# CONSTITUTION PROJECT

## A DISCUSSION OF NATIONAL SECURITY COURTS, PREVENTIVE DETENTION AND PRESIDENT OBAMA'S EXECUTIVE ORDERS

**WELCOME:**
VIRGINIA SLOAN,
PRESIDENT,
CONSTITUTION PROJECT

**MODERATOR:**
STEPHEN VLADECK,
ASSOCIATE PROFESSOR OF LAW,
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

**SPEAKERS:**
DAVID LAUFMAN,
FORMER ASSISTANT U.S. ATTORNEY FOR EASTERN VIRGINIA,
ATTORNEY, KELLEY, DRYE & WARREN LLP

DEBORAH PEARLSTEIN,
ASSOCIATE RESEARCH SCHOLAR, PRINCETON UNIVERSITY,
WOODROW WILSON SCHOOL of PUBLIC AND INTERNATIONAL AFFIARS

GABOR RONA,
INTERNATIONAL LEGAL DIRECTOR,
HUMAN RIGHTS FIRST

MATTHEW WAXMAN,
FORMER DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR DETAINEE AFFAIRS,
ASSOCIATE PROFESSOR OF LAW, COLUMBIA LAW SCHOOL

**FRIDAY, MARCH 20, 2009**

*Transcript by*
*Federal News Service*
*Washington, D.C.*

VIRGINIA SLOAN: (In progress) – afternoon. I'm Ginny Sloan. I'm the president of the Constitution Project and I want to welcome you all here on behalf of the Constitution Project, as well as our co-sponsors of this event: Human Rights First and the Georgetown Center on National Security and the Law.

The Constitution Project's mission, as many of you know, is to safeguard and defend the Constitution and we do that by creating coalitions – bipartisan coalitions of experts who come up with consensus recommendations for reforms to defend and safeguard the Constitution. Our statement "A Critique of National Security Courts" is an example of those reforms. It brings together experts from across the political divide to condemn the idea of national security courts as well as preventive detention.

I'm pleased that Steve Vladeck, the law professor who helped our Liberty and Security Committee achieve consensus on this report, is the moderator today. Human Rights First is an influential advocate for building respect for human rights and the rule of law to help ensure the dignity to which every individual is entitled and to stem tyranny, extremism, intolerance and violence. I'm sure we will hear a lot today about Human Rights First's report, "In Pursuit of Justice."

Our other partner today, as I mentioned, is the Georgetown Center on National Security and the Law, which combines innovative scholarly theory with practical research, aiming to foster balanced, non-political examination of national security related issues and to develop practical policies for both enhancing national security and protecting constitutional values.

So, as I mentioned, we are just delighted to be co-sponsoring this event with both of these wonderful organizations. And I'm also glad that so many people are here today to join us from the Hill, the military and the executive branch. These are people who will be working on the issues we're discussing today and advising on important policy decisions. I hope our discussion today will help guide their deliberations.

We want to get right to the substance of our discussion so let me turn the program over to Steve Vladeck. Steve, as I mentioned, is a law professor at American University Washington College of Law where his teaching and focus – his teaching and research focus is on federal jurisdiction, national security law, constitutional law and international criminal law. He's a nationally recognized expert on the role of the federal courts in the war on terrorism and was part of the legal team that successfully challenged the Bush administration's use of military tribunals at Guantanamo Bay in Hamdan v. Rumsfeld. Steve has authored any number of amicus briefs and reports on these kinds of issues, including the Constitution Project's report "A Critique of National Security Courts."

And with that, let me turn the program over to Steve.

STEPHEN VLADECK: Okay. Thank you, Ginny. Let me join Ginny in extending my thanks to the Constitution Project, to Human Rights First, to the Georgetown Center on National Security and the Law. Today's panel really wouldn't be possible without each of those organizations and so I share Ginny in thanking them.

So our topic for today, as you can see from the title, is "Bringing Detainees to Justice and Justice to the Detainees." As of today – I think this was unintentional but it's been exactly two months since President Obama took office and just a little bit less since he issued his executive order dictating that Guantanamo shall be closed within one year. So we've got 10 months left, I guess.

And two months in, if we actually stop for a moment and try to take stock of what has passed to date, since the executive order – at least publicly – we haven't seen that much movement on the question of closing Guantanamo, even though I think we can all be sure there has been plenty of discussion and debate and movement behind the scenes.

