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GUANTANAMO DETAINEES:

IS A NATIONAL SECURITY COURT THE ANSWER?

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P R O C E E D I N G S

MR. TAYLOR: Welcome, everybody. I'm Stuart Taylor, moderating the latest in The Brookings Institution series of Judicial Issues Forums where we discuss issues of law and policy and politics and anything else that gets within the neighborhood of the judiciary.

This time we're proud to be working together with the Progressive Policy Institute represented here by Will Marshall, and our subject, of course, is entitled Guantanamo Detainees: Is a National Security Court the Answer? And I'm going to talk just a little bit before I get to the answer on the question, before I introduce the panelists. President Obama and his national security team are wrestling with the question of what do we do with the 240-some detainees on Guantanamo who we inherited from the Bush administration, not to mention their counterparts in Afghanistan.

And there are by some calculations at least three groups at Guantanamo, 80-some at the most, maybe a handful, who could be prosecuted under ordinary criminal law standards either in military courts or in federal courts; 60-some by the administration -- the previous administration's calculations who are not so dangerous and could be released. But that would leave more than 100, perhaps many more than 100 who are deemed at least by the military, at least under the prior

administration to be non-prosecutable because of various problems with evidence and standards of proof, and maybe they haven't even committed any crime, but too dangerous to release. And the hard question is, what do you do with that group, assuming they exist?

Some human rights groups such as the ACLU sometimes seem to assume there are no such people and that anybody who needs to be detained can be criminally prosecuted, and that everyone who cannot be criminally prosecuted should therefore be released.

The Obama administration so far has, on a lot of detailed issues, gone largely with the status quo, the Bush rules: They're still detaining people on an interim basis; they're still detaining them based on support; they've added the element of substantial support for al-Qaeda and its affiliates. They're no longer going to call them "enemy combatants." That was the big flourish last week: No more enemy combatants, which has prompted various conservative cynics to say, well, what should we call them, then? "Undocumented freedom fighters"? "Next slice the neighbors"?

There have been other similar suggestions, but there has been a certain -- they seem to be treating them as enemy combatants even if they're not calling them that which brings in the question of, well, how do you apply the laws of war in this situation? And one of several approached, several alternatives to the status quo, which we'll hear described in the

course of things, is to establish a separate stand-along national security court, and that will be the focus of our discussion, but the discussion will deal with the whole range of issues that come up in this context.

We have the best panel I could imagine assembling for this, and each panelist will speak for about five minutes. Then I will ask questions of them in the same order in which they began for 30 minutes or so. That should leave another 30 minutes or so for questions from the floor.

First will be Professor Jack Goldsmith of Harvard Law School, who served in the Bush administration Justice Department and dealt with these issues, and who is one of the few members of that department who escaped with his reputation more than intact. He has recently written a paper for Brookings called Long-Term Terrorist Detention and Our National Security Court. And I'd say Jack has advocated something along the lines of the stand-alone

National Security Court for reasons he will explain.

Judge Patricia Wald, who's to my left, former Chief Judge of the United States Court of Appeals for the District of Columbia -- which some would say is our national security court now, de facto -- and former Judge of the International Criminal Court for the former Yugoslavia, will speak second. And she is a subscriber to the Constitution Projects Report entitled A Critique of National Security Courts.

Third will come Harvey Rishikof on my far left, Professor of Law and National Security Studies at the National War College. He's written a number of in-depth articles on the concept of a national security court, the justifications for it, how it would work, and so forth.

And last, to my right Stephen Vladeck, Associate Professor of Law at American University Washing College of Law. He, I believe, was the principal draftsman of the aforementioned Constitution Projects Critique of National Security Courts. So I think we have a pretty good spectrum of views here, and Jack Goldsmith, there you are, why don't you start off:

PROFESSOR GOLDSMITH: Okay, thank you very much, Stuart. So I was asked to be brief and I will be brief. I want to start off by drawing a distinction: I think that there are two analytically separate issues under the -- thee are many analytically separate issues under the debate about national security courts but I want to emphasize two.

A lot of the first issue is whether we can and should have a regime of long-term detention, military detention, that's not criminal, that doesn't involve trials. And this is, I think, the most controversial question. It's a question that asks how we translate traditional wartime prerogatives to detained members of the enemy; how do we accommodate that traditional power to what everyone had to acknowledge are the c hanged circumstances of this war: the idea that the enemy doesn't wear uniforms,

the detention could be indefinite and the like.

On this issue, it's easy to see this is the central issue: whether or not the government can and should detain members of the enemy on a noncriminal basis. And the arguments here are well fleshed out, and I won't go into them in detail. It's a question about, on the power side it seems to be, that the president clearly does have the power to do this, and I think that maybe the best statement of this is the brief filed by the Obama administration last Friday laying out a very robust power to detained members of al-Qaeda and the Taliban and associated forces, indefinitely, based no a combination of the congressional authorization to use force and the laws of war, a traditional presidential prerogative.

We can debate that if you like, but that's one issue about whether there needs to be and should be this long-term detention program that's not based on trials.

The analytically separate issue is whether we should have a National Security Court. And the claim I make in the Brookings paper is that if we have a program of nonmilitary -- excuse me, of noncriminal military detention, which the Obama administration suggested last week we would have going forward, then, by definition, we're going to have a National Security Court. But there is going to have to be a court that's going to supervise this detention program either under necessarily under the habeas

corpus review, and probably under statutory -- to put a statutory jurisdiction enacted by Congress.

And we have, in fact, as Stuart said, a National Security Court today, and it's in the District Court and the Court of Appeals in the District of Columbia. And it's a de facto national security court, but it's a lot different than the national security court we had until 2004, which was entirely decentralized over the country. After the restored decision of 2004 and especially after the median, it's become the accepted practice and custom that all habeas review are detainees, will go to the District of Columbia. And we already have a thinly institutionalized but definite National Security Court.

What is a national security court? It doesn't have to be a freestanding new institution. This is the important point. The National Security Court is a court that's expert in these detention matters and has special rules to deal with these detention matters, and we've already developed special rules, a lot of the judge-made
in the District of Columbia and in the Court of Appeals in the District of Columbia, and the types of expertise that advocates of the National Security Court have argued for is developing in the D.C. Circuit.

The hard question -- excuse me, the important question is not whether we have a national security court. We're going to have one if we

have noncriminal detention. The important question is who decides what the National Security Court looks like? Who decides what the rules should be for judges supervising these detentions? And on that issue I claim right now it has been for seven years -- eight years almost -- largely the Federal Judiciary without any input at all from Congress and, obviously, with advocacy from the Executive Branch but with the Judiciary having the final say.

And my final contention is that the ultimate National Security Court that will prevail -- two final points: One is the ultimate National Security Court that will prevail in the District of Columbia has to be one in which Congress and the President today, the political branches, the accountable branches, the branches that are supposedly expert in making the tradeoff between security and liberty, or at least accountable for those tradeoffs. They need to make the hard calls, and there are a whole host of hard calls that need to be made about the definition of "the enemy," about the information that needs to be given, about secrecy, evidence rules, access to lawyers and the like. All of those issues need to be fleshed out by the political branches and not the courts in the first instance, obviously subject to judicial review.

And the last one I would make is, there's been a red herring about national security courts, and this is implicit in what I've already said,

that we need to have a freestanding new institution that can, to the defy of the court, and I don't think that's necessary, and I don't think it's necessarily a good idea because there are all sort of political costs, both domestically and abroad, that would come from creating a new freestanding institution called the National Security Court.

We don't need that. We've got one now. It's in this district, and all we need to do is to have slightly more elaborate rules with the input from the political branches.

MR. TAYLOR: Thank you, Jack.

Judge Wald?

JUDGE WALD: Well, I have a couple of points to make, and the first would be is addressing Jack Goldsmith's main point about whether we should have a what I would call a revolutionary new regime of indefinite detention without the possibility of charges or trial outside of the current laws of war or the current criminal process. And I would say that a sufficient justification has not been made out for that, and I base that on the fact that we have not only the criminal process, which I admit has some limits to it, but we do have the law of war, and we have the Hamdi Decision.

Now, the Hamdi Decision which said that a person, in Hamdi's case, who was apprehended in the zone of combat

-- and there have been several others -- can be detained to the end of

traditional notions of combat. But, actually, under the law of war and even under the civil rights groups that we hear so much about are not so intransigent that it doesn't include other people as well.

For instance, the papers that I've seen admit that if you have a person in the hierarchical -- "self-proclaimed" hierarchy of al-Qaeda, et cetera, they, too, can be -- somebody says, "I'd like to, you know, -- I'm part of al-Qaeda, I was going to get rid of all of you people, that they certainly come within the Hamdi Regime.

Also, I think there's a convention case against accepted by a lot of civil rights groups that wherever the military have the right to engage -- rules of engagement in conflict, even if it's not in a country that we've gone to war with like Afghanistan, suppose there is a military or place where the military is allowed to use force, and say it's in Yemen or say it's in -- on the attack on the Cole, et cetera, that people apprehended in the course of that can also come under the Hamdi Regime.

