of the Administration's claims that there were close ties between Al Qaeda and Saddam Hussein in terms of chemical warfare training and the like. Information that proved to be incorrect.

There's a debate between Charles Krauthammer in the Weekly Standard and Andrew Sullivan in the New Republic. Krauthammer says a nuclear bomb about to go off in New York City. You have the guy who knows where it is. Do you—it's a moral imperative to torture him in a case like this, says Krauthammer. Sullivan disagrees.

The continuing fighting about military commissions. This week we'd had a report that there's a deal near on the McCain Amendment, but Senator Graham was on TV yesterday, saying that there isn't a deal in sight yet on his amendment.

And so there's a lot going on, and both Left and Right are unhappy with the McCain—I'm sorry—with the Graham-Levin Amendment and the Administration has been very unhappy with the McCain Amendment.

So we have—it's very fortunate that we've got four panelists who are among the leading experts on this, covering a diversity of points of view.

The format will be each panelist is to speak for five minutes, opening statements.

I'll introduce them sequentially as they speak, and then I will ask questions of the panelists, a couple of rounds of questions, more or less in the same order in which they spoke. They can interrupt and if somebody else says something they want to respond to. Then there will be time for questions from the floor.

And the first panelist to speak will be Thomas Wilner, who's a partner at the large New York law firm, Sherman and Sterling, the Washington Office I think. And he's been representing a group of Kuwaitis held on Guantanamo for at least two or three years I think, and has been deeply involved in the litigation, including the Rasoul decision that went to the Supreme Court in June 2004, and the continuing litigation over the many issues that we're talking about here, with particular reference to his clients on Guantanamo. And with that, could you say what you have to tell us, Tom?

MR. WILNER: Absolutely, and I'll try to be very short.

First of all, let me say that I'm normally a back row and go last sort of person. I hate going first, but, nevertheless, I'll do it.

And I hope you notice I'm sitting far to the right, so I give a perspective from that view.

I actually—let me talk about torture first. There's been a tremendous amount of publicity on torture since the pictures came out on Abu Ghraib a year and a half ago, almost exactly a year and a half ago.

And I can get more into the details on it later, and what I believe about that. But in summary, I agree with the statements that Senator McCain has made; that preventing torture is very important, and it's important not just for detainees; it's important for America. It's about what we stand for and who we are as a nation.

Our case, the Guantanamo case, is really—weren't about torture, at least originally. When we first brought those cases, I had no idea that the United States could possibly be torturing people. But the cases were about something else we stand for I think, and what we are. They were really about due process and the rule of law.

Let me give just a little bit of background: I was contacted in March of 2002 by a group of Kuwaiti families, actually a lawyer representing them in Kuwait. At that time, they had their family members were missing. They didn't know where they were. They had been mostly in Pakistan in September 2002. Didn't know where they were; thought they were in the hands of the U.S., but asked us to help find out.

We made inquiries in Washington and were told that we wouldn't learn anything. They couldn't tell us anything.

I went to Kuwait in April of 2002 to do the sort of due diligence on the families. I found out a lot of interesting things here I could talk about later.

For instance, the Red Cross told us that they had learned that a lot of these people had been turned in for bounties by Pakistani tribespeople for substantial bounties paid by the U.S.

But while we were in Kuwait, the U.S. government told the Kuwait government that eight of our 12 people were in Guantanamo and the Red Cross told us the other four were there.

On May 1st, we brought a suit in the District Court. We asked for very limited relief. We asked for basic due process. We didn't ask for the release of them. But most importantly, we asked for—that they'd have access to some impartial tribunal to see whether there was a reasonable basis for holding them there.

Now, let me say always, from the beginning, I have felt that the United States has got to have the right to detain and hold and capture anyone who's really dangerous.

And if they're really terrorists, we have absolute right to punish them and string them up by their most vulnerable parts.

But the key thing always was there's got to be some fair process to determine whether the people are dangerous or not. That's all the cases have ever been about is some—trying to get some fair hearing process to determine whether these people are correctly held.

You know a lot of people recently, including Senator Graham, have said that our case is about extending legal rights to terrorists. It's not about that at all. It's much more fundamental: It's

trying to assure that there is some fair process to determine whether they're terrorists or not.

And that really is the essence of the rule of law: some impartial judicial examination of the facts to determine whether there's a reasonable basis to deprive somebody of their liberty.

It's particularly important here. Actually, I talked with Stuart about two or three years ago. Soon after I brought the cases, I was contacted confidentially—very secretly actually; I had to have meetings off in cafes, with some Army intelligence officers and counter-intelligence officers, who told me—one of the guys told me that many of these people down there are there by mistake. They're innocent.

One guy told me at least a third are there. The other fellow told me, oh, at least a third—probably no more than a third of the people down there are really connected in any way with the Taliban or Al Qaeda. There are just a lot of mistakes that have been made.

It's very interesting, because that has come out more recently in papers across the country, but nobody has pulled it together. The Wall Street Journal quoted the commandant down there that's saying many of these people are innocent. The Deputy Commandant said that most of these people weren't fighting; they were running.

Former interrogators—Eric Sar, in his book written with Vivica Novak [ph.] at Time said, at most a few dozen people down there had any connection with Al Qaeda or the Taliban.

And there's another former interrogator, actually a CIA plant, who was on PBS' Frontline that said, at most, 10 percent of the people should be there. The others were turned in for bounties. There could be grudges or other things.

So a lot of people at Guantanamo are innocent. They have never had a fair hearing. And it's interesting, too, the government in taking people to Guantanamo simply ignored existing military regulations. And let me give some background.

You know, people say, well, in World War II, we didn't have court cases over determining whether people are enemy combatants.

Well, in World War II, of course, it was pretty easy to tell who was an enemy combatant. They normally wore a German or a Japanese uniform.

We first really confronted the problem of, you know, a doubt of the people we captured in Vietnam, when we were picking up a lot of people dressed like civilians. Now, there's no doubt that civilians, particularly in this current war, can be bad guys.

But also a lot of civilians are not bad guys. I don't—none of you are dressed in military uniforms. You're all like civilians. And I doubt whether many of you are bad guys.

So there's got to be a process to determine it.

The Army or the military really, with careful thought, designed such a process, and it's modeled after the Geneva Conventions.

If you pick up anyone, and there's any doubt, there's supposed to be a hearing promptly in the field to determine if—what they are.

As David Cole pointed out in a terrific book he wrote about a year ago, in the last Gulf War, we had 1,200 or so of these hearings, and three quarters of the people were found to be innocent civilians and returned home. We simply didn't have those hearings here—simply ignored the regulations.

The regulations also say that if you determine that somebody is a combatant, but you're not going to give them prisoner of war status, and you still want to incarcerate them, you need to have another hearing. They didn't do it.

The government instituted hearings for the first time, really more than three years—or about three years after they took people down to Guantanamo and after we won before the Supreme Court. The Supreme Court said they had the right to challenge their detentions in court.

Nine days after that, the government put in what they call these combatant status review tribunals to determine whether the decisions that their superiors had made all along; that these guys were horrible, whether they should be confirmed; whether they were, in fact, enemy combatants. As expected, almost in 95 percent of the cases, they found that they were enemy combatants.

Judge Green, who looked at that, said that frankly that this CSRT Combatant Status Review Tribunal process was wholly inadequate. It didn't give the people notice of the accusations against them or an opportunity to rebut them, and it allowed the use of evidence obtained through torture.

We are now in the courts on that. Let me just finish by saying two things.

The whole structure of what the government did was seriously flawed. The government purposely took people to Guantanamo, because they said it's beyond the sovereign territory of the United States. And they argued if we take people there, they have no legal rights, and we're not answerable in the courts.

The whole purpose of taking people to Guantanamo was to avoid the law. That created I think an atmosphere or a culture of illegality throughout this Administration. And I think what we found about in Abu Ghraib and elsewhere is a direct result of that culture of illegality, the feeling that the government doesn't need to abide by the laws.

Let me just say one more thing, as we get into torture. We can have lots of great debates about do you torture somebody if you know you have a terrorist in front of you and he has ticking-bomb information that save millions of people. But that rarely happens.

The real problem is, as we found at Abu Ghraib, does anyone here believe that we should torture people who may well be innocent, because, you know, we found out in Abu Ghraib the Red Cross said over 90 percent of those people who suffered those indignities were absolutely innocent and picked up by mistake.

The people at Guantanamo have never had a fair hearing to distinguish who's innocent or not. No matter how you feel at torture, we shouldn't feel comfortable with torturing innocent people. I'll stop. I don't know how long that took.

MR. TAYLOR: Brad Berenson will go next. Brad is a partner at a large firm, Sidney and Austin. More to the point for our purposes, he was an Assistant to now Attorney General Gonzalez, then White House Counsel Gonzalez, for about two years, the first two years of this Administration; and, therefore, has something of an insider's perspective on things like why the President, for example, was so confident that these are all bad people, which is what he said about the folks that Mr. Wilner was referring to at Guantanamo a couple years ago. Brad?