If anything, the last couple of weeks at the very least have seen some measures and some developments that actually suggested it might be even harder to close Guantanamo successfully within a year, things that include the D.C. Circuit's decision in Kiyemba v. Obama on February 18th when the court held that the federal courts lack the power to order the release of any of the Guantanamo detainees into the United States, right when the Uighurs case – these are 17 Chinese Muslims who cannot be returned to China.

We have the Obama administration invoking Kiyemba as authority for limits on the power of the D.C. courts more generally to provide relief in any of the Guantanamo cases, which suggests that the answers really will have to be political as much as they are judicial. We have the filing last Friday where the administration advanced a new – and I guess we will debate how different – definition of who can be detained under the authorization for the use of military force.

And finally, we have the filing in the Maqalah litigation over the scope of Boumediene and whether the detainees at Bagram, who we need to be careful not to forget about in all of this obsession with Guantanamo, are also entitled to the privilege of habeas corpus in the federal courts.

So these are very momentous questions. These are hard questions and I think it's safe to say that at least in these two months publicly we have not moved that much closer to answering them.

So what are we to do? What is the administration to do with the detainees currently in U.S. custody, especially at Guantanamo? Should they be released and repatriated to those countries that are actually able to take them? Should they be transferred to civilian custody for trial on criminal charges? We've already seen this, at least in the case of Ali al-Marri, the one non-citizen who was held as an enemy combatant in the United States. Al-Marri is now facing criminal charges in the Central District of Illinois for providing material support to terrorism and for conspiracy thereto.

Should the detainees be transferred to another detention facility, perhaps even one in the United States? Although I pity the member of Congress who has to say, yes, they can come here. Right? The question is where to go if they're going to go somewhere besides Guantanamo.

And the alternative, should any of the detainees be tried under the military commission still in existence and indeed still around under the Military Commissions Act of 2006? Those cases are all on hold right now, but at some point, presumably, there will have to be some decision about whether they should go forward and if so in what form.

Finally, should there be a new process? There had been some calls in the academy and on the op-ed pages for the creation of a hybrid system, a national security court. There's a new paper by Jack Goldsmith, the Harvard Law School professor, formerly the director of the Office of Legal Counsel, saying we already have a national security court; it's just called the U.S. District Court of the District of Columbia and it's high time we recognized that.

What are we to do and how are we to do it and what questions must we be careful not to neglect in resolving the fate of the detainees at Guantanamo and elsewhere? This is the topic for today's panel and I think it's safe to say we really could not have assembled a better group of experts to discuss it.

Our format for today, I'm going to briefly introduce our four speakers. Then they're each going to give what we hope are brief opening comments; at about eight or nine minutes I'm going to have to chase them off the stage. Then we're going to have a moderated dialogue among the five of us before finally turning it over to all of you for your questions and comments.

So let me just briefly introduce our panelists and then we will get started. We're actually going to go in the order in which they are seated. So first, to my right is Deborah Pearlstein. Deborah's a visiting scholar in the law and public affairs program at the Woodrow Wilson School for Public and International Affairs at Princeton University. Formerly she clerked for Justice Stevens before becoming the founding director of the Law and Security Program at Human Rights First. I like to tease her that I was the founding intern of the law and security program, although that's not nearly as witty a title. No.

DEBORAH PEARLSTEIN: (Inaudible) – more important.

MR. VLADECK: Well, I was going to say or as well paying a job. Yes.

So Deborah brings this sort of experience at Human Rights First where she was instrumental in that organization's increase in role in these issues and as a voice for moderation.

To her right, speaking of Human Rights First, is Gabor Rona. Gabor is the international legal director for Human Rights First, where he advises programs on questions of international law and coordinates international human rights litigation. Previously he was a legal advisor in the legal division of the International Committee of the Red Cross in Geneva. And maybe, if we're really nice, he'll tell us who leaked the ICRC report to Mark Danner, if he knows. (Laughter.) He's published on international humanitarian law and international criminal law. He's taught at Columbia Law School and a host of other institutions, and indeed he has his LLM from Columbia.

To Gabor's right, speaking of Columbia Law School – I've got segues going pretty well –

MS. PEARLSTEIN: You do.

MR. VLADECK: – is Matt Waxman. Matt is an associate professor of law at Columbia Law School where his expertise includes the domestic and international legal aspects of fighting terrorism. He's an adjunct senior fellow for law and foreign policy at the Council on Foreign Relations. And also from 2004 to 2005 he served as the deputy assistant secretary of defense for detainee affairs. Prior positions also included as the principle deputy director of policy planning at the State Department. So Matt comes from the internal side of this.