So I think that that together with our criminal process, so far I have not heard -- now, maybe I'm not traveling in the right circles -- but I have not heard any U.S. attorney or somebody say we really want to prosecute that person, but we just can't. I've talked to several judges who have done international terrorist trials; they think they can be done. Sure, they're going to take a little bit more time, and, sure, they're going to be a

little bit more frustrating.

But at least into my second point: I think before we go down this route of an indefinite detention scheme which I think is more revolutionary than any of us seriously considered in the past, I don't think any of the analyzed civil commitment or some of the other ones, or quarantine, are all applicable. I think we have to remember our history, and that is whenever we design a system that sounds great but that really shortcuts the kinds of protections not just for the benefit of the accused but for the reliability of the process itself, whenever we start to go down that route, it goes south, and it only solicits the more recent military commissions experience.

I, in regard to another project, have read every decision which has come out by one of the military judges in the military commission -- admittedly not many because only one went to trial -- 21 -- but there were a lot of interim decisions, and a judge both in the domestic courts and the international courts, you know, I was overwhelmed as I kept writing, you know, this isn't the way you run a reliable process.

So I would be very interested in the fleshing out of the proposals for the National Security Court of what you're going to do different. If it's really going to be loose dirt -- I mean that's what the military commissions I pass my time with did, too. I mean it loosened up a lot of the

rules, at least the way it was interpreted by the military commission judges. It loosened up privileges against self-incrimination; it loosened up hearsay; it loosened up, certainly, any kind of right-of-confrontation.

I'm perfectly happy to throw my lot in with the D.C. -- even though (inaudible) it was when I was there -- but I'm willing to throw my lot in with the D.C. Circuit, Article 3 interpretation, currently in the habeas corpus proceedings, and I think there you will note that even though something like 21 or something people have -- they're already decided there wasn't sufficient evidence against. And there have been -- there is flexibility in the rules. They've certainly been -- but even they have found and many of the conservatives judges have found that they simply couldn't buy into the kinds of denial of the confrontational.

So the last point -- only one minute, if I've got a minute left.

MR. TAYLOR: You've got a minute.

JUDGE WALD: I've got it, okay. In the fleshing out of any National Security Court that would supervise, monitor, et cetera, a preventive detention scheme -- and I point out that the Obama filing in the court, which I found very surprising, I'll leave it at that having been a -- I'm a supporter of Mr. Obama all last year -- they said, "This is just for Guantanamo. We're currently going to completely -- you know, a separate process to decide what we're going to do in future." And even this process,

they said, is evolving, but here's where we are now.

But here are the questions: Who runs this? If the military runs this, does that mean these people are in military facilities? The way you are treated or the things you can do with people in military proceedings are a lot different than you can do when they're in a civilian prison. Can they be interrogated once they're put in preventive detention? Can they be interrogated by the military or by the CIA? I don't know.

We all, I'm sure, are current with what the recent revelations with some of the CIA interrogations were like, and we're hopeful that will not happen in the future. But, nonetheless, I think one of Jack's pieces said, well, listen, those Article 3 judges, they will periodically look it over. How are they going to be in a position to know whether these guys who were not put in because, if I understand it, they were dangerous in your proposal, although it's a real question.

Is there a "dangerous," as components of deciding -- prediction to deciding whether somebody goes into the process, or is it simply that they aided in some -- as Obama finally said -- "some substantial way" the al-Qaeda or Taliban, or some other organization in the past -- but in the future these Article 3 judges, if it ever comes into being, leave the Article 3 judges, having been one for 20 years, leave them where they are. Don't put them off in a corner and say: This is your full-time work, your

national security work. The FISA judges have come and gone, as you know, and it's only part-time, so it's going to added on, added on court.

And so if it comes to that, I would certainly hate to see it off someplace in the middle of the country, and I'm not sure you'd get too many volunteers for it. So I'm a highly skeptical instituting preventive detention. I don't think we have shown the need for it, and I'm really worried about its consequences, including spillover into the regular process.

MR. TAYLOR: Thank you. Harvey Rishikof? have you been persuaded?

PROFESSOR RISHIKOF: Well, first let me thank the Progressive Policy Institute and Brookings for doing this. I think it's very important that we discuss it and do it in forums like this and even more in (inaudible) forums. As the Judge has pointed out that we have to flesh out the issues.

The first thing I think is I think the distinction between Jack and the Judge is the clear, sort of factual question which we'll all mention the filings of the Obama administration, because the first issue is: Do you think this is a new type of war, that this is a novel type of armed conflict? That was put in the filing, and what does it mean to be novel, which is that this is somehow a hybrid war? And either we can use the traditional institutions to resolve the problem, or we need what Jack has put forward, a functional

resolution of a unique set of circumstances and threats posed. And you will have people totally disagree on that threshold question, and how you break on the threshold question will often dictate where you go on this particular issue.

Interestingly enough, there's no good, clear analogy. Even in the filings that was used by the administration, they used Jack's quote, and Jack's quote is that this is not new, sort of, of declaring war on persons. We've done it with slave traders, pirates, Indians, the Chinese Boxer Rebellion, and Poncho Villa. And my view is that each one of those analogies doesn't work. And we can go into the debate why each one doesn't work, and I love Jack for having thought through the problem, but these are not pirates. Poncho Villa really didn't have people Yemen riding with them, to my best knowledge, coming from other parts of the world. It makes it hard. That's why it's hard.

The next point is that there's no good analogy in IHL, International Humanitarian Law or Law of Armed Conflict. As you know. we're not signatories to protocol 1 and protocol 2. There are protocol 1 and protocol 2 issues that are raised by the dealing with these unique stateless actors. Different countries have been trying to resolve that problem. They have had a comparative experience. What's interesting about the American experience is that there are the countries like France and Israel that have

created specialized courts. They've decided that's the way to go, and they haven't had experience.

There have been bad experiences like the Diplock court, but every -- many democracies confronting this problem have gone through an created a unique, functional, specialized form of adjudication to deal with an experiment with it.

Ultimately, there are six choices you have: You can either use a criminal court; you can use our courts' marshal, which is in some of the military warrant. We've tried to use the military commissions. There are ICC-type courts that could be used, the judges in the peripheral perspective to address it.

MR. TAYLOR: That issue whether or not eventually, and if it's in the data whether or not the ICC should take up the care of jurisdiction. And then there is the local courts. You just leave them in place, which is you don't make it our problem. But the reason why it's hard to do that is if you look at the filing, you will see that Steve was also involved in an ABA project we call "due process in terrorism" when he was the reporter.

And what we came out of that particular court, which I recommend to you is that there are basically six analytical categories of status, and we're really fighting about the status issue, and then what you accord each individual status that you think is due process. And then the

fight is once you've gone beyond that, which entity should be the adjudicator.

And I guess the last two points I will make is that we carve up the issue in a way that says, okay, we're looking at detention. But prior to detention is you know that you have to make a decision of, do you decide to detain or to target and kill? That is -- before you take. And what's happened in Israel where they've confronted that problem, there's a recent Israeli court decision on targeted killing, and Justice Blalock, who's a very thoughtful jurist, has come to the conclusion that you can do it, but he only is going to recognize two categories of status under international law, which is either you're going to be a combatant or you're a civilian.

And if you're a civilian, Justice Blalock's position is that what the Israelis must do is first make a determination why they're not going to arrest, because that's what you do with people who are noncombatants, if you think they're locking you up, to arrest them. And then once the decision is made not to arrest, then you make a decision you can kill, and then there's a proportionality problem. And his view, which is quite intriguing, is that the court is involved in that decision; that the court should review those military decisions in order to see whether or not due process was followed.

So Jack and I sort of agree and disagree is that I think the judges should be involved, and I think Congress should be involved in

shaping the new forum that we're going to use. But my (inaudible) about running (inaudible) on time is that the Article 3 solution as opposed to the de facto solution we're getting now did not work, and now we are moving towards this in a backward way, and we should be much clearer about it, and we should be much more systematic and structured in creating, for instance -- I'm remembering the ADA standing committee on national security law, and we're going to be start carving specific forums to say: What are the actual procedural substantive problems for Article 23 judges? How would you resolve that so it's not loose? Because I don't like particularly to be in opposition to Judge Wald -- I don't mind being in opposition to Steve, because he doesn't have tenure yet -- but this idea of looking at it appropriately and keeping an open mind is, I think, what we're talking about, Jack and myself. That's it.

MR. TAYLOR: Thank you. Steve Vladeck, (inaudible) clean up. Could you make it all fit together in a harmonious way?

ASSOC. PROFESSOR VLADECK: I can try, although it's harder because I don't have tenure, so I just have to be careful.

Let me start with what I think is probably common ground or at least mostly common ground for all of us. There's a phrase Jack uses in his most recent paper that I think is actually very helpful. He calls proposals for national security courts a canard, and I think that's right, because I think

one of the things that the Constitution Project report says is that what we really mean when we say we should have a national security court is we mean to sort of short-circuit the harder questions, probably because they are hard, that we're talking about here, right? The question of scope of detention, length of detention authority, et cetera.

So I think it's important to start there, and this suggests that the real debate is this debate, right, is what is going to be the government's detention authority? What role is Congress going to play in circumscribing that authority, et cetera?