MR. BERENSON: Thanks, Stuart. I think probably the most useful thing I can do with these initial five minutes is to try to give everybody a little bit of insight into the overall mindset of the Bush Administration and its supporters in confronting the whole range of issues that we'll probably touch on this morning, not just the McCain

Amendment or the Graham-Levin-Kyle Amendment, but the questions of detentions, detentions down in Guantanamo, military commissions, and the like.

I think there are eight basic principles that underlie and inform Bush Administration policy on all of these legal issues. And before getting into a lot of the details on these various subjects encompassed by our topic this morning, I thought I'd tick these principles off for you to try to give you some insight into the overall perspective.

In the course of doing that, I'll try to address a couple of the things that Tom said, but I'll leave most of the detailed discussion for the back and forth.

Principle number one is that we are at war, and not just metaphorically so. It's not a war on poverty. It's not a war on drugs. We are really and truly at war.

9/11 is what convinced the people in the Administration, starting with the President, of that. Al Qaeda had declared war many, many years earlier on us, but nobody took it terribly seriously, it was regarded as more a problem for law enforcement. But on 9/11 the capital of our country was attacked, literally. The center of our defense establishment was successfully attacked. Thousands of Americans were killed. One of the bloodiest days in our history, including all of our previous wars, and certainly one of the bloodiest days for civilians.

NATO invoked Article V for the first time. The President made a finding that there was a state of armed conflict. Combat air patrols flew over Washington and New York, and under all of the applicable domestic and international definitions of armed conflict, or war, we were certainly in that state.

So that's principle number one.

Pardon me. [Laughter.]

MR. TAYLOR: You get an extra 15 seconds.

MR. BERENSON: So principle number one is that we are, in fact, at war.

Principle number two is that the stakes in this war are extremely high; that the threat we face now is not a low-grade threat. It's not a threat of embarrassment. It's not a threat of marginal impact on our lives or our values or our security.

It's an existential threat. Primarily this conviction comes from the kinds of considerations discussed by Professor Allison of Harvard in his book, "Nuclear Terrorism."

The extent of threat that an adversary poses to you is essentially if it's expressed as a mathematical equation, it's a product: someone's will to hurt you multiplied by their capacity to hurt you.

In the Cold War, we had an adversary who had obviously the ultimate capacity to hurt us, to annihilate us with nuclear weapons. But

the will was low because they wanted to safeguard their own lives, and they had an investment in the international system.

Now, the circumstances are somewhat reversed: We have an adversary whose will to hurt is almost unlimited, whose heedless of their own lives, and deeply desirous of destroying us if they can.

And while we think and we hope that they don't have the capacity to annihilate us yet, the circumstances surrounding the availability of fissionable material on the world market are such that we cannot have confidence that they won't have that capability in the future.

And my view and the view of a lot of people in the Administration and supporting the Administration is that if Al Qaeda were to succeed in detonating a nuclear weapon in any western city, including this one—this would certainly be high on their target list—that really and truly it would be the advent of the new Dark Age; that western values and western culture and western society and all the glories of human progress, advancement, and happiness that those have produced over the last few centuries would be on an inevitable slide, and we would descend into a new Dark Age.

So the stakes are extremely high.

Principle number three is that war calls forth an entirely different legal framework than we are accustomed to in situations that do not involve war.

The details of that we can flesh out as we address various subjects, but to make it obvious, when you are at war and you have a suspected adversary across from you, you're entitled to kill that person with no due process or advance warning whatsoever. Indeed, it's your obligation to do that.

That's what protecting your own country and your own citizens requires.

Two of the principal consequences of this different legal framework comprise the third and the fourth general principles.

One is that when we are at war, we weigh the risks to innocents entirely differently than we do when we are not at war. Grievous damage to the lives and liberties and property of innocents are a regrettable but daily function of a state of armed conflict, of warfare the kinds of injuries that are totally unredressable in war time, but which we would never tolerate in peace time, if we were not at war.

And this gets to a lot of what Tom was talking about. Obviously, there is going to be an error rate. When you're on the global battlefield trying to identify and capture terrorists, you're not going to be correct a hundred percent of the time. I don't know whether the error rate at Guantanamo is as high as Tom suggests. I suspect it's a quite a bit lower.

But surely there is an error rate. Surely, there are people there who don't deserve to be there.

But our objective is not to protect suspected enemies in time of war. It's to protect our own people, and we have to understand that that is going to mean sometimes hurting innocents in the process.

Number five: the primacy of the executive. In war time, the executive has to be empowered to function and to protect the country and to protect the continuity of government. No other branch of government can do it.

If there were another attack tomorrow, nobody would be calling the Supreme Court, asking what are you going to do to protect us. Why did this happen? How come you didn't prevent it? And frankly, they won't be asking that of Congress either.

It's the President in time of war, the executive branch that's responsible for our security, and in order for there to be proper accountability that responsibility has to be married up with the authority to successfully prosecute a war.

Of importance here—and I'll not go into too much detail, 'cause I'm sure I'm running out of time—we cannot judicialize the conduct of warfare. That would be an absolute disaster.

It's unheard of in the history of nations over the course of millennia. Nobody, nobody at war gives access to their domestic court system to the people that they are fighting and trying to subdue and trying to defeat.

Our judiciary is particularly unsuited to weighing these kinds of national security considerations. Their focus is necessarily on individual rights, and the political branches have to be responsible, with the executive primarily responsible.

Principle number six is that executive responses to date, what the executive has tried to do has been very moderate by historical standards and well within the rule of law and due process that Tom refers to. And that's not to deny that there have been mistakes, errors, and abuses. There have. There have been in all past wars, and I suspect there will be by both sides in all future wars.

But if you take military commissions, for example, there's been enormous uproar ever since the President signed the order authorizing the creation of those commissions. The use of commissions to try war criminals goes all the way back to the Revolutionary War.

George Washington used them in the revolution. They were used in the Mexican-American War by General Winfield Scott. Throughout the Civil War, there were thousands of them. The Lincoln assassins were tried by them. They were used in World War II.

And the military commissions we have today, under the rules we have today, are the absolute state of the art. They are the most elaborate, most fair to the defendant that the world has ever seen. And that is really not a fairly debatable point. They absolutely are.

Number seven: In order to win in this war, we need to summon our resolve and our will to do the difficult things that war entails. War is not and cannot be antiseptic. We have to stare it in the face and sometimes that's ugly.

But if we do not summon the will to do what our forebears have done and what war time leaders in other countries have done, we will surely face defeat. And some of the most discouraging signs in the current context are signs that our elites in this country—and, frankly, in Europe as well—have lost faith, have lost resolve, have lost the will to fight a war as a war has to be fought; and have frankly lost confidence in the proposition that our cause is just.

And that leads to the final principle here, which is that the true cause of human rights, of civil rights, and of civil liberties is the cause of the United States in this conflict. Effective counter-terrorism is the single best way to protect all of those liberal values that probably everybody in this room subscribes to.

Were there to be more attacks on the scale of 9/11 or God forbid worse, there would inevitably be a far more draconian response than we've seen thus far. And so in the name of preventing that kind of response, which the public would demand, and in the name of ensuring our ultimate victory over an Islamo-fascist ideology, a religiously inspired fascist ideology, that is as illiberal as any the world has ever seen, we all need to keep first and foremost in our minds the need to

wage this war effectively and ensure that the forces of right and the forces of liberalism and democracy prevail in the end.

MR. STUART: Thank you, Brad. Next David Cole will speak, and I forgot to mention that full biographies of our panelists are out at the front table.

David is a professor at Georgetown Law School; Georgetown University Law Center I suppose it is. And more to the point here has been one of the leading civil liberties lawyers in the United States for much too long, considering how youthful he looks. Didn't you write the brief in the flag burning case?

MR. COLE: That's right.

MR. STUART: In about 1950 or so?

[Laughter.]

MR. STUART: Or 1990, whenever it was. And one of the most I think principled critics of the Administration. He's always worth listening to, even when he's wrong, which is has happened once or twice. David.

MR. COLE: Thank you, Stuart. I'm honored to be on a panel with such distinguished and eloquent spokespersons and people, all of whom have really devoted a great deal of their own energy and effort toward making us safer and making us abide by the rule of law.

I want to start by agreeing with at least four of Brad's eight principles: that we're at war, that the stakes are high, that the balance in

a war time is different than in a civilian context, and—I can't read my—I can't read the fourth—but I think I agree with the fourth as well.

But I want to—what I want to suggest is that on his sixth point, namely, that the Bush Administration has responded in this war in a way that is consistent with the rule of law, I think he's completely off the mark. And I think, in fact, what the government did from the outset was to chose not to be bound by the most limited, minimal requirements of the rule of law; that is, the laws of war.

The laws of war are not onerous. They are minimal. They reflect everything that Brad said about the—that war is different from peace time, et cetera, et cetera, et cetera. But they do impose certain minimal requirements, and we decided from day one to ignore them. And I think as a result, we are paying the costs today.