And finally, speaking of the internal side of this, to Matt's right is David Laufman. David is a partner at Kelley, Drye & Warren here in Washington, D.C., where his practice focuses on federal criminal investigations and prosecutions. From 2003 to 2007 he was an Assistant U.S. attorney in the Eastern District of Virginia where his many responsibilities included the successful prosecution of Omar Abu Ali, one of the terrorism cases I suspect we will talk about later today. The Supreme Court just denied cert about three weeks ago in Abu Ali so I told David he's finally off the hook. Let's see. He previously served as the Chief of Staff to the Deputy Attorney General at the Justice Department and he is a graduate of the University of Pennsylvania and, indeed, of Georgetown University Law Center, so welcome back.

So with that I'm going to turn it over to Deborah and then we'll get this underway. Thank you very much.

MS. PEARLSTEIN: Thank you, Steve, for the wonderfully sort of coherent introductions, and also to Ginny Sloan and Sharon Bradford Franklin and the Constitution Project and my alma mater, Human Rights First; and of course Georgetown for hosting this forum. It's a terrific honor to be here.

So the panel has obviously set up a really wide range of complicated questions to address and the issues are all related, of course: what to do about Guantanamo, do we need a national security court, and so forth. But I hope it helps, since I'm leading off, to sort of structure our discussion by saying I want to talk about two distinct problems that the – or what I think are distinct problems – that the new administration is having to address. And problem one is, okay, we're closing Gitmo; what do we do with these people? And problem two is what counterterrorism detention powers and structures do we need to be effective in counterterrorism going forward?

Why do I say these are distinct problems? They're obviously related but I think it's important to distinguish them as a matter of policy solving – policy problem solving, and also as a matter of legal problematic, and that is because the answers to question one – that is, what are we going to do with this unique set of folks at Guantanamo Bay – is now enormously constrained in many respects by what we have already done to them over the last – I guess now seven years. They were denied Article III hearings and other standard law of war protections at the outset. Some of them have been rather egregiously abused. And there are a host of other reasons based on what we have already done that now limit the options for what we can do with them, and then I would argue what we should do with them going forward.

The answers to the second question are very – potentially very different; that is, what kind of counterterrorism detention powers and structures do we need going forward? They are – and I think Matt Waxman and I are very much in agreement on this point. In the first instance, principally questions about strategy, counterterrorism strategy writ large, who would want to detain, why do we want to detain them, and so forth. And these questions have to come first and really at some level haven't yet been answered before you start creating new national security courts or other structures.

So what I want to do in the militantly brief time I've been given is – appropriately, because Q&A is always more interesting – is give you my own quick take, for what it's worth, on both of those questions. So let me start with what are we going to do with the folks at Guantanamo? I'll tell you my views, and they won't comport in all respects with everyone else's, so we can have a discussion about that. And then I'll give my own sort of general sense – again, as a lawyer, not a counterterrorism expert – about how to think about what kind of powers and structures we need going forward.

Okay. So closing Guantanamo. In my view I think it is possible to group the remaining detainees at Guantanamo into roughly three groups. Category one are people who can be prosecuted. That is to say, we think they have done something wrong or were about to do something wrong or have committed some kind of war crime or are otherwise subject to prosecution under domestic criminal law or the international laws of war.

As a matter of law, I think it might well have been possible to prosecute these people under either the traditional system of Uniform Code of Military Justice courts martial or under a lawfully constituted military commission, military tribunal. I think that is not initially the direction that the last administration took. And as a result I would say as a policy matter, if not strictly a legal matter, the right solution now is to just prosecute those who can be prosecuted in Article III courts.

So to reiterate, I think it is possible to carry out a lawful prosecution under, say, a courts martial structure. But at this point it is also possible to carry out not only a lawful and effective prosecution but I think a prosecution whose legitimacy is, if not unassailable, much less likely to be assailed domestically, internationally. And we can talk about the procedural hurdles and the particular challenges of pursuing prosecutions, protection of classified information, other procedural hurdles – I suspect Gabor's going to get into that a little bit. If not, we'll address it in Q&A.

But I think fundamentally those hurdles can be addressed through – either already have been addressed through the Classified Information Procedures Act, other modifications that exist in federal criminal law, or can be addressed by relatively minor modifications that we might need to make in these cases.

Okay. So that's category one.