To that point, though, let me add that unlike Jack and Harvey, any of the proponents of national security courts also see them as a useful means for prosecuting terrorism suspects. And I'll also suggest that there it's not just that I think they're unnecessary, for reasons that Jack lays out, I think they're actually dangerous because if you actually start having a separate hybridized court that simply does specialized criminal prosecutions, presumably you can dip at levels of evidentiary proof, different kinds of substantive offenses, maybe even a different burden of proof, different rules with regards to access to evidence, access to counsel.

I think that's where we start because we're much, much more in danger of subverting fairly fundamental values. That's important to keep in mind, that for some people -- Andy McCarthy is one example, Glen

Sulmazie is one example, Amos Dior is one example. For some of the people who have been the most outspoken in support of national security courts, it's not just the ballot, the form in which we are going to solve these detention questions; it's also about a separate system for prosecutions. And I just want to suggest that I think that there are a separate host of problematic questions that go along with that conversation.

The other point I would make is, you know, I think Jack is probably right that we have a national security court. I mean Ben Wilson and I have this, you know, dog and pony show where every time we're on a panel together, you know, I say we shouldn't have a national security court; Ben says we already have one, and we end up agreeing with each other, right.

I think, you know, if we see the National Security Court as the D.C. District Court and the D.C. Circuit, I think that to some degree undermines the arguments that we need some new system, right, at least until we've had the conversation about what reforms need to be made in the concept of the current system. And to that end, you know, everyone has their sort of most disturbing decision of the D.C. court so far in the Guantanamo cases.

The one that I find the strangest is Chief -- oh, I guess former Chief Judge Ginsberg's [sic] decision this January in Bismullah where he

said that after Brumettie and there is no longer combatant status review, tribunal review. After Brumettie and the only review for the Guantanamo detainees, it's habeas corpus. They can no longer have the statutory appeal to the D.C. Circuit.

I actually think that's unfortunate because it's one thing for the court to have said in Brumettie that the CSRT appeal isn't enough to satisfy whatever the suspension clause projects. It's another thing to say it might not alleviate the need for habeas review in most cases, but it was certainly true that in the WEDO Case, right, in par Haught the D.C. Circuit in CSRT appeal had no problem reissuing the merits (phonetics), right, in saying that there was no authority to detain.

So I think it's important that if we're going to assume that the D.C. District Court and the D.C. Circuit are the National Security Court we're stuck with, there have been some curious things they've been doing. There could be pause about having stated that that's the right answer, at least in its current form as well.

My last point, and then I think we can turn this into more fighting with each other. We've been talking mostly so far about Guantanamo, and I think it's important to, you know -- Harvey mentioned the ADA report where we talk about the six different classes of detainees. You know, the reality is that the D.C. District Court and the D.C. Circuit have

become a national security court for Guantanamo only, right, that until and unless something remarkable happens in the Macalo litigation with regard to Bagram, there's actually no structure in place right now for judicial review of detentions of noncitizens elsewhere outside the territorial United States. And thence to the al-Marri case there are no longer noncitizens in detention in the United States.

So I think it's important to keep in mind that the status quo is not going to work, right, that whatever one thinks of the merits I think I'm closer to Judge Wald on this than I am, probably, to the rest of the people up here, that Congress is going to have to do something if not for Guantanamo, given the Obama administration's promise to close it in a year somehow, someway, certainly for everywhere else. Because I think, you know, it is not at all clear that the (inaudible) is going to follow the flag to Bagram. And I think the real question is going to be, what do you do with the thousands of individuals who are in U.S. custody elsewhere?

So I guess I agree, right, that the real fight here is over preventive detention and what role different groups are going to play and what the outer constitutional law limits are. But I'm just, you know, I think I'm less convinced that the way things are right now have a good likelihood of holding.

MR. TAYLOR: Thank you.

Jack, could you spend a couple minutes responding as you may see fit? And one point I hope you'll address in responding is Judge Wald used the phrase "outside the current laws of war." Could you describe what she's concerned about?

And I'd love to hear you address, generally, can our national security interests in this area be reconciled with international law, or are we going to have to go our own way and say international law doesn't work here?

PROFESSOR GOLDSMITH: Okay, on that question -- that's one of the questions I wanted to address -- I find myself in the surprising and unusual but very happy position of defending what the Obama administration said last Friday, and that is that there's nothing radical at all about retaining members of al-Qaeda and the Taliban pursuant to the congressional authorization in the laws of war.

And as Justice O'Connor said in the Hamdi Decision, the laws of war, clearly and historically, have permitted a government to detain members of the enemy until the end of the conflict. It's a traditional prerogative of wartime; it's uncontroversial, legally uncontroversial, that we're in a war -- the one that was authorized by Congress 2001; the fact that we are in a legal war has been confirmed buy Congress twice. The Supreme Court has said that we're in a war and that triggers the president's

military powers. And, of course, both presidents, both of our war presidents, President Bush and President Obama think that.

And so if there's nothing at all outside the laws of war that the legal position articulated by the Obama administration last Friday, if all were straightforward in the laws of war, what makes this unusual and hard, much harder, are two facts: 1) This enemy, unlike the 400,000 to 500,000 POWs we had in this country in World War II without any lawyers or habeas rights, or any review at all, unlike those folks these, the new enemy, the latest enemy, doesn't wear dog tags, doesn't wear uniforms, doesn't distinguish himself in civilians, and therefore there's a heightened possibility of mistake.

And the second and really fundamental difference is that this war has been going for a long time, and we have a hard time figuring out how even what it looks like to end. And neither of those changes that make this war different, in my opinion, undercuts the basic rationale that Justice O'Connor articulated, and that the laws of war have already articulated about detaining the enemy until the end of the conflict.

What they do argue for is much greater procedural protections than the laws of war normally confer on members of the enemy, and that is exactly what the courts have been working out; it's what the Bush administration actually gave these detainees, and the Obama administration is going to give them more, much more than what the

Geneva dimensions contemplate.

So I don't think it's that detention scheme like to act, the one that the Obama administration articulated last Friday is outside the laws of war. They relied throughout the brief quite accurately and correctly, in my opinion, on the laws of war.

The second point I'll make -- and I'll stop after this -- is just because they have the power to do that doesn't mean they have to do it. Just because they have the power into the laws of war to detain without trial doesn't mean they have to, and it's perfectly open to them at the end of their six-month review, obviously, to say: We have this power but we're not going to exercise it.

But we shouldn't overlook the costs that come from insisting on the trial or release program. And the costs, in brief, are: 1) All of the difficulties of proving crimes because of the difficulties of gathering and collecting evidence, the especially difficult problem of revealing sources and methods is something that we all should face up to which is that in any trial there's the possibility of acquittal. And that's what makes a trial legitimate.

And so the question that the administration I think is grappling with probably is, do we want to insist on a -- do we want to give up this legitimate power to the president, the commander in chief has, pursuant to the direct authorization , pursuant to the laws of war to detain dangerous

detainees, are we going to give up that power and insist on a trial or release program with all the costs that come from that. And that's the big choice. Just because they have the power to do that doesn't mean they have to exercise it, but I think it's going to be that this administration, like the last one, is not going to want to run the risk of releasing a very dangerous terrorist because of any of the many technicalities that can occur during the trial process.

MR. TAYLOR: Thanks.

Judge Wald, I think you had a response in the process that also asked you to specify what troubled you, exactly, about the Obama administration's brief last week, and also there seemed to be some questions on the table for the country now, the definition who can be the detained, burden of proof, what kind of evidence, hearsay, classified, coerced that somebody called "legislative questions." Why shouldn't the legislative branch be heard on those questions?

JUDGE WALD: Okay, let me do the international law point first, and then I'll move on. I was surprised and, quite frankly, disappointed in the Obama filing. I did not find it particularly convincing on the areas of international law.

Now, I'm perfectly willing to go along with the fact that yet we have the (inaudible) of a war without tight assure. But I will tell you that my

understanding of international law is that -- primarily the Geneva Convention, et cetera -- is that it takes care, it lays down fairly specific rules, but in the case of traditional war, okay? I believe that the Hamdi case and Justice O'Connor's opinion said we will take those against the backdrop of those international laws applied to traditional wars, and we'll apply it in the case of Hamdi to allow the detention.

But I read her Opinion as having been limited to the area of combat, the zone of combat, the Afghanistan War in which she said, "So far as we know, these rules of international have applied to traditional wars which come to a tradition end, and we don't know about this, but until it's different we're going to apply the same rules."

So I do not agree with the Obama filing if it is interpreted to mean that because of that we can pick up anybody outside of the area of combat and put them into an indefinite detention scheme, and let me just use one example:

We've all seen Casablanca, right, and the great World War II movie. Okay, here you are in a country in Northern Africa. America is -- let's assume, I can't remember whether the dates are exactly correct, maybe not -- but let's assume America's at war with Germany by that time, okay? Sure, Casablanca and the African country is crawling with Germans who are probably in there trying to do things that will be bad for America,

that will be fighting against our interests against our military goals, and they had to be swarm- -- they were all in Rick's Cafe, but they had to be swarming with that. I do not believe that international law in any way affirmatively endorsed the notion that the Americans could have gone in, swooped into Rick's Cafe, kidnapped those people, brought them back to the United States and put them in a preventive detention scheme.