In effect, what we have done is painted ourselves into a corner. It is increasingly unacceptable I think to the world at large to hold people at Guantanamo, certainly for the rest of their lives, as Donald Rumsfeld has asserted, without any sort of trial on any short of charges. That's increasingly intolerable.

At the same time, it's virtually impossible to try most of them because of the way we have treated them and the way we have treated others in obtaining information in the war on terror, such that any trial will very likely turn into a trial of the United States itself, a trial of our interrogation tactics, which we now know have included things like

water boarding, like making people stand for 40 hours straight in cold cells at 50 degrees, dousing them with cold water regularly, denying them sleep, injecting them with IV fluids and then denying them the ability to go the bathroom, making them bark like dogs, attacking them with dogs and the like.

Those tactics have, in effect, immunized most of the worst of the worst from any trial in which they could actually be held to account, convicted, and then held for the rest of their lives properly after a trial.

And the results of these decisions, the decisions essentially to number one, deny people any basic hearing at the outset to distinguish, as Tom said, between the innocent and the guilty; and then number two, to refuse to abide by the basic minimal requirement that you treat people humanely, and you treat people humanely whether they are lawful combatants or unlawful combatants.

And by treating them humanely, it means you don't water board them. You don't make them bark like dogs. You don't inject them with IV fluids and you make them urinate on themselves and the like.

We've decided not to abide by those rules. And what are the results?

We know many of the results. Many of Tom's—Tom indicated some. Stuart indicated others.

One instance is the case of Maher Arar, a Canadian citizen who's been living in Canada for 20 years, who, upon his return to Canada

from Europe, was changing planes at JFK, where we stopped him, and sent him to Syria, where he was tortured using a dossier of questions provided by the United States, and locked up for a year without charges; released at the end of a year because there was no evidence that he had done anything wrong.

He's now living in Canada, where he's a free man again because there's no evidence that he's done anything wrong.

The results are also seen with the pictures from Abu Ghraib, which speak for themselves. The results are shown by the report this last week that information obtained from a suspect that we rendered to Egypt for torture was the information that the Bush Administration then relied upon to assert the link between Al Qaeda and Saddam Hussein, which got us into the war with Iraq.

And most significantly, the costs or the results of this decision to not abide by the basic minimal laws of war—a hearing and humane treatment—are that Guantanamo and Abu Ghraib have become synonymous with the United States' War on Terror.

And those are about the worst possible images that we could use for the War on Terror. Those are the best possible images that Al Qaeda could ever come up with to assign to the United States in the War on Terror, because, as the 9/11 Commission has pointed out, and as I think all of us understand, the War on Terror is ultimately not about, you know, checking every bag that goes on an airplane. It's ultimately about

winning the hearts and minds of people so that we are not the target of so much venom.

And we have created unfortunately so much of that venom by our refusal to be bound by these simple basic rules.

Now, the tragedy of all this is that it is entirely unnecessary. The question posed by the title of this debate is, are law and national security inconsistent? I don't think so.

I think we could have served all of our national security concerns and abided by the rule of law in this war, and we would not be in the box that we are today.

Had we given the people at Guantanamo hearings at the outset, the world would not be objecting to our holding them for the duration of the war with Al Qaeda, which is routine in war time.

Had we abided by the basic minimal requirement that you treat every human being as a human being and not subject them to treatment like dogs, then we would be able to try those who are the masterminds of 9/11, who are fighting for Al Qaeda, because fighting for Al Qaeda is a war crime, and we could try them. We could convict them, and we could put them away for the rest of their lives properly, with legitimacy, and without creating an international embarrassment and a disaster for our foreign policy.

I was struck—and I'll close with this—I was struck a month ago or so when the Washington Post issued its report on the black sites—

CIA black sites, secret prisons. The next day Russia rushed out a press release to distance itself from the United States, because it was concerned that if it was associated with the United States, its image, in terms of human rights, would fall.

You know, you know that we have come to a very, very sad time in our history when a country like Russia is seeking to distance itself from us because of concern about human rights images and records.

Supreme Court Justice Barak in Israel, in a very important case assessing the legality of using physical coercion to try to get suspects to talk, said that democracies must fight terrorism with one hand tied behind their backs. Precisely because they do so, they are likely to prevail.

The Bush Administration sought to untie that hand, and that's why unfortunately we're not prevailing. Thank you.

MR. STUART: Thank you, David. Next comes David Rivkin, who I believe was born in Russia, speaking of Russia, and is a partner with Baker and Hostetler's office in Washington; a former official of the White House and the Justice Department, and an astonishingly prolific author of op-eds, amicus briefs I believe, you know, perhaps books and encyclopedias, mostly defending the Administration's handling of the issues we're talking about. David, please share your thoughts.

MR. RIVKIN: Thank you, Stuart. I will try to briefly run through my views on the current torture debate, and if I have a second issue a general rejoinder to my good friend, David Cole.

I think we can all agree that we should have a serious debate about how do we obtain intelligence from captured enemy combatants in this war. I think the reasons for it are very obvious: intelligence has always been pivotal in terms of being able to prevail in the past, particularly during the Cold War.

We got a lot of good using this so-called national technical means of collection, and, of course, we had defectors. No time to dwell on it, but I think serious students of intelligence would tell you probably learn more from defectors and people who volunteered and stayed in place than we ever learned using our own national technical means of intelligence through satellites and interception of communications and what not.

Unfortunately, that's not very useful these days, because the terrorists, by and large, do not speak certainly by now in ways that render their conversations easy to intercept. They send, you know, missives by messengers. They speak in code. And unfortunately, and this I think is a test of the vigor of ideology, evil that it is, I don't know of any defectors from Al Qaeda and most other terrorist organizations.

We certainly have not succeeded, speaking generally, in being able to place our own people in there. So the only way we can get

intelligence in this war, to just dramatize the stake, is by interrogating people we capture. And without it, we're definitely going to lose this war.

Now, we should have a serious debate, and I emphasize the word serious. Fortunately, from my perspective, this debate has been unduly legalistic and has been unduly focused, I would say obsessively focused, on the term torture.

To me the real debate should be more policy-centric and, in addition to torture, of course, the famous cruel, inhumane, and degrading treatment. And the debate should really focus on what means the United States can and should use. We're comfortable with using as a people as [inaudible] for a century in an effort to accomplish what we need to accomplish, namely getting intelligence.

Now, the reason I think we should stop obsessing about legal issues is not because legal issues don't matter, but because I think the legal parameter is far from being a straightjacket that has been portrayed by the critics are fairly broad. In fact, let me stress it—that they're sufficiently broad, what I call the legal box, is a broader problem in the policy box. I think we can do more things legally than we'll be able to count on as a matter of policy if we have a serious debate.

The reason for it is very simple, and hopefully I don't think most of my colleagues in this panel would disagree with me. It's because coercive interrogation techniques, ladies and gentlemen, are not

inherently torturous, not necessarily torturous, and not necessarily even rise to the level of cruel, inhumane, and degrading treatment.

And I think one of my biggest problems with the critics of—that stress interrogation techniques is that they wrapped the whole issue into the use of the term torture so much so it's almost become synonymous with the stress interrogations.

Now, again, I'll easily concede, no difficulty there. Torture is illegal regardless of whether or not a particular captive qualifies as a lawful combatant or not. The prohibition of torture was the principal purpose why we signed the U.N. Anti-Torture Convention, and just quote very briefly with respect to torture, which was specifically defined in the Convention as quote unquote "intentional infliction of severe pain or suffering to interrogate, punish, or interrogate a person."

The Senate ratified the Convention what virtually in qualifications to be sure in the transmittal letter to the Convention—it was transmitted by President Reagan. There were statements to the effect that the term torture should be interpreted in a fairly limited fashion, corresponding to a common definition of this term as a universally condemned practice.

According to CRS, the State Department suggested that rough treatment falling in the category of police brutality, while deplorable, does not amount to torture for purposes of the Convention, which is quote "usually reserved for extreme, deliberate, and unusually

cruel practices, such as sustained, systematic beatings, amplification of electric current to the sensitive part of a body, and tying up or hanging persons—or hanging positions that cause extreme pain."

Still, I would say, with those couple of caveats, the term torture is reasonably clear, and Congress fervently enacted federal anti-torture statutes to deal with it. That is certainly, ladies and gentlemen, not the case with the CID, cruel, inhumane, and degrading punishment.

That term, to me, is inherently ambiguous, susceptible of subjective definitions and inherently context driven. What I mean by that are things that clearly would be cruel in one context would not be considered cruel and inhumane in a different context.

And that term is also quite vague, which I think is quite important for those of us who care about the vagueness issue as far as coming up with standards that people follow; you know, difficult to interpret easily; and, therefore, should not be a basis of easy to administer punishments.