Well, that is, in effect, what the filing seems to say. I hope I'm misreading it, but it does seem to say that. In other words, if somebody -- and this I get back to something in Jack's -- one of is articles which starts out by saying, yeah, it's right, of course, if you have a self-proclaimed person in the hierarchy of al-Qaeda and Taliban, they should be able to be, if you catch them, preventably detained, or if they've engaged in some sort of direct participation in hostilities in the United States.

But then it turns out that he interprets that -- and correct me if I'm wrong, Jack -- he interprets that as meaning somebody who went to a camp, or somebody who gave some money -- we can fight about what's "substantial money" and not the little old lady didn't know she was giving it -- but somebody who gave money to it, not that they haven't maybe committed some sort of crime but that they can be picked up in the preventive detention scheme and brought back. I don't think international law -- I don't know that it forbids it but I don't think it endorses it. I don't think

it's any kind of a natural extension of what has already been said to be within international law and even under the Hamdi. I think that goes only so far as where we're doing it (phonetics).

PROFESSOR RISHIKOF: Let me just respond to that real quick. I think we all agree Vichy, France, is not the model.

(Laughter)

So if you look at footnote 12 of the critique, I will read your own words -- it's quite fascinating -- of the publication that you all have in your packet.

And look what it says: It says, "O'Connor's put out an Opinion stated that even beyond the authority to hold prisoners of war the government may also retain anyone captured, enemy combatants, and through a session of acts of (indistinguishable). There is some disagreement among committee members as to whether the Hamdi position is correct."

JUDGE WALD: That was not me. That was not me.

PROFESSOR RISHIKOF: "Some committee members might just considered to be more convincing. As Justice Souter explained in Hamdi, the government could have detained alleged enemy combatants as it found with POWs. Because it chose not to do suggested (indistinguishable) AUMF was an insufficiently clear statement from

congressional intent or other forms of preventive detention. However, under the pluralities formulation, the defenses for it extended beyond fields only if (indistinguishable) were captured on the battlefield. Established (indistinguishable) to show on the percentages of persons as captured is really comparatively small.

The issue of the Hamdi decision and how we stand on it and the real critical problem of the hard group, which is, I think, battlefield detention is actually of the cases the more easy case. The hardest case is not on the battlefield, non-U.S. citizen being scooped up either by us or by another country and then rendered to us in some fashion, what are we going to do with it? That's the heart of the problem: What is the appropriate due process? And as far as going in, you know, we -- Noriega was someone who I don't think voluntarily came to the country, and the Supreme Court's decision was, well, when we get him we get him. His position was he wasn't here, voluntarily. but --

JUDGE WALD: But he was soon going to be put on trial.

PROFESSOR RISHIKOF: He was put on trial, and then we released him, and then he had to be picked up by the Europeans. So it's a very fascinating set of issues of how the international law is being followed, how we're getting engaged on it. But I think the really tough issue is the hard case.

JUDGE WALD: That's right.

PROFESSOR RISHIKOF: Right, and then should that be just Article 3, or should there be something else involved, given what the charge is going to be, which will be conspiracy -- which is not an overly recognized international crime, not usually frowned upon -- and then all the hard questions, as you pointed out, what does "substantial support" mean? What does "pardon" mean? What does "associate" mean? That's the really hard way to get at issue.

JUDGE WALD: And who makes the decision.

PROFESSOR RISHIKOF: And who would make -- Jack and I think --

MR. TAYLOR: Steve, could you address that, and also, just to put a little more concrete meat on the bones -- I suppose that's a mixed metaphor -- take Salim Hamdan, who was the driver for Osama bin Laden and ferried weapons around and so forth and who was prosecuted, as you know, in a military commission.

Suppose they hadn't prosecuted him in a military commission. Suppose the question was, can he be detained long-term, or can a Taliban foot soldier who might return to the fray in Afghanistan be detained long-term? How should that question be answered, and who should answer it?

ASSOC. PROFESSOR VLADECK: Well, I think those are related, right? You know, Harvey says that is the hard case, and I think no one's going to disagree with that the hard cases are the ones that make the bad law, right. I think we have to be careful that there are really two different questions here.

The first is, what do the laws of war require/permit, right?

The second is, to which cases do the laws of war apply? But there's an assumption that pervades a lot of the discussions in this area that the laws of -- you know, it's one thing to characterize the laws of war and to say that under the laws of war, you know, you can hold for this long, you can hold without these procedures, et cetera, et cetera. It's another thing to assume that the laws of war apply to every single person who we're picking up in the context of the military force that Congress authorized in September 2001, right.

I don't think it's at all clear that in the context of a noncitizen who is picked up, let's say, on the streets of Sarajevo not by us, right, who is only indirectly turned over to us, that the laws of war would apply. They might, right, and they might not. But I think that, you know, we have to be careful to resist the assumption that they did because I think that's where we get into trouble with Hamdan.

And I should say -- I think it's in my bio -- I worked on the

Hamdan case, so I may be biased -- I am biased, although, you know, find me a sort of a lawyer in D.C. who didn't somehow work on one of these cases at some point. With Hamdan I think it's important to realize when Hamdan was captured in the context, you know, quote, "on the battlefield," right -- well, he was captured -- he was captured in --

PROFESSOR GOLDSMITH: At a border process.

ASSOC. PROFESSOR VLADECK: But in -- in Afghanistan.

PROFESSOR GOLDSMITH: Yeah. For the border crossing, yes.

ASSOC. PROFESSOR VLADECK: I mean but he was captured in Afghanistan, right. This is not a case like Hamdi where there was a -- where there is a reasonable allegation that he was only picked up and turned over to the U.S. because of a bounty that the U.S. was paying to the Northern Alliance.

I actually think Hamdan's case on the pure laws of war detention question is a close one. And I think, you know, I think the government would have been in much better strengths in Hamdan's case had they actually held onto him. Indeed, if the government really believes that Salim Hamdan posed a threat, detention would have been much better than a military tribunal because --

JUDGE WALD: They've only got four months.

ASSOC. PROFESSOR VLADECK: -- because he'd still be at Guantanamo as opposed to free in Yemen, having served, you know, seven months in prison after his military commission.

So I guess the larger point here, right, is that I think we have to be careful not to speak in generalities, right. The laws of war -- I think we would all agree that the laws of war do permit detention of people who are properly classified as combatants; of people who received those procedural protections that the laws of war require, right; whereas I suspect we will disagree, and where I suspect many of us will disagree, is to whom the laws of war apply. And I'm less bothered by the notion that the laws of war would apply to Hamdan than I am that they would apply to someone captured in far less specific circumstances.

MR. TAYLOR: Jack, to pick that up, address any part of that you'd like, but also the Bosnians, Bumedian himself and several other Algerians, I think, who had become citizens of Bosnia, were picked up by Bosnian security forces, handed over to the United States, held at Guantanamo, recently found not detainable by Judge Leon based on not there being not much evidence.

To pose, hypothetically, that the government had very convincing intelligence information from Bosnian intelligence that this guy was trying to blow up the U.S. evidence -- embassy, but they don't want to

give it over to the court. How do you handle that?

PROFESSOR GOLDSMITH: Well, legally, the way you would think about it, the fact that someone wants to blow up the U.S. embassy by itself does not give a detention authority. Again, I'd just go back to the Obama filing. Under that rubric, you'd have to show that they were doing so either as a member of al-Qaeda or the Taliban, or as an associated force or cobelligerant.

I don't know enough about the facts to know whether they satisfied with treachery, but if they didn't and if the government couldn't show that, then they would not have the authority to detain, and, of course, they could try them if they wanted to.

MR. TAYLOR: No matter how dangerous.

PROFESSOR GOLDSMITH: Yes. This is not a freewheeling -- I'm not proposing the Obama administration is not proposing -- I don't know anyone recently who has proposed --

MR. TAYLOR: (Laughter -- inaudible).

PROFESSOR GOLDSMITH: Seriously -- no -- a freewheeling authority to detain someone just because that person is deemed dangerous. There's a strict legal test, is what has Congress authorized, and what do the laws of war traditionally permit? And there's lots of black and white about that, and there's lots of gray that needs to be

worked out, but that is the framework for understanding this.

But let me just say one other point. I don't think that this distinction between -- again, I agree with the Obama administration that this distinction about on the battlefield/off the battlefield is not coherent. Congress authorized the use of force against an enemy that attaches inside the United States. The battlefield was in a very real sense here; they said they wanted to prevent that from happening again; the enemy is spread out all over the globe, and we've been attacking the enemy all over the globe using military authorities authorized by Congress all over the globe.

The question is -- there are two sets of questions: 1) Can we go after those people consistent with the use and bellow of the laws of war consistent with the congressional authorization? I think the answer to that is yes, but there is a separate question about "use and bellow" whether we can enter another country and do so.

MR. TAYLOR: Um-hmm.

PROFESSOR GOLDSMITH: That's a separate analytical question. But this idea that there's the battlefield in Afghanistan, and you can detain people there but people you pick up elsewhere you can't detain under the laws of war I don't think is correct.