Now, we all know that the Senate adopted a limiting, in addition to [inaudible] general observations, the Senate adopted a reservation that basically said that our duty to prevent CID stands only insofar as the term means cruel, inhumane, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and 14th Amendment. I will skip the detailed discussion about why and looking at some case law, why most people, certainly in the Administration, construe that to

mean that the prohibition does not apply overseas, because most constitutional provisions do not apply overseas.

But again, to me, it does matter. I would readily concede we should not engage in CID, even overseas. The real issue is the definitional issue.

Now, switching back to the policy issue, what is the range of policies that is available to us? Well, one policy would be to eschew coercive interrogations, basically treat everybody we capture as POWs, who, as we all know, under the gold standard of Geneva, cannot be subjected to any threats or blandishments. You cannot offer people oranges or cigarettes to induce them to talk.

Well, let's be clear about what it means. That basically means that will be fine. It will be very clear, easy to apply to it. It basically means we're not going to get any intelligence, and the end of the discussion. But I don't buy the argument that most of the people from Al Qaeda or Taliban are susceptible to the sort of blandishments the FBI uses. We're talking to bank robbers who are being offered if you give up your fellows, we'll put you in a witness protection program. It doesn't work, but we can debate that.

Clear guidance, no ambiguity may get some plaudits from the Europeans, but zero intelligence.

By the way, Administration critics routinely point out that torture doesn't work. I think it's more of a catechism in reality. The sad

fact is that torture has been used, ladies and gentlemen, for millennia, and it does work.

Now, people—it does work in sense, and I'm not advocating torture, but again let's not debate on fake utilitarian grounds. Torture works in a sense of eliciting information, some of which is true, some of which is false.

By the way, and people, practically not particularly good people, release information without torture. Not all of it is true, either. But torture does work. But we still should debate this in terms of morality and policy.

The sad thing to me is because of this obsession with torture and with CID, we're not looking at the possibility that there are things that can be done, stress techniques that we can discuss in some detail.

To me, sort of the last policy point I would make, the kind of things—military is a different sphere. It's a different life. We use stress techniques with recruits in an effort to break down the soft habits of civilian life and turn them into warriors. They are subjected to psychological pressure, but yet [inaudible] that. The drill instructors tell them to drop down and give you 200 push-ups. You get put in stress positions in full combat kit. When people go for Hell Week in Paris Island, some additional unpleasant things happen to you.

I would be frankly comfortable with getting rid of water boarding and most of those other things that people are uncomfortable

with, but at least reserving the ability to protect that level of stress techniques that could be used to elicit information.

The bottom line is I think we should have a serious policy debate, because at least that range of techniques is so squarely and comfortably within that legal box, and instead of debating the McCain Amendment, which, by the way, whatever its other virtues are, is very poorly written. So if it passes, instead of debating what the Torture Convention, we're going to debate a year from now with people like Tom and David what the McCain language means. We should have a serious policy debate.

One criticism of the Administration is it has used sort of tortured syntax, if you will, no pun intended. Instead of speaking forthrightly about the policy, we talk about flexibility, preserving presidential powers. Unfortunately, that is not enough.

So my bottom line is let's have a serious policy discussion; not worry too much about the law.

MR. STUART: Thank you, David. I'll ask some questions, and then we'll have questions from the audience. I'd ask each panelist to keep the answers to one or two minutes. I'm sorry. Mr. Schiff.

[Laughter.]

MR. STUART: Adam Schiff is a Congressman from California.

MR. SCHIFF: I thought I had got off easy there for a minute.

MR. STUART: Well, I had a late night. I'm sorry about that.

But notwithstanding my oversight, Mr. Schiff is here, among other reasons, because he was the first member of Congress, as far as I know, to propose that we actually get Congress in on the act of some role in deciding how these issues are resolved in the United States.

The President prefers to do it himself. Mr. Schiff would prefer to see Congress involved, and he was in the lead on this, although the publicity lately has been to Senator McCain and others, Mr. Schiff was there before they were I would say, and please give us five minutes of whatever you have to tell us.

MR. SCHIFF: Thank you very much, and it's probably not coincidental that you wouldn't recognize a member of the House on this issue because we haven't had anything to say really, which has been a big part of the problem in the last three or four years.

This past week, our Secretary of State spent four days in Europe, ostensibly in an effort to get NATO to expand its forces in Afghanistan, and I hope that our Secretary was successful. But, of course, this entire four days was overshadowed with questions about U.S. policy on torture.

And a very significant percentage of her time was spent defending the United States' practices, defending the U.S. rule of law, and defending its either running or not running of secret detention camps. And this has been a tremendous cost to the United States, having our Secretary of State employed in this way.

And when you think about it, when you step back for a minute, it's really quite phenomenal in a negative sense that here we are in a war on terrorism, where we are fighting people who are blowing up innocent men, women, and children, and it is our Secretary on the defensive about the American rule of law.

That is an extraordinary circumstance, and I think we have to step back for a minute and ask ourselves how did we get to this point. How did we get to this point where our rule of law is subject to question? Our Secretary is subject to questions in a combat with people who fly planes into our buildings.

And I think you have to go back to three, three and a half years ago, when we decided that certain aspects of the rule of law we would either abandon or we would so dramatically modify. They wouldn't resemble the way we had conducted our democracy in the past.

And to me, the very earliest and most strident example of this was the decision by the executive that we could pluck an American off the streets of this country, label them as an enemy combatant, deprive

them of access to counsel, deprive them of judicial review, and say they were going to be held indefinitely. This was really quite shocking to me.

During the last three years, most of the debate over civil liberties, until very recently, in this country has been a debate about the Patriot Bill. And perhaps because I was a prosecutor with the U.S. Attorney for six years, and was aware of what we could do before the Patriot Bill, and recognized that much of what people complained about the Patriot Bill actually the government already the power to do before the Patriot Bill, it seemed to me that the most significant civil liberties issue in the country was really the issue of detentions and more specifically the detention of Americans, but also the detention in Guantanamo of foreign nationals.

But to me, it was most clear that we had crossed a new line when the Administration took the position that it could identify anyone of us, give us a name, call us something other than an arrestee or a defendant, call us an enemy combatant, and that somehow all of our constitutional jurisprudence is thrown out the window—no right to jury trial, no right to cross examine, no right to confront the evidence against us—really, no right at all.

And this I found extraordinary, and I also found extraordinary in the institution I serve in, in the House, that no one seemed to care. And I would have thought that particularly among my most conservative, most libertarian colleagues, they would have had some

queasiness about giving this federal government, in their view the repository of the problem, not the solution, the power over an American life that way would be at least problematic or troubling. But it really wasn't.

And, of course, there was less concern about foreign nationals at Guantanamo, but the result of this congressional abdication responsibility was that the executive felt and quite correctly it could do what it chose to do in the War on Terror in terms of due process, and the Congress would not complain. And indeed, we haven't until very recently.

It is I think a commentary about the power of the Congress and the institution of the Congress, and where it is vis-à-vis the primacy of the executive that the very first issue that we have chosen to involve ourselves in is really the most bright line case and that is the case of torture.

But I think that the whole debate really revolves around the broader issue, which, in part, I think is the executive's outline of how we will treat enemy combatants, and the Congress' abdication of its responsibility to provide any oversight of that.

Yes, we're at war, and things are different in war. And this is a war where our existence is threatened. And I fully agree and I'm a subscriber to Graham Allison's philosophy that the ultimate preventable

catastrophe is that of the use of a nuclear weapon. And it would radically change this country.

But while we're at war, and it's not an intangible kind of a war, like the war on drugs or war on poverty, it is also a unique kind of a war.

When Attorney General Ashcroft first testified before the Judiciary Committee, and we had a chance to ask him about our policies in this area, I asked him what criteria he was using to designate someone as an enemy combatant as opposed to a defendant. Why are the Lackawanna Six defendants and Jose Padilla at least formerly an enemy combatant? What was the criteria? And he said, well, that's above my pay grade.

Well, I'm not sure how many people there are above his pay grade, not many. But I said, well, I hope it's not the quantum of evidence, because if that's the case, then you give the least amount of due process where there's the least evidence; and, therefore, the greatest likelihood of making a mistake.

And he said, well, there's a precedent for detaining enemy combatants at war time, and there is. The problem is there's no precedent for a war like this. When will this war be over? When will we see a flag raised over an enemy capital?

There will not be a VE-Day or VJ-Day, and so this war is different in kind because this war may be unending; and, therefore, the

changes that we make to accommodate the fact we're at war are changes that potentially will never be unmade.

And I think the use of a power for which there is a precedent in an unprecedented context makes it an unprecedented use of power.

And I think that the inability of the executive to work with the Congress to set out the rule of law in this area has contributed to lot of the problems that we've had.

I agree: We should judicialize the conduct of war per se, but that's exactly what's happening. The Courts have stepped in because the Congress has not, because the Courts have felt that they could not simply allow the executive to define its relationship to an American citizen or foreign national completely.

Justice Scalia I found an unusual ally in this observed that the courts are really not in the best position to evaluate and balance the scales between the need to protect the national security and due process considerations on the other hand, but there is an institution that is. It's called the Congress.