ASSOC. PROFESSOR VLADECK: Is that a categorical distinction? I mean I guess at least what I -- I mean I may have misspoken,

because I'm not suggesting that there is no authority to detain off the Bosnian law. I'm just suggesting that the questions are different, right, that when you have someone who's picked up by the Bosnian security forces, right, there may be a more plausible claim in that case, right, that it's, you know --

PROFESSOR GOLDSMITH: We did the government's proof is he same. The government has to show that, no matter who picks them up -- and maybe that makes the government's burden greater since we didn't pick him up ourselves has a chain of evidence problem. So maybe that increases the government's factual -- what the government has to show. But the question is, has Congress authorized force against this person? Is this person part of a group against which Congress has authorized force? And, if so, the president can detain him.

MR. TAYLOR: Well, let me just jump in. That issue is -- first on the Hamdan case, as you know, there were two sets of problems. One was the chain of evidence because the RPGs were put in a place in which we didn't tag. And then second of all, circumstantial evidence which was the video. And that's what's the core of the case. And when you put that in front of a jury, the jury found that evidence somewhat underwhelming because of procedural issues.

ASSOC. PROFESSOR VLADECK: Which case are you

talking about now?

MR. TAYLOR: Hamdan. Hamdan.

PROFESSOR GOLDSMITH: Now, the second issue is, where there's also (indistinguishable), it's been raised, and I'd like to hear about the original judgment, Jack, on this, is that the big problem is DPIH, direct participation in hostility. That's a big problem that we're having in international law. We have the core problem with Hamdan in a way it could get a private contractor. He could have said, "Look, I just got hired to drive this guy around, and occasionally he asked me to put stuff in the trunk, but I'm not somehow involved in al-Qaeda, I'm not also somehow involved in associational. I am sort of like Blackwater in LZ. I was hired to be a driver."

So the DPIH in the context of where we are with the type of enemy is the original, Jack, I think, Judge, debate. Is this a new novel type of war which then allows there to be new types of targeting, new types of capture, or are the traditional, historic Article 3 classic POW category sufficient? I think that's where the line breaks.

JUDGE WALD: Can I -- can I just --

MR. TAYLOR: He's doing -- and then I had a specific question to ask you.

JUDGE WALD: Uh, you know what? Yeah, I -- I agree with Harvey in the lines he's throwing on the debate, but he's the way the world

looks from my point of view, is we did have international law, and certain -- it covers certain parts of the relationship between countries. It certainly is not, was not created for this particular kind of war, although protocol to and various things you might bring in. But it wasn't -- and it's limited, admittedly.

But what we are seeing proposed and where it's limited, countries have to fill in the gaps for themselves. I admit if the international law doesn't cover some critical part, then our national legislature goes in and does it. But when we're deciding what it can do according to our own constitutional, according to our own traditions, I think I am just kind of amazed at the scope both of what is being proposed here when we get down to nuts and bolts, and what is being proposed in the Obama situation.

Because, basically, what we are saying is when Congress decides that al-Qaeda, not just al-Qaeda but Taliban, but in the future there may be other organizations. It specifically says that we're not limited to those organizations.

MR. TAYLOR: Um-hmm.

JUDGE WALD: When we decide that these -- it could have been, from my point of view, being the oldest person in the room -- it could have been a communist conspiracy of the '50s or '60s which was out to under -- by some interpretations without parts of it to do away with by sabotage, revolutionary means. It means we can then go in any part of the

world, pick up anybody not a citizen, et cetera, take them back not using the normal extradition or those kinds of means, bring them back here.

Even that, I know we have the case in California which says that's okay under our Constitution, so leave the rendition part out for a minute, okay? That may be a separate question. Bring them back here for what? For a trial as to whether or not they really were doing that?

Whether that kid who went to the -- I'm not trying to minimize it -- but the kid who went to the training camp, and then later on he said, "Ah, that's not for me, I'm going back to school," and never pursued it any further, whether or not they can then be put in a preventive detention scheme and held -- I don't know how long -- indefinitely or whatever, I find that just a -- quite an overwhelming concept and one I think is very much an extension of either international law as we know it or our own laws.

And I think that how we do that, even the protections that Jack talks about, if it is -- and in your article you say they would have habeas, I think, in one of your articles. I'm trying to figure out what the habeas they have according to a preventive detention scheme outlined by Congress, but it seems clearly implicit that they're going to get less than the habeas; they're going to get habeas light or something.

Otherwise, you know, why -- why have a special court if -- and if habeas light means we don't want to -- we're afraid to show certain

classified information kinds of things are of legitimate concern, but what it's going to come down to is somebody -- and it's going to be a prosecutor or it's going to be a military person, after they've picked up that person around the world someplace, is going to decide, am I going to put this guy into the preventive detention track, or am I going to put him into a regular criminal case track? And I think that decision and how it's made, like Barack, I have, you know, real concerns about that because I don't see where the incentives are going to be, especially if somebody says, "Ah, we can't put that guy to trial because we'd have to show this classified information or that."

PROFESSOR RISHIKOF: Could I ask one, specific along that concept (inaudible)?

MR. TAYLOR: No, because I think you made it clear if we catch an al-Qaeda guy with a gun in

Afghanistan --

JUDGE WALD: Yeah.

MR. TAYLOR: -- in 19 -- 2001, he's detainable.

JUDGE WALD: Sure.

MR. TAYLOR: If it's Rick's bar in Casablanca, not detainable; presumably Bosnia. not detainable. Right now, every few days the Obama administration is shooting a missile into Pakistan to kill a bunch of Taliban,

alleged suspected Taliban leaders, a) that's illegal; and b) What if the status --

JUDGE WALD: That's outside my job description.

MR. TAYLOR: They're not paying you enough. They're not paying you enough for the (inaudible).

JUDGE WALD: And I don't want --

MR. TAYLOR: Instead they send a commando team across, and they grab the Taliban leaders instead of killing them, and then they put them in Bagram Air Force Base for -- bring them back to the United States.

I mean I guess I'm trying to get a feel for is there a line somewhere? The battlefield guy in Afghanistan versus somewhere between him and Rick's bar.

JUDGE WALD: Yes, I know, on a real-life level, so the notion is you can shoot a guy -- and, look, I'm not an expert on what you can do under use, bellow, in no circumstances whatever. I only get them after they're well in (inaudible).

And so I can't answer that --

MR. TAYLOR: That man has filed no habeas corpus petition.

JUDGE WALD: I can't answer that question, but what I do have the sense is that if you do capture them and -- well, for one thing, I won't even get into the fact of whether or not it's in the borderline of Pakistan

or whether or not that could be the defined as a combat zone, et cetera. I think that's a close question, too. But if we grab somebody someplace and he isn't in the combat zone, and he isn't in any kind of direct participation in an act of hostility against the United States, and then we're back into the hard cases.

MR. TAYLOR: Yes.

JUDGE WALD: I think the hard cases do belong in some form of regular court procedure, and I think we have the weapons.

You saw what happened to al-Marri. They went all the way up to the court. It went -- and I, honestly, had something to do with the al-Marri case, so in al-Marri they went all the way up, and then finally it just got too sticky so they brought him back to the civilian court where he had been in the first place. They filed a two-page -- as I understand it, I haven't actually read it, I read about

it -- two-page indictment which said he's being indicted for conspiracy to materially -- or whatever the word --

MR. TAYLOR: Constrictive action (phonetics).

JUDGE WALD: Right -- where he could substantially or materially aid the enemy. There's no question that we have enough laws on the books, so it then becomes a question, why can't we do the regular trial? There are only two reason I've seen written by anybody: One is the

evidence might be tainted. Well, we know -- we know everybody, including the Obama administration, because we're not touching torture. Torture is out. We don't like torture, it's gone. So, theoretically, that shouldn't be it.

The next question, then, is show it as torture, coercion, inhumane Article 3 type --

MR. TAYLOR: For quarantining him to camp (phonetics?)

JUDGE WALD: -- for the types 3 must do. So, theoretically, maybe we all ought to bring somebody to trial because of that kind of thing, or we don't want to -- we don't want to disclose certain amounts of classified information. We don't think CIPA Classified Information Procedure Act, is sufficient to do it.

That bothers me a little bit if that is going to be the linchpin of whether somebody goes into one track or the other, is does a prosecutor think that it might be a hard trial, or it might be too difficult to try. Is he going to be allowed to make that decision? And, if so, what are the incentives? Already we know that in some past cases the prosecutors have suggested to people being regularly tried while we have the enemy combatant track in place, look, if you don't plead guilty, you know, you may end up being an enemy combatant.

Imagine if you got this track where you can just put them there to begin with every time you don't want to disclose a classified information.

MR. TAYLOR: Jack and Steve, please address that, and also, Jack, you mention in your latest paper, the Moussaoui and the Pedillo trial, which has some resemblance to the al-Marri case just mentioned because they ended up in the criminal justice system. And I think you had some -- you thought there were problems there.

PROFESSOR GOLDSMITH: Right. So this is one cost of -- it's just one cost in the mix when you're trying to decide, make the policy question. And it's a policy call, and it's a hard policy call about which trials to use, how often to use them, what the rule should be and the like. And one consideration is -- this invariably happens -- is that there's going to be, if we used the regular civilian trials to try the terrorist, as we saw in Moussaoui as we saw in Pedillo, there's going to be inevitable pressure by prosecutors because of the difficulty of proving the crime, of stretching concepts beyond their normal place.

So in Moussaoui we had some adjustments, to put it mildly, to the confrontation rights of the defendant. In Pedillo, it was a shockingly broad conception of conspiracy that allowed him to be prosecuted. Those are precedents in the civilian courts that can be used for every defendant, theoretically. And that's one of the problems. There's spillover from terrorist trials to trials of other defendants. That's just one of the many costs one has to consider in deciding whether to use civilian trials.

That argues, perhaps, for using UCNJ procedure where the precedence, I think, can be more cabinet -- at least an unconstitutional precedent, and so.

MR. TAYLOR: Steve, when you address any of that, but also when you work through all the complexities here, is the bottom line that they're going to be a lot of dangerous people that just have to be released because there's no legally sufficient basis for holding them? Or is it something else?

ASSOC. PROFESSOR VLADECK: You know, I think it's something else. I mean I think, you know, that the suspicion -- and I think to some degree this is consistent with statements the Obama administration has made -- is that they are going to try to find other remedies for as many of the Guantanamo detainees as they can and then see how big the group is who's left. Right, and so, you know, where it's possible to repatriate detainees to their home countries perhaps for trial there, they'll do that; where it's possible to pursue criminal charges against them in the United States, you know, they may do that, and then you see how many people are left.

And I think -- I mean this is where I perhaps part company with some of my friends -- but I think that there is room for Congress to come back and to create some kind of framework detention statute for those hard

cases, right. Because I would add one category to Judge Wald's description, right: There's also the cases where the evidence may not be inadmissible, right, where the evidence just may not be enough to prove in a criminal proceeding and yet the government has enough information that they know that releasing this person is a real threat. And to me, when we talk about the hard cases, that's the hard case, right.

(Inaudible) Shia Mohammad, to me, is not the hard case, right? The hard case is the case where you have a minor guy who we have pretty good reason to believe is up to no good, right, but who we really can't prove that to any, you know, neutral fact-finder. And the problem in that case is, what kind of precedent does it set if all those people are detainable? So that's why I think the better way forward is a more detailed statute, right, that has a clear definition of who can be detained; that has regular review, right, that provides access to counsel, right.

I mean, you know, I think -- I think the problem is, is that too much has been left up in the air. I mean if you read the AUMF, the AUMF says the president has the authority to detain all persons, organizations, et cetera. He determines, right. We're already past the test of the AUMF because it's not the president who's determining this anymore, it's the court. And I think -- I actually think that, you know, it's better to have the courts doing some things here, but I think, you know, there's a lot of room for

Congress to come back and actually provide a far more lucid and far more useful definition whether, you know, whether or not consistent with the laws of war for who can be held.

MR. TAYLOR: Two quick questions for you and Judge Wald, and then I'll go to the floor. Do you share Judge Wald's concern about the Obama administration brief filed last week?

And also, Judge Wald, how about that? How about Congress getting into the act, as Steve just suggested?

ASSOC. PROFESSOR VLADECK: I mean my -- I'm not -- I'm not quite as worried about Friday's brief as I am about Thursday's. What I mean by that is, you know, there's a decision out there in the case of the Uyghurs called a Kiumba, and the Uyghurs, you know, is a very hard case because here you have 17 tried as Muslims who have been determined by the D.C. Circuit to be not detainable as enemy combatants, who cannot be sent back to China because they credibly feat persecution and torture there. And so the question comes, what do you do with those guys?

Now, one could treat the Uyghur case as too regenerist. The problem is that the Obama administration isn't, right -- that the administration has now invoked the D.C. Circuit's decision in the Uyghur case as support for the proposition that none of the Guantanamo detainees is actually legally entitled to a court order releasing them. And so I think that

position far more troubling than the intermediate view of who can be detained.

And if I can just throw one last thing on top of that. In talking about criminal trials, I actually think the even worst precedent is the Abdul Ali case. All right, we talked about Moussaoui, we talked about Padilla. In the Abdul Ali case, you really saw, I think, what Jack was referring to insofar as stretching the procedural rules in a terrorism case. But I don't know that that in and of itself is an argument in favor of some specialized process; I think that may just be an argument that there are constitutional limits that should be observed in all of these cases, right, and that's where we go back to Congress.

Part of the issue isn't -- what the Judge is concerned about is prosecutorial discretion, because that's the decision, it's a strategic decision made by the State. But the second issue, or the analogy, is look what's happening in piracy. We had thought that we had resolved that problem. Well piracy's come back with a vengeance, and one of the problems of piracy, which is if you want to use which we were talking about earlier, the Al Capone approach, you use other types of statutes to get the person, which I think is the position of the Article 3.

The problem with the piracy issue using the Al Capone approach is, why the Brits and the Dutch were using a capture and release

program is their fear was that they actually captured the pirates, brought them back to their jurisdiction, they could only try them, but their charge would only be about 10 years. Then they would have -- after 10 years they'd have to release them either into Holland or England.

They didn't want to do that. They found that that would be a huge problem for them, so they put them back onto the water, and that's -- because there's a lethal mall doctrine under international law which is you cannot return someone if you fear they're fearful (phonetics).

So there's an extraordinary gap there, and that is not being filled either by the international regime or the domestic regime, and in a certain way, that's your hard case, the way Uyghur to fall into that gap, and there's maybe more of that as a potential problem.

I guess I just find it ironic that at the end of the day the reason why we are supposed to be not as concerned about a specialized process in these cases is because the criminal justice system is too harsh, and the rules are stretched too much. I mean, you know, there's a

-- I don't disagree with the statement that the criminal justice system is too harsh and that the rules are stretched, but I don't think that's what limited all of the terrorism cases.

And so, you know, if we want to have the separate conversation about, you know, making sure that we're actually not adopting

these overly broad evidentiary rules, I mean I worry that we keep -- we keep sort of -- it's a moving target, right, that we keep using the deficiencies in one system that are not necessarily terrorism-specific with right to argue for why the other system is more appropriate. And that's why people on both sides are often seen as talking past each other.

MR. TAYLOR: Let's get questions from the floor as soon as you respond, and also is there a role for Congress here, do you think?

JUDGE WALD: Yes, I'll step up to that. All right, two quite points: One, the spillover works both ways. You worry about, and maybe justifiably about stretching the ordinary rules of criminal justice too much in order to encompass a new kind of -- and that may be a legitimate rule. I worry about I am a moviegoer, as you know, and I don't just watch Casablanca, I watch only these called The Field of Green. And field the field, and they will come, as I worry, too, about when you have this separate process that will be so much more attractive to the decision-makers about which goes in, then trying to either go in a criminal process or stretch the rules.

I don't think the Al Capone thing is so bad.

PROFESSOR GOLDSMITH: I know.

JUDGE WALD: My feeling is al-Marri was originally up for several -- I don't remember the --

PROFESSOR GOLDSMITH: Many crimes for (inaudible).

JUDGE WALD: Yeah. Yeah, yes, okay. Please put him away. I mean --

PROFESSOR GOLDSMITH: For life, right.

JUDGE WALD: Yes, okay. All right, that's -- Congress can come in and decide that (inaudible). I'm not against Congress making penalties on criminal process, what I think are the legitimate ones. To me that is less harmful to the whole future of our rule of law than creating this amorphous . Do I think there's a role for Congress? Of course. The AUMF can never -- can't operate under NIFAT indefinitely no matter what we do, no matter which way we go. And if Congress wants to clarify who can be detained, et cetera, I don't have any problem with that.

I have some skepticism based on the Military Commission Act. I, along with hundreds of others, testified before Congress, et cetera, et cetera, and I don't think what came out at the other end -- now we have a different Congress, maybe it will be better this time.

My bottom line concern, if you haven't guessed it yet, is that to create a whole separate track which is making different decisions according to different rules and putting people away for the indefinite future is something I think is really quite revolutionary and something we have to think really long and hard about.

MR. TAYLOR: Any questions from out there? Yes?

MR. RITKERS : David Ritkers, Cato Institute. I've been wondering, would beefing up the military end and determining status alleviate some of these problems, like if we were to take the competent tribunal standard in Article 5 and move it more towards the judicial tribunal standard for actually trying these, and essentially using a military judge for basically habeas light being habeas by a military judge, using as a screen? Would that alleviate some of the concerns before it moves to an Article 3 forum ?

MR. TAYLOR: Jack, do you want to address that t?

PROFESSOR GOLDSMITH: I don't have concerns about using the Article 3 forum, so -- I mean it's a hard question to answer in the abstract. There are tradeoffs. I think the sea search is not a process that a lot of people have confidence in. I haven't actually studied it in detail. I think we need to -- this is a vague answer to a somewhat vague question -- I think we need a process that maximally ensures accuracy that we have the person who has been, has done the things that we think that he has done to bring it within a legal standard, and if that requires ratcheting up the procedural demands and the showings at the first-level stage, I think that's one of those contextual calls that Congress should make.

PROFESSOR RISHIKOF: But under Bumedian, the only

thing that was declared unofficial is 7A, which a habeas issue. The rest of the Act stands. So that's (indistinguishable).