But reluctantly the court has been brought in, dragged in, and I think very reluctantly. This is not an activist Court. This is a Court that has not wanted to tread here, but in the absence of any congressional action has found it has to.

And so now, we have this crazy quilt of decisions, with lower courts in one area deciding one thing and other courts deciding

another, with the Court of Appeals reversing the lower court, with the Supreme Court granting cert, with the Justice Department deciding to stop treating Jose Padilla as an enemy combatant, and treat him as a criminal defendant now on the eve of the briefs being due before the Supreme Court.

We're having these decisions made in this crazy quilt way because the executive doesn't sit down] with the Congress and the Congress is content to leave it that way, and set out what should the rules be.

I introduced legislation three years ago to try to set out some rules in Guantanamo, a heavily deferential bill. We had not a single hearing in the House and really nothing much in the Senate until Senator McCain, who is a unique force in the entire Congress; and Senator Graham as well has brought this issue to the forefront.

And as important as Senator McCain's work on torture is, I think Senator Graham's work, along with Levin and Kyle, to set out some form of due process, some regulation of the tribunal system, I think is important in two respects. It's important, number one, because there is a very real legal question about whether the executive has the power to detain enemy combatants, and then, number two, what those procedures ought to be. And I agree with Mr. Wilner that the government should have the power, must have the power.

The first part of my legislation says the government has the power to detain enemy combatants. But there's no reason I think why we cannot have processes at Guantanamo and elsewhere that meet all of our national security standards, and they have to meet our national security priorities, and at the same time provide a due process that we can hold up to the rest of the world so that when we go to democratize, to spread democracy, to spread the rule of law, they cannot throw back at ourselves what they consider a lack of the rule of law in Guantanamo.

[End of Tape 1, Side A; flip to Side B.]

MR. SCHIFF: [In progress.] —Abu Ghraib or elsewhere. And so I think this debate, which again has focused mostly on the Patriot Bill, has now really come to the place it should be and that is focused on the issue of detentions. And I really think that all of the concerns that have been raised about the McCain language, which may not be perfect—the precedent that's set up using our 8th Amendment may not be the right way to go. But it's the very beginning and I have reservations about Graham-Levin, but it's the beginning of congressional action in this way of a real dialogue between the Executive and the Congress.

And I think that if we can work together constructively, we can answer some of these questions, which we have been reluctant to take on because the fact is they're really tough. They're really tough. We have not had this kind of a conflict before. We're in completely

uncharted territory. But the fact these questions are tough doesn't mean that we are absolved of the responsibility to answer them.

And I thank you for inviting me.

MR. STUART: Thank you, Congressman.

MR. SCHIFF: Even if you weren't going to let me speak.

[Laughter.]

MR. STUART: Well, you were very persuasive. Thank you.

I'm going to ask one round of questions. We have 30 minutes or so left, and I'm going to ask one round of questions to each panelist and would invite them to hold the answers to one to two minutes, and then if any other panelist hears an answer that he strongly disagrees with to respond to it.

If we can do that in the next 15 minutes, that will leave another 15 minutes for audience questions.

And I'll begin, Tom Wilner, with you. We don't want to be bogged down in legalities, but we should shed a little light on the McCain Amendment and the Graham-Levin Amendment. And I'll try quickly to summarize them, and you can correct me, and then I'm going to ask you whether they're adequate to the problems that you're raising and adequate congressional response.

The McCain Amendment has been characterized as no more torture, and, as I mentioned earlier, that's a little off. By common consensus, it's already illegal through United States criminal law as well

as international treaties for American personnel to torture anyone, anytime, anywhere on the face of the Earth.

Now, there was a memo that the Justice Department prepared in August 2002 that later leaked that said basically that defined torture so narrowly that you could do almost anything and that said even if something did amount to torture, the President could order it anyway, because his Commander in Chief power trumped that of—trumped any power of Congress. This was later withdrawn under attack.

But the McCain Amendment, as I understand it, would do two things.

First, it would say we need—for our military, we need understandable, clear standards that say you can do this; you can't do that to get information from captured enemies of any kind. And it says the Army Field Manual, which has been established for many years and which is generally been thought pretty adequate from the standpoint of protecting detainees, it's designed for interrogations of prisoners of war.

And I think, David Rivkin, you pointed out that maybe we shouldn't really be giving Al Qaeda terrorists the same protections we give prisoners of war. That's one issue it raises.

There's another provision that's specifically more for the CIA, and that is the one that takes the ban on so-called cruel, inhuman, and degrading punishment, which already applies inside the United States, and applies it extraterritorially.

Well, a lot of people think it already applies extraterritorially, including Abe Sofair [ph.], who is the State Department lawyer, who helped negotiate it, but the Bush Administration's position was, whatever the CIA does outside the United States, yes, they can't torture, but cruel and inhuman and degrading punishment is not banned.

Now, that Secretary Rice, in Europe last week, said, well, we got a policy against it; and there was a lot of back and forth over whether it's just a policy or whether you're now changing your position, admitting there's a legal ban, the McCain Amendment would say, from now on, there's a legal ban on cruel, inhuman, and degrading punishment.

The Graham Amendment, which is more complicated, I'll describe more briefly. It would I think basically overrule the Rasoul decision, which was your victory in the Supreme Court, allowing Guantanamo detainees to bring habeas corpus petitions saying basically I'm innocent; release me. Or they're torturing me. Do something about it or whatever. Henceforth, they would no longer be able to go into the United States District Courts.

Instead, there would be a much more limited review by the appellate court in D.C., the D.C. Circuit Court of Appeals, of A, whether the fundamental rules for tribunals in Guantanamo to determine whether you are or are not an enemy combatant, whether those rules are constitutionally sufficient; and, B, I think whether the Pentagon, in fact,

followed those rules in each individual case. And there's more on military commissions, and that's the heart of it.

The details are still being negotiated rather intensively as we speak I think. But my question for you, Tom, is, are either of both of these an adequate cure, congressional cure, for the problems you see at Guantanamo?

MR. WILNER: Gee. You know, in a minute, this is very tough.

First of all, let me say I think you've basically described both amendments correctly; basically, and then there could be some arguments about it.

You know, I don't think they're an adequate cure at all. I think the McCain Amendment starts a process by staking the United States out, saying we're against torture and we're against cruel, inhuman, and degrading treatment wherever it occurs.

So, you know, I think that's a good thing. Unfortunately, the Graham Amendment takes away the right to judicial enforcement in a large part of this, so it would sort of neuter McCain own amendment I believe.

And, you know, let me just back up. I agree with what David Rivkin said. I think that we need—and what everyone said on many things—I don't think this is much less of an abdication of the congressional responsibility, frankly. Senator McCain is throwing an

amendment in on the Defense Authorization bill, and Senator Graham threw an amendment in without debate or consideration in committee on how to deal with these issues at the last moment, just before the Senate broke for the Veterans' Day holiday, without debate.

There hasn't been a serious debate in the deliberative bodies of our elected representatives of how you deal with these issues.

At least the Graham Amendment is terribly draconian. What it does is eliminate habeas corpus where the Supreme Court has said it exists. And habeas corpus is nothing more than the right to obtain judicial review of a detention to make sure that somebody reviews the executive's actions.

It has I think long-term repercussions that could be very harmful.

And let me just say one thing, because it goes to Brad's point: Nobody wants the courts interfering in the government's conduct here. The reason the courts didn't interfere before is because the government, by and large, used to follow the rules. The only reason we went to court is because the government didn't have the hearings required by its own regulations. If they had simply followed the regulations, followed the rules, there would have been hearings in courts. When they don't do it, you need to have the ability to go to court. Graham would strip that.

MR. STUART: Thank you. Brad, unless somebody wants to respond to that, Brad a question for you with two parts.

With benefit of hindsight, there are some things that the Bush Administration should have done differently in these areas that we're talking about. And one particular question I'd like you to touch on in addressing that is, is the cost-benefit analysis. Are we getting enough intelligence from the coercive interrogation that's being used with the approval of the Administration to warrant what some would say are the gargantuan costs in terms of our international standing—one of which I think is the CIA I believe is being kicked out of these prisons in Eastern Europe, because there's such an uproar about it, in part, because of what's going on at Guantanamo. Well, that's a cost; isn't it?

MR. BERENSON: It is, and that question gives me the opportunity to outline two very substantial areas of agreement that I have with both Tom Wilner and Congressman Schiff and Professor Cole.

The first area in which I emphatically agree with them is that the images coming out of Abu Ghraib and the practices which they depict and publicity about other similar practices at Guantanamo has imposed very substantial costs on the United States and on the United States war efforts.

Now, I am nowhere near as convinced as Tom is that if we had followed the Army Regulation 190-8 at the beginning that there never would have been any outcry. I think there are too many constituencies

that are too powerful, both here and abroad, that are determined to oppose the Administration's War on Terror no matter what for us really to have avoided criticism and avoided opprobrium simply by affording Article V hearings to people as they were captured.

But, you know, what happened at Abu Ghraib I was sick about it when I first saw it. And I was sick about it not only on behalf of the people in Iraq who had been subjected to that treatment, but because I also knew immediately how damaging it was going to be to our war efforts.

But it's worth keeping in mind that in Iraq and at Abu Ghraib, the Geneva Conventions apply. Administration policy was to apply the Geneva Conventions, and treat these people as POWs.

What happened there wasn't a failure of policy. It was an abuse. It was a violation of policy. It's deeply regrettable, but it's not something that's very easy to say is the President's fault, and we have tried to respond to that by finding and punishing the people who did wrong there.

The second broad area of agreement that I have with the panelists on the other side of these issues—and this is really the one area where I am a bit of a heretic from the Administration's point of view—is I think the Administration would have been much better off, years ago, engaging in a serious, comprehensive policy debate with the Congress to

try to craft legislation to deal with the whole range of detention and interrogation issues.

I understand I think why the Administration didn't do that, but I think it would have been much better served to do that. We've been having the inter-branch dialogue with the wrong branch of government, with the judiciary. It should be with the other policy making branch, with the Congress.

I think the downside risks of the legislative process from the Administration's perspective are much less than they think, in part, because their own party controls both Houses of Congress, and, in part, because the President always has the veto pen and can have a substantial influence on these debates as they take place.

But comprehensive regulation by the political branches would have been—excuse me—much better than these piecemeal, the crazy quilt of court decisions that the Congressman described and much better than fielding fly balls coming in these late filed amendments to Defense Authorization Acts.

We really should have a serious and comprehensive debate.

So those are areas where I do agree with the critics.

MR. STUART: Just, David, a comment?

MR. RIVKIN: A very short comment. I agree with Brad. I have a dubious privilege of belonging as the U.S. Representative to something called the U.N. Subcommission on Promotion and Protection

of Human Rights, which is an expert body backing up the Human Rights Commission, so two years running I've been for three weeks in Geneva debating the world's human rights experts, their view of American policies.

I wish, with all due respect to David Cole, I wish it really was the case that if not for the unfortunate abuses of Abu Ghraib, and few things pertaining—you know, there is debate about torture would get a clean bill of health.

Ladies and gentlemen, most of the world, for reasons we don't have time to get into it, fundamentally disagrees with the premise that this is war; fundamentally disagree with the premise that the criminal justice paradigm, which is I think at least most of us hopefully appreciate is manifestly inadequate for dealing with this problem should not apply, so it wouldn't have been as crisp, it wouldn't have been as vicious perhaps.

But in absence of all this torture stuff, what we've been debating is about the fact that people are being held without charges and maybe we can satisfy Tom or maybe even David—[inaudible—with regard to Article V type proceedings, but most of the world thinks that these are terrorists, much criminals, and you give them the full extent of due process, and if that's not what you are doing, if we don't have speedy trial, if we don't have speedily charges, the United States is fundamentally in default of its obligations.

My personal opinion, very briefly, is given the nature of our criminal justice system—and thank God for that—it is impossible on a large-scale basis to accord those people criminal level of due process, because we don't have the amount of evidence that withstand scrutiny and challenge by, you know, glove doesn't fit, you got to acquit type of criminal defense counsel.

And to the extent we do, we cannot vent it in open court, because, you know, it's not like dealing with some snitch from a mafia, you know, who's sitting behind a screen testifying about the rest of his family is going to go in the witness protection program. If we do actually have somebody—and I don't think we do—who belongs to the Bremen wing or a cell of Al Qaeda, we are not going to be able to have this information in open court.

So it doesn't mean, by the way, we should throw out the reason and do whatever it takes, but let's not kid ourselves, just like we shouldn't kid ourselves about the fact that torture doesn't work; therefore, it's not even worth talking about.

Let's not kid ourselves that if not for those few things, the war would continue to lull us because that is total bunk. I wish it were otherwise.

MR. COLE: Can I respond on that?

MR. RIVKIN: Yes.

MR. COLE: Because I mean it's interesting that both David and Brad, recognizing that there's an unprecedented level of anti-Americanism in the world today, want to say that it's not our fault; that it's not the Bush Administration's fault; that the world—Brad's words were there are too many constituencies opposed to the United States War on Terrorism. David's comment is, everybody in the world, who he's polled anyway, says that we should be going at this criminally rather through military means. I don't know where they get that idea.

My recollection is that on September 12th, we had the world's sympathy. My recollection is that the world signed on to the war against Al Qaeda. A hundred plus nations signed on to war in Afghanistan. The U.N. Security Council sanctions. NATO sanctioned it. Nobody was suggesting that it was impermissible. You had to try these people criminally. You couldn't use military force. So it's not that people object to our fighting against Al Qaeda, using military force against Al Qaeda.

What they object to are the means we have pursued toward that end, and it's those means, namely no hearings whatsoever, unilateral executive power that can't be checked, the ability to coercively interrogate and torture suspects in the name of getting information, and going to war in Iraq in the "name" of the War on Terror that have led to this unprecedented level of anti-Americanism.

As I said at the outset, I think it was—it's totally unnecessary. I think we could have—we would be more secure today had we simply followed the basic rules of the laws of war, and it would not have come at any cost to our security.

MR. STUART: Congressman Schiff.

MR. SCHIFF: I just wanted to add a further clarification and that is that we don't have to chose between providing no due process or go into full blown U.S. court system with all of the panoply of rights you get as a defendant. What Graham-Levin has proposed is codifying some of the rules pertaining to the status commissions, the status tribunals.

What my own legislation does is try to set up a standard of due process at Guantanamo based on the Uniform Code of Military Justice, a military process for dealing with these detainees.

So we don't have to choose either full U.S. constitutional due process rights that you would get in a criminal court or nothing at all. There is something in the middle, which probably makes a lot of sense given the detainees' situation.

But again, my own legislation, Graham's legislation, is still only a partial answer to the problem, because it only deals with Guantanamo. And so those that are detained as enemy combatants anywhere else off U.S. shores, whether they're detained in Iraq as enemy combatants rather than POWs, because they're foreign jihadists, not Iraqi

Sunnis; whether they're detained in Eastern Europe or elsewhere, none of our legislation goes to that.

The McCain legislation does, but that only prohibits certain torture or inhumane treatment. But still, there are broader questions to be answered.

But I think they can be answered jointly by the Congress and the Executive in a way that we can hold up to the rest of the world that we have a set of rules that apply that will help distinguish between the guilty and the innocent, that will help demonstrate that the U.S. is following a rule of law indeed as we attempt to pursue and push and encourage other nations around the world to adopt the rule of law as well.

MR. STUART: Thank you. Brad has a 20-second rejoinder.

MR. BERENSON: I just need to tackle one thing which has been repeatedly asserted by both Tom and by Professor Cole, which is that we were somehow at the outset of this war in default of our legal obligations; that there was a culture of illegality; that moving people to Guantanamo had the purpose to evade the law; and that we did not comply with the standard customs and usages of armed conflict; and that's the source of this problem.

That's an assertion central to what they've been saying that I disagree very, very strongly with. I disagree with it, in part, because I sat in meeting after meeting after meeting in the wake of September 11th, where the Administration lawyers from the White House, from the Justice

Department, from the Defense Department, from the State Department, from the CIA agonized over the laws and customs and usages of war tried to determine where those lines were and tried to make sure that whatever else we did, we were in compliance with those obligations.

The reason why Article V hearings were not given, as we detained people, is that, as the President correctly determined, and there's not actually any serious debate about this now, the Geneva Conventions do not apply to Al Qaeda terrorists, and Article V hearings are a function of that.

Now, you can make an argument that as a matter of policy we should have done it anyway. That's a respectable argument. And you can go back and forth on that. But we weren't required to, and at the time, we were doing—we were trying to do those things that we were required to do.

The notion that capturing people and holding them without charge and without counsel and without access to your domestic court system until the end of the conflict is somehow unusual or in default of the normal rules in the laws of war is absolutely wrong. For millennia of human history, that is the background rule.

And the CSRT [ph.] process that's now in place in Guantanamo is, in many ways, superior to an Article V process. So the notion that nobody's had a fair hearing at this point. They've all had combatant status review tribunals. They all get annual administrative

review board hearings, and this is far in excess of the international law obligations and the law of war obligations.

MR. STUART: Bearing in mind that we have 10 minutes left, and I had one question I want to ask, and we hope to get the audience. Tom Wilner has a 20-second response to Brad's 20-second comment.

MR. WILNER: Brad, that's not true. First of all, let me tell you for the Supreme Court this first of all intent. We had a document that we found called "Why Gitmo?," which was by a Colonel who was participating in all of these discussions, and the reason they said that they went to Gitmo is it's outside the United States, and outside the jurisdiction of the courts of any other country, and if we go there, we can't be sued in court, and we don't need to abide by the law.