At B, you still confront the same problem. You're going to still have what we've been discussing all morning, these very hard, hard cases. And my sense is that for strategic reasons, you don't want to have the military system, the harshest effect and teach JAG officer. And the JAB officers did extraordinary calls (phonetics) between the total seven or eight years. But I think it's not something that they want. To get to move to the full courts martial, it's a different set of problems, so my sense is why of us have said either you're going to use the Article 3, or are you going to use a new forum, and that's the consensus of us on the panel.

MR. TAYLOR: Steve, is that you view, or do you think there's a role for military courts here?

ASSOC. PROFESSOR VLADECK: I actually -- I mean I think there's a role for military courts in those cases -- I mean assuming that these are cases we agree are properly dealt with in the military paradigm. I think that's the important, number one thing about Bumedian, right.

Justice Kennedy's concern in Bumedian was not with the CRST in the abstract, right. His concern was with the confinement of the D.C. Circuit's ability to review CRST, right. So I actually think there's room in Bumedian in those cases where that kind of procedure is appropriate.

To craft some kind of military review process, so long as you are not tying the hands of the Article 3 judges who will inevitably sit in review of that process, right. I mean, I think what was really offensive to the court in Bumedian, the majority in Bumedian, what was offensive to Scalia was the majority in Bumedian. But what was really offensive instead of the majority of Bumedian was not the CSRT process itself, but the way that the Detainee Treatment Act circumscribed and actually technically confined the power of the D.C. Circuit to review the CSRTs. And I think it's important to keep that in mind.

JUDGE WALD: Actually, many of the civil rights groups, the civil liberties groups, or special interests, however you want to call them, were very positive toward a kind of Article 5 proceeding. Now, they were thinking of it in terms of the Afghanistan battlefield --

PROFESSOR GOLDSMITH: Yes. The short --

JUDGE WALD: -- it was only in combat.

PROFESSOR GOLDSMITH: Yes.

JUDGE WALD: Going up, pointing out that, if I recall something like a thousand -- it was sued in Vietnam and over a thousand people were let go right then and there by the --

MR. TAYLOR: You're talking about Article 5.

PROFESSOR RISHIKOF: Yeah, the Article 5, like a Geneva

Convention.

PROFESSOR RISHIKOF: Tribunal off the rapid fact issue (phonetics).

JUDGE WALD: Military.

PROFESSOR RISHIKOF: Correct.

JUDGE WALD: Military, yeah.

MR. TAYLOR:

PROFESSOR RISHIKOF: Correct.

MR. TAYLOR: Is there a hearing on the --

PROFESSOR RISHIKOF: Very loose battlefield .

JUDGE WALD: A hearing on the battlefield to single out prisoners of war, people claiming a prisoner of war status versus somebody who doesn't have it, but in the process the guy who was taking his lands to pasture, whatever it is --

PROFESSOR RISHIKOF: It was The National Geographic reporter.

JUDGE WALD: Right. Right, right, right. Right, a thousand of them got let go right then and there. And so the group, and some of those -- I won't say how many -- some of those thousand that didn't get let go or whatever in Afghanistan ended up in Guantanamo. I'm not talking numbers because I don't now numbers. But some of them did.

So I think there may be, in terms of that kind of thing aware , but it was always felt, I think, by the JAGs that I talked to, worked with, that you needed the Article 3 subsequently.

ASSOC. PROFESSOR VLADECK: Somewhere, right. Was it actually --

JUDGE WALD: At some point. This was a --

ASSOC. PROFESSOR VLADECK: Was it ultimately consistent --

JUDGE WALD: This was a sorting out, right, at the field.

PROFESSOR RISHIKOF: Right, the racket statutory, (phonetics), yeah.

ASSOC. PROFESSOR VLADECK: There's one exception, right. There's a curious provision in the Military Commissions Act that I think no one ever talks about which allows for the trial by court martial of a lawful enemy combatant, as defined by the Military Commissions Act. Right now on at least what was the Bush administration's view, you know, we have yet to see whether this philosophy

-- the Obama administration's view no one detained in the conflict against al-Qaeda, they were lawful enemy combatants. But, right, Congress has actually already provided for court partial proceedings at least in some of these cases additional, yes.

MR. TAYLOR: More questions from the floor? Yes, sir?

MR. ARCADES : Hi, I'm Jim Arcades from the Progressive Policy Institute. If, I could, since you're all lawyers, we've gotten into a lot of nitty-gritty, and I think that the discussion is fractured a little bit. On the one hand there's this question of, should we have an National Security Court? And then the discussion has also gone into, what are the laws for detaining?

So I think I'd like to crystallize, maybe take a brief poll of the panel and talk about three issues that seem to really get at the heart of what we're talking about.

So when we pick up people on the battlefield, and the rules of detention are poorly defined and we're not sure where, what scenario they exactly fall into, if I could have briefly each of the panelists discuss what are the tradeoffs here? In your view, is it better to hold these people without trial or in the due process of law? What serves the best interests of American national security to either afford them the best traditions of due process or hold them without any sort of due process?

Secondly, how long should we be holding these people if we are to afford them due process?

And then the third issue is, what form should the due process best take?

MR. TAYLOR: Do you want to take that on, going left to right?

PROFESSOR RISHIKOF: Well, clearly, you give it an easy case: If they're picked up on the battlefield and they're in a firing situation, that's an easier case. So you say of course we can hold them. The question is, do you want to use a traditional, if they're a, quote "lawful combatant," you have a decision to make whether or not you want to use classic military justice.

If their court did not follow Geneva Convention, our whole position is, is that you should be able to bring them to some form of prosecution, should that be the traditional Article 3? Should that be the National Security Court? Should that be a traditional military commission? But I think most of all agree that you can hold them, that there's going to be a parole system. We've had the repeatedly while you're detaining. You have a system in which you have a fixed or yearly meeting in which you meet with the individuals detained and ascertain whether they're a threat or not, or continue to be a threat or not. And then you make a determination.

And then the last question is that's what this is about. Your view that it's disjointed to crystallize is they're connected. That's why it's so complicated. It's not disjointed. The issue is how we detain is a strategic matter, and which form we use has a significant impact on how we understand the rule of law, how we understand due process, and how we

think we're doing just deserts to the people that we're fighting and are fighting us.

MR. TAYLOR: Do you want to go on (indistinguishable)?

JUDGE WALD: Yeah. I'm basically in agreement with you. If you pick them up in the battlefield or in the general combat, you can have an Article 5 just for your own sake to get rid of the clearly innocent people. But you can certainly -- you don't have to have a trial on the battlefield, you can certainly take them over to a holding place, hopefully not Guantanamo, but some kind of a holding concern. At some point, I think you then do have to have some kind of a CSIT.

I know Jimmy Jones didn't get to it, but, certainly, there was some hard cases to be made that the form of the CSIT was pretty bad. And, hopefully, it would be one that had some war , not a full-scale trial, but some war. You want change in a (indistinguishable).

(Panelist speaking simultaneously)

PROFESSOR RISHIKOF: Just for anyone who objects here , the CSRTs are the combatants and --

JUDGE WALD: Combatant status reform.

PROFESSOR RISHIKOF: It's inside the --

JUDGE WALD: It's run by the military people.

PROFESSOR RISHIKOF: Yeah.

JUDGE WALD: People -- people were shackled to the floor, they never knew what the charges were ahead of time. They didn't really have any right to a lawyer. They were pretty bad, okay.

MR. ARCADES (?): But how do you really feel?

JUDGE WALD: And so I think -- but, you know, you made it easy to me at least, by talking about having them picked up in the battlefield with -- how long can they be detained? That's a hard question because some of these -- we'd all hope al-Qaeda will go out of business in another 10 or 20 years, but probably not, or there may be some other group in the (inaudible). You know, that's a fairly hard question of how you apply traditional things at the end of the war, and I don't have the answer.

PROFESSOR RISHIKOF: As the example in the Afghanistan system, there were three systems that were operating there. You're going to have, if it's picked up by ISAF, The international force, they have 96 hours to make a decision to turn that individual over to an -- we call them the "judge of instruction," because there are civil codes and stuff .

If they're picked up by the Afghanis, they have a decision to make within 72 hours. They have to give it to a -- because it's a speedy issue in order to make an investigation for reference to be made by that judge.

If we decide that somehow you're dealing with a non-Afghan,

nonforeign citizen who we have not declared war with, we're not at war with because there is no state of war, then the decision has to be made as to whether or not we're going to hold that person because who captured them, and then what are we going to do with them?

So that is what the military is struggling with, because you're under three possible regimes in order to have that detainee, and we're deploying Marines right now in the Helmand Province as part of the surge, and that's going to be a real problem for them: Which regime are they under? How much time do they have? And what should be the process? And what's the nationality of the person that they're capturing? Because you can always keep them in place. Afghanistan has a criminal system and Iraq has a criminal system.

It's that other group that we're dealing with when you say "capture on the battlefield." That why we had the six categories, because you don't now what you're dealing with. There's three categories in each one of the battlefields.

MR. TAYLOR: Let's see if there are other questions. I now we haven't quite finished the poll, but, yes? A question back there? And then Will Marshall.