MR. BERENSON: So was Afghanistan.

MR. WILNER: Wait a second. No, Afghanistan was subject to—but that's what it said.

Secondly, in terms of the consequences, it's not a question of debating the Geneva Conventions, which I think do apply to anyone captured, but our military regulations require a hearing if you pick up anyone if there's any doubt as to their status. And that's not only a doubt whether they're a prisoner of war; it's a doubt as to whether they're innocent or not. That was simply not done. That was simply not done.

As a result of that—and I've never said go to court for trials for people. That's a false thing. I just said they never got their hearing.

When you have a hearing three years—the reason the military does that is that people who are familiar with the facts and circumstances of why you were captured are available then and there in the field. Three years later, they're not. And they weren't available for these combatant status review tribunals. So the law was not followed.

MR. STUART: Thank you. Here's my one quick last question, and first for David and then for the other David, and then hopefully we can go to the floor. It's very specific. I'm not going to ask you about the ticking nuclear time bomb scenario, but this one may seem almost equally improbable.

You are President Bush's National Security Advisor in 2003. He calls you into the Oval Office, and he says, the CIA has caught Khalid Sheik Mohammed. He's the mastermind of 9/11. He's the field marshal of Al Qaeda. We think he knows about a lot of future attacks. He knows the location of terrorists. If we can crack him, and get what's out of him, and he's a tough nut, we can save a lot of lives.

Now, the CIA told me they've already got him chained naked in a room with the temperature at 40 degrees with his hands chained to the ceiling and they're dousing him with cold water and they think they're getting somewhere, and should I—what do we do? Should I tell them to stop? That's my question.

MR. COLE: Well, my answer to that is I think two-fold: I think you need to think, if you're in that position, you have to think long term, not just short term. And you have to realize that if you are engaging in those kinds of tactics against this individual, you have immunized him from being tried and convicted and locked up for the rest of his life. And if he is Khalid Sheik Mohammed, we want him either dead or locked up for the rest of his life. Those are the only two options that we, you know, we want; right?

And we've captured him, so we can't kill him now. If he was on the battlefield, maybe we could have killed him, as that's, you know, that's something that's done on the battlefield. But once, you've captured him, you can't kill him. What are we going to do with him long term? And we need to retain the ability to hold him, try him, maintain the legitimacy of the War on Terror; and, thereby, avoid using the kinds of coercive tactics that are prohibited under the Convention Against Torture; prohibited under the Geneva Convention, and will only undermine our efforts in the War on Terror.

And the fact of the matter is that as much as David Rivkin will say we can't possibly get information from people unless we coercively interrogate them, that's simply false. That's recognizably false.

We don't generally torture people in the United States. We capture people in the United States all the time, some of them very bad people. And we get information from them.

In fact, the Millennium Bomber, we captured. We didn't torture him. We didn't declare him an enemy combatant.

We treated him with respect. We developed a relationship with him. As a result of that, we got incredible amounts of information from him that allowed us to capture many other suspected terrorists, and to bring them to justice using his cooperation.

So you don't know whether those kinds of tactics can't work, and to just assume that the only way to get information is to violate the most basic prohibition probably that the rule of law recognizes I think is wrong.

MR. STUART: Dave, assuming that you agree completely, we could go to the floor.

MR. RIVKIN: No, I will very briefly register my complete disagreement with my good friend David Cole.

Three things: Number one. Look. Yes, traditional criminal justice style, FBI-style interrogating techniques do work. I don't have much time to get into an explanation as to why they don't always work, but I'll tell you one thing: The Washington Post, the New York Times, the Wall Street Journal, not editorial pages, the news side, most of our newspapers could not be accused of my sympathy to the Bush

Administration—all head stories last year, and early this year, describing how a number of Al Qaeda and Taliban operatives were captured after the early months of Afghan operation were not talking.

One of the reasons they're not talking is because we don't have enough interrogators who can establish that kind of cultural rapport. Some people, a number of hard members of those organizations, cannot be broken by appealing to their good graces and by trying to talk about their families because they've basically made peace with their maker.

My only point is this: To the extent that we cannot get information from most people by kissing them on their head and sharing a cup of coffee with them, it is absolutely absurd to suggest there's only one alternative; that is torture them and violate our legal obligations, even engage in cruel, inhumane, and degrading treatment, because there's a whole bunch of things again we do to our own recruits in basic and advanced training. Are we torturing them?

I would support the use of stress positions, not for days, for hours. I would support sensory deprivation.

By the way, when our troops go out in the field, do they sleep in comfortable air-conditioned places? Do they have exquisite cuisine or do we eat MREs? Are they not exposed to extremes of cold and hot? We should be at least able to do as much with unlawful enemy combatants as with our own recruits.

MR. STUART: Thank you.

MR. COLE: I just want to say

MR. RIVKIN: No, and one last point. It is nonsense to say that if we subject people to those techniques that are legal, we cannot prosecute them, because we're not going to be relying on information we elicit during those interrogations and basis for their prosecution, but rely on whatever information we had about them to begin with.

And they can be prosecuted in a military justice system.

MR. COLE: Ten seconds. A lot of interrogators have said those people weren't talking because they were innocent people.

MR. STUART: I'm sorry we've gotten so late, and we have a lot of questions. I might point out that the question I just asked is do David's—I think the Administration's position would be legally that was neither torture nor cruel, inhuman, or degrading punishment—40 degree cell, and doused with water. Yes, ma'am?

MS. MULLIN: My name is Mary Mullin [ph.], and I work on the Bosnia Support Committee.

What about the Americans that took the pictures of how they were torturing people? What do you think about their motives about that? And I wanted to say that the police, by the way, in the United States and, according to what the fellow from Georgetown said, do harm to people because I was just a wife, a teacher, and a mother, and I was reporting this New World Order Movement—this was years ago. And the police made me be a dog, because they said I was imagining this. They

tied me up and by my hands; shackled my feet, and beat me. They put me in—they arrested me and put me in jail when I was trying to report it to the Secret Service Center—a congressional hearing. I mean they—the police in this country do hurt people. And anyway, I wanted to ask about the first question about why these people took the pictures. It just seemed to me they were trying to discredit themselves.

MR. RIVKIN: It's actually, very briefly. I wish you saw the full sequence of the photographs. These people are a bunch of depraved, disgusting individuals, who unfortunately in our sex saturated and obsessed culture, people like to photograph themselves.

There is evidence that these people first photographed themselves having sex, having group sex, before we even deployed to Iraq; then they photographed themselves—I don't want to get graphic—using objects or whichever when they were in Kuwait. They were depraved and disgusting individuals who first did it to themselves and then did it to the Iraqis. And they do it for the same reason: You have gang members—there's a case in Virginia less than a year ago—who hacked somebody's hands off, who photographed themselves doing it, and that's how they were caught and convicted. They are sick people.

That's the simple answer.

MR. : Let me just respond to that. I think that's way too simple. They—what's depraved and disgusting is the underlying

conduct. And it's not just the pictures, the fact that they recorded it in pictures that's depraved and disgusting. It's the treatment.

And we've seen similar accounts of similar treatment at Guantanamo, not by depraved and disgusting individuals who were having sex beforehand, but by FBI agents who were outraged at what they saw: our own military doing to people at Guantanamo by Army interrogators in their interrogation logs, which were then leaked to Newsweek.

So I think it's actually critically important that this stuff has come out, because it forces us to confront it in a real way.

And as to the United States, of course, you know, police in the United States have engaged in coercion. The point is that it's prohibited, clearly prohibited. No one argues that it's okay, and in the run of cases we get information without.

MR. SCHIFF: Can I just add on real quickly? I just want to draw on a distinction that Brad made earlier and that is that even with the best defined rules of law and procedures for detainees, there are going to be incidents like at Abu Ghraib that are not preventable, and because there are going to be aberrant people that are going to do them. And obviously, everything we do is designed to minimize that. That's one problem that we're going to have to confront as long as there's war.

But the more damaging aspect I think for the United States if we don't have a clear cut policy, and the rest of the world doesn't respect

our adherence to the rule of law, that is a much more significant problem in the greater war of ideas, which is really at the heart of this War on Terrorism.

So the aberrant who took the photos, the aberrant people who were in the photos, they're going to be hard to weed out completely. We'll never successfully weed them out completely. But we can prevent a situation where our Secretary of State has to go around justifying herself and the country when she should be getting more troops for Afghanistan and the other part of the question about Sheik Khalid Mohammed is what would we say if we had to weigh whether we torture KSM if it means it's going to cost us getting two to four thousand troops from our NATO allies in Afghanistan. What's worth more? Because there are real costs when the world doesn't perceive that we're adhering to the rule of law.

We saw a real cost in the trial of Saddam Hussein, when there was testimony of torture at Abu Ghraib, and some people's reaction was, well, the Americans did that, too; now admittedly, at a wholly different level, wholly different circumstances, but there's a cost in very real terms to getting our cooperation with other countries around the world, to preventing the catastrophe that Graham Allison writes about. If we can't get Spain to work with us, Poland to work with us, our allies to work with us because of issues like this, it puts us more at risk.