MS. KROUD: Hi, I'm Nina Kroud. I'm Director of the Center for International Free Expression and a local human rights and criminal

defense lawyer.

I wonder whether the panel could inform us about what other nations are doing in relation to capturing terrorists? Spain comes to mind, Germany comes -- I guess Germany comes to mind, England certainly comes to mind that also have troops, I think in Afghanistan. I don't know whether they've declared war the way we have. I don't -- regardless of the Supreme Court's decisions, I don't believe this is a real war, but nevertheless how have they handled people who have been captured, whether in their countries or elsewhere in their either military or judicial systems?

MR. TAYLOR: Who wants the answer to that?

MS. KROUD: And whether or not that can inform -- whether that can inform us as to how to handle our situation?

MR. TAYLOR: Steve, are you equipped to answer that?

ASSOC. PROFESSOR VLADECK: I can talk a little bit about it. I mean I'm probably going to mess up some of the specifics, but at least in Afghanistan what has been true is that -- I mean Harvey, I think, described it accurately the choices that everybody faces. And those countries that have been involved in detention operations -- it dwindled in list -- have mostly either created their own processes or have, you know, turned them over to us.

I mean really, in Afghanistan and Iraq, the predominant model has been to give the people to us if they're not going to give them to the domestic authorities, and let us deal with it. But it really has become our problem.

There are, however, fascinating comparisons to draw with how our various, you know, friends overseas are dealing with domestic terrorism suspects. England has these things called "control orders" under the Enemy Terrorist Act in 2001 and various amendments thereto that are, I think, much more aggressive than what we currently have on the books insofar as what it allows the government to do with regard to length of detention, with regard to standards for detention, with regard to lack of, you know, trial. But you also have time limits, and have a deliberative judicial review.

Now, there's been debate among, I think the human rights community, about how rigorous those time limits are and how flexible they are. But I actually think that if Congress were looking for an example either of what to do or what not to do, you know, the control orders over the terrorism act would be a place to start, not because they are perfect but because they're at least one example of a country that has tried to figure out how you might do at least shorter detention of terrorism.

MR. TAYLOR: How about Germany and Spain? Does

anyone on the panel know how they're handling these issues? I believe they were mentioned.

PROFESSOR GOLDSMITH: The French Judge Bruguiere was the terrorist judge, so the French were handling it with by having a specialized judge who's a cross between being a prosecutor and the FBI, because he has his own control. And that's the French model that Progressive Policy Institute paper has some descriptions of what Judge Bruguiere's powers are. The people feel -- the French have been quite aggressive on this issue and have had a long term with it under the criminal code. We give those judges even more power if they're a special judge.

ASSOC. PROFESSOR VLADECK: There is also -- I mean going back to the due process question, which I think you know, one of the important questions is going to be, if we're all in agreement that Congress can and maybe even should do something, right, one of the questions is going to be, how will the Constitution limit what Congress does?

I mean there's actually -- there are actually a series of probably -- one could see the litigation post-911 as knocking off World War II error precedents one at a time right, you know. I mean trying to be funny and not working. But there's actually -- there's a case from 1948 called Dudecki v. Watkins (phonetics) which is about the tension under the Alien Enemy Act, and the Alien Enemy Act, which is still on the books, allows for

the detention and deportation of nationals of countries with which we are at war, right.

So during World War II, we held noncombatant German civilians and Italian civilians who were in the United States under the Alien Enemy Act. And in 1948, the Supreme Court in a very, very bitterly divided 5-4 opinion says not only is the Alien Enemy Act constitutional and not violating due process, but the war isn't over, right? This is 1948, and, you know, I shouldn't have to go through too much history to point out the oddity of saying in 1948 that the war against Nazi Germany wasn't over, right.

The court said the war isn't over for due process and detention purposes until the political branches say it is. And the didn't happen in Germany's case until 1951. So the precedent out there actually seems to give Congress certainly more leeway than I'd be comfortable with. But there is a lot of room there, and I think the notion that due process might provide the limit on the duration of detention. It's something that actually is, you know, I think the right way to think about it, but we're not there yet insofar as understanding how the cases all work.

MR. TAYLOR: Will Marshall? A question?

MR. MARSHALL: Thanks, just two quick questions. It seems clear that there is not much international law that covers the case of the people that we're talking about here, terrorist conspirators, you know,

al-Qaeda but may be affiliated with other groups. And in the absence of that, I'd like to know, is it the position of those who are skeptical about national security courts that such people, when picked up should be presumptively entitled to the full panoply of constitutional protections that an American citizen enjoys.

And for the supporters or those who lean toward this security court idea, what is he principal advantage? How does it help us balance security and due process and civil rights protections or civil liberties protections better than the existing civil court system?

MR. TAYLOR: Judge Wald, do you want to take that?

JUDGE WALD: Okay.

MR. TAYLOR: And Jack?

JUDGE WALD: I think the people we pick up, if they are -- if we pick them up in a context of being a direct participant in hostilities against the United States, then I think they are covered by I think correct interpretations of international law, and I think that they could be detained under the Hamdi decision with whatever -- with whatever surveillance or oversight we want to give the Hamdi detainees.

I still am stuck with the notion that if you're picking up people in foreign countries that we're not at war with, and they have not been what we call "direct participants" in hostilities against the United States, the

Obama people reject that particular standard in their filing. Then I think, skipping over how you get them to the United States because that's a whole different thing, then I think they, once we get them here, yes, we ought to try them under our criminal laws by a regular criminal process.

I think to set up some kind of different thing where we pick up people, bring them here, and put them in a different process that doesn't have the same rights is extremely dangerous to our own -- to our own traditions.

MR. TAYLOR: Time for one or two more. Yes, you had a question?

MS. HUSSEIN : Thank you. My name is Tara Hussein. I'm just wondering what any and all of these things, the relevance or role of U.S. citizenship or U.S. legal residence should be or could be in the case either of the preventative detention regime or national security codes?

MR. TAYLOR: Jack, I think you addressed that.

PROFESSOR GOLDSMITH: I argued in my Brookings paper that any detention scheme created by Congress should extend to U.S. citizens, and we shouldn't draw a distinction between aliens and U.S. citizens for two reasons: 1) And I know that's complicated and will be very politically controversial and probably a nonstarter -- but any detention system that was designed for U.S. citizens would be one that is, let's just put

it much fairer than one we get to -- any one that we're competent enough with, the Congress is competent enough with for to detain U.S. citizens as a member of al-Qaeda or the Taliban would be one that would be we'd be confident in for aliens, and, in general, would also be much more legitimate in the eyes of the world whose citizens we are detaining.

One of the great -- one of the many reasons why our allies don't like our detention system is that it just applies -- we have this double standard. We don't have confidence enough in the system to apply it to U.S. citizens. I don't think we should have a scheme that draws that distinction. We should be confident enough to apply it to U.S. citizens. And, by the way, every time the DNI or the attorney general for the last three or four years goes up before Congress, he has said that the threat of a serious terror attack in the United States could come from a U.S. citizen just as much as a non-U.S. citizen, so that's my view on that.

ASSOC. PROFESSOR VLADECK: Just a short (inaudible). I actually agree with Jack entirely the policy matter that if we actually treated all terrorism suspects alike, the odds are much greater than we would then be more carefully about how we did it.

It's important, though, to keep in mind Justice Scalia's dissent in Hamdi where, which surprised certainly a lot of people. I will --

MR. TAYLOR: Stephen, Justice Scalia --

JUDGE WALD: It was Stephens.

ASSOC. PROFESSOR VLADECK: It was less surprising that it was Stephens, right. But --

PROFESSOR RISHIKOF: But it was a dissent.

ASSOC. PROFESSOR VLADECK: Right.

PROFESSOR RISHIKOF: It got two votes (laughter).

ASSOC. PROFESSOR VLADECK: It was a dissent, but I mean I think -- but if you actually, I mean I think if you read the tea leaves, there would have been five votes in dissent. I mean I think, you know, I think there is -- there's at least the argument whether it has more than two votes that citizens are special under the Constitution, right, that there's a way in which the only way you can detain a citizen without criminal charges, at least according to Justice Scalia, is to validly suspend habeas corpus; otherwise you could try them with treason.

Now, I think that goes to the -- I mean I know -- I know Jack disagrees with that argument -- I think that goes to the last question about how far we're going to go to extend other constitutional protections to, you know, noncitizen terrorist suspects. And I think the answer to that is we first have to understand what the constitutional projections are, right, due process variants. The notion that citizens have due process rights abroad does not mean they are the same due process rights that they have here,

right. There's a 2nd Circuit decision, what, from last fall that says the warrant clause doesn't apply -- or the 4th Amendment doesn't apply extraterritorial because how could you go to a judge?

So I think to ask whether we're going to give equal rights, rights to citizens and noncitizens, is to first require us to understand what the rights of citizens are when they are considered to be terrorism suspects overseas. And I think even that is a little hazier than we'd be comfortable with.

MR. TAYLOR: I think we're out of time. I'd like to thank all of you for coming, thank our panelists for a fascinating discussion.

(Applause)

And recommend to the Obama administration that if they can get the panelists to agree on anything, that they adopt that policy.

* * * * *

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