MR. STUART: Thank you. Now, we're almost three minutes over time, and some people may need to leave; some on the panel, some in the audience may need to leave. So anyone who needs to leave right away, please feel free to do so.

Anyone who wants to stay about five more minutes, so we can try and get a couple more questions in, please stay.

MR. WILNER: Unfortunately, I do need to leave. I just want to say each of my clients at Guantanamo was tortured in the way you describe torture at some place by the United States, so we're not talking about deviant behavior somewhere. When you finally investigate this, it will be widespread. It's systematic, and it hasn't been addressed. And I think it was created because of a feeling that we could avoid the law in this conflict.

With that, I've got to go.

MR. STUART: Thank you. Gladys Arrisueño. Thank you, Tom. Our hostess, Gladys Arrisueño of Brookings is going to bring a going in five minutes. And let's hope that we can be brief.

The gentleman on the aisle has a question.

MR. SPANOS: Yes, I'm Ed Spanos [ph.] from Executive Intelligence Review.

I mean Abu Ghraib was absolutely not an aberration. This was a policy. General Miller was sent there for the explicit purpose of

Gitmoizing Abu Ghraib and the prisons there, and he told the commanders to treat them like dogs. This was a policy.

The driving force behind this I think is now pretty well recognized was Dick Cheney and his office. It was David Attington that actually wrote that memo in January of 2002 that warned that senior Administration officials could be prosecuted for war crimes for what they were doing and what they were going to do, and offered as a defense of that to parse the application of the Geneva Conventions.

So my question is given the role that Dick Cheney has played, what sort of beneficial effects would it have were the Vice President to resign for reasons of health or legal reasons or other?

MR. STUART: Do you have someone in particular you'd like to answer that?

MR. SPANOS: Anyone.

MR. STUART: Brad?

MR. BERENSON: I'm not in favor of the Vice President resigning.

[Laughter.]

MR. BERENSON: I don't think that would be beneficial for the country.

MR. COLE: I think what we need is a full accounting of the torture scandal. And I think it is a scandal in and of itself that we spent some $70 million investigating Bill Clinton and Hillary's—I mean

Hillary—and Monica's dress, and we haven't had any independent investigation whatsoever of the—of this. We've had the military investigate itself. We've had the CIA investigate itself. We had the Justice Department investigate itself, and three entities that are responsible, and we've had no independent investigation. It all calls for such an investigation, which I think are [sic.] critical to restoring our image in the world at large—have been simply rejected by a partisan Congress.

MR. RIVKIN: Let me just make somewhat of contrary point. With all due respect to David, and I am just as disgusted by Abu Ghraib as anybody else here, the facts do not bear out, ladies and gentlemen, there's a widespread level of violations in the system. There have been over a dozen investigations, yes, primarily military ones, but not by the same people, who would be culpable if something goes wrong. We have very honorable men and women in uniform.

Independent Schlesinger Commission, independent at least in a sense that you don't have people who are working with this Administration. You had Democrats and Republicans.

I would say this, again. If you look at the statistics, we have lower-level abuses relative to the number of troops in the field, the number of people—of detainees—after all the spotlight and all the self-reporting, and all the media scrutiny, lower than any war in American

history, including World War I and World War II. Far better than Korean and Vietnam.

And the level of abuses, ladies and gentlemen, compares favorably apropos with one of our questioners with that in federal and state penitentiaries, where there are no investigations, no imperative to learn anything.

Unfortunately, I wish I could be it differently, but there's a lot of evil in men's hearts. Every time you put people in a position of exercising dominion over their fellow human beings in a penal situation, be it, you know, in Egypt, at the time of, you know, Mesopotamia or in the 21st century, you're going to have people raping, sodomizing, brutalizing, abusing each other and inmates. That's a fact.

The first thing we do as lawyers when we look to see if new rules are needed, be it environmental protection or health care is the current system working in a sense of producing results that is below or above historic areas. The system is working. It's just bunk to say that, with all due respect to Mr. Wilner, that everybody is being tortured. There's no evidence for it. There are few hundred cases of torture out of 70,000, 80,000, 90,000 of people who have been detained. And that's a fact. We have nothing to be ashamed of as a country.

And we're bringing people to justice much faster than in any war in human history, including the British in Northern Ireland. It took

them seven or eight years to get to the first case. We're actually putting people in jail.

MR. STUART: I think it would be appropriate to thank you and invite another question.

MR. RIVKIN: Sorry.

MR. SCHIFF: Let me just add one thing quickly to this, because I also want to emphasize I've had chance to visit our troops in Iraq a couple times—Afghanistan, elsewhere. I think this is aberrant, so I have to disagree with you. I think that Abu Ghraib was a terrible aberration. It doesn't mean it was an isolated case, and we found out with respect to Gitmo that Abu Ghraib was not isolated, but yet it was an aberrant episode. And I agree with the comments you just heard that the vast, vast, overwhelming majority of our forces are acting with much greater restraint than probably those of us in this room would given if we were in the kind of dangerous situations they are facing everyday.

At the same time, when I look at Abu Ghraib, I look at it as military defeat that had real costs to the country; like we've lost the military battle, because in the war of ideas, we lost the military battle at Abu Ghraib that continues to have enormous consequences, and I want to know why that happened and what took place so we can avoid losing that battle again down the road.

Let me make one other comment on McCain, and on the torture language and the whole torture debate, because we've had some

discussion here about well, how strenuous can you interrogate? When does it become torture? When does it become degrading and inhuman, and I suspect that in terms of the degrading and inhuman element, where torture is easy to find inhuman and is not so easy to define. It's a little bit like pornography: you know it when you see it. But I guess probably in my view the clearest way to view it, where you draw the line, s how would we have our own troops treated.

And if it's not conduct that we'd be willing to accept, if one of own troops was captured, then it's not conduct that we should condone.

And admittedly, our own troops are not enemy combatants and they are fighting according to the laws of war, but, nonetheless, we hold ourselves to a higher standard with those that we detain in the War on Terrorism.

And I remember how I felt in the early part of the Iraq War when American POWs were being photographed, chained to a chair with a blindfold on, and how upset we were at their being humiliated by being the subject of this photography.

And I remember that vividly, and I tried to use the standard of how I would treat our own people as a bare minimum of how we would want to treat others.

MR. STUART: The going has rung. And I sort of made a commitment to the gentleman in the back of the room that I would allow him a quick question, and then we really are done.

And with apologies to those of you who had questions, I'm sorry that it's a big subject and everyone has a lot to say, and we kind of ran out of time. Sir?

MR. MILLIKEN: Al Milliken [ph] the Washington Independent Writers.

How is what Saddam Hussein and his sons and his regime did in Iraq that was cruel, inhumane, and degrading treatment of prisoners affecting and justifying what we are now defending or rationalizing? And does suicide murdering terror make any treatment that keeps a prisoner alive look tame and lame in comparison?

MR. STUART: Brad?

MR. BERENSON: Well, the magnitude of the evil that we're facing on the other side, whether it was Saddam and his regime, or Al Qaeda, is something that I think every single one of these panelists today agrees on.

Equally though, we have to make sure that as we confront that evil and do our very best to defeat it that we stay within appropriate legal lines.

There's another layer beyond that of policy, which raises some of these questions of public relations and whether the detriments to our standing in world opinion and world image, even if what we're doing is completely legal, are worth the benefits to our war fighting effort and intelligence gathering effort. But we've got to stay on the right side of

the law. Everybody agrees with that, although there's some disagreement about where those lines are or at least ought to be if Congress is going to legislate.

But I think it is important to keep in mind how unbelievably illiberal and savage the foes are that we are facing and how very important it is that we and the values that we stand for and represent and always have and hopefully always will prevail over them.

MR. SCHIFF: I just want to add a final note on this question because—and with this, I agree with the Bush Administration. I don't think there's any equation of anything that we have done or will do in the War on Terrorism that is—that can be in any way placed in the same arena with the people we're fighting. And I really don't accept that kind of more relativistic view that equates somehow what we're doing with what our enemies are doing. I don't accept that.

But we hold ourselves to a much higher standard. And, in fact, I think that we have a higher standard than probably any other nation on earth. Our allies that are critical of us now, were they the primary target in the War on Terror, my guess is they would observe a much lower standard than we employ ourselves.

But we hold ourselves to a higher standard, and I think we always have. I'm proud we always will. We're not flawless, and we've had a discussion of some of our mistakes here today. But it's not because

we can equate ourselves with those we're fighting. It's because we call upon ourselves for something much better than that.

MR. COLE: And I would just add that I think we had a higher standard; that the emphasis is on the past tense.

MR. STUART: Thank you to all our panelists, including those who had to leave.

[Applause.]

MR. STUART: And thanks for a very patient audience, and again apologies to those whose questions didn't get gotten to.

[END OF TAPED RECORDING.]