Category two are people who either the previous administration has already designated can be released, either no longer as enemy combatants or – although this wouldn't be said – woops, we made a mistake initially. And I suspect there will be some more. And these are some dozens of people who will be designated as subject to release by the former and current administrations. Some of them pose challenges of release because we can't send them back home without violating other treaty obligations. That is to say, if we send them to their home country – Saudi Arabia, Yemen, Morocco, what have you – they are so likely to be subject to torture or other forms of persecution that we would be violating our so-called – (inaudible) – obligations to send them back. So what do we do with these people? We have to find a home for them, either here or in another host country that is not going to torture them.

I don't want to minimize the significance of that challenge. And this is the challenge, critically, of the Uighurs case that Steve mentioned. But these cases pose fundamentally not so much a legal problem, I think, as a diplomatic problem. And that's why I think you've seen the Obama administration announce now it's got this special envoy for finding homes for these people. I think we will ease substantially our own diplomatic task if we take in a couple of them here. But that is another significant chunk of the folks at Guantanamo.

Okay. So this brings us to category three. And many would say there is no category three. But I think we should proceed on the assumption that category three is not a null set. There may be two people in it. There may be 20 people in it. But some group of people who cannot – at Guantanamo – who cannot now be prosecuted, even though we have substantial evidence that they did something wrong, they committed some criminal act, because either we've tortured them or for some other reason; or people who say, for example, we have no other information about them except their own statement not under torture that, "I am al Qaeda. If you release me, I want to kill you." And I think there are some people at Guantanamo – and again, this could be a very small number, but some – who fit into that category of people. What do we do with these folks?

And I think I should say – oh, good. Two minutes – I think there are two options with these folks, and I'll fill in caveats later. Option one is I believe there's an ongoing international armed conflict under the laws of war in Afghanistan. The extent these people were picked up at the beginning of that armed conflict, I think it is possible to continue to hold them lawfully under the laws of war. I think as a matter of policy they should be afforded all protections we would afford prisoners of war, whether or not they were entitled to them in the first instance or not. They also have a constitutional right to habeas corpus so are going to get, as far as we can provide them, the Cadillac of procedural protections for whether or not they are appropriately held.

Beyond that, we are facing the prospect of having to release some of these people because while they were detained, the law – at the time they were detained in 2002, the law did not authorize their detention. So we can talk more about I think what should be the focal point of our debate, how big this category is and what the legitimate options for them are. That is the subject of the administration's brief that was filed earlier this week in which the administration proposes a standard. The Guantanamo lawyers are now going to propose a counter-standard or

at least propose a counter-filing. And talking about the scope of that I think is one of our major tasks.

Okay. So that's topic one in a nutshell.

Topic two, what should our attention authority being going forward? In other words, is there a category three? Not just because of the vagaries of who we happened to pick up and who are now sitting in Guantanamo, but is there a general category three set of people out there who cannot be reached by the criminal law or under traditional rules of international armed conflict? And I'll say I think three short things.

One, as a matter of law, while both international and U.S. law impose significant restrictions on our ability to detain people administratively, preventively and so forth – and you can see this in immigration law, civil commitment laws and so forth. So these people are entitled to a host of protections, I would argue, including purview, strict time limits and access to attorneys. In my view there is no categorical legal bar to detention of people for reasons other than prospective criminal punishment.

That said, I would be and I am enormously wary of arguments that we need to create a detention system for this category of people, and let me just give you three reasons. One, the level of procedural protections to which they're entitled, I think, are so significant, including access to attorneys, time limits, and so forth, that many of the reasons why we would want to create such a detention system – prolonged interrogation and so forth, indefinite detention – will be made impossible if the system is designed in a constitutional way. That is to say that the procedural protections may vitiate the policy basis for why we would want this kind of detention system. If people who think intelligence interrogation is aided by indefinite detention and that's why they want a new system, I think to be constitutional the detention can't be indefinite. If you can't get indefinite detention, do you really gain that much by creating a new system? So it's that category of questions.

Two, criminal justice now extends so broadly and much more so since 9/11 to extraterritorial offenses; offenses like material support and so forth. The system is now so flexible I think the options there are quite a bit more broad than when we began having this conversation in '01, '02.

And finally, where the criminal justice system still doesn't go; that is to say can we prosecute – this is my last point; I want to stop – can we prosecute mere members – it's not a criminal offense, writ large, to be a member of an organization; and writ large, there's some significant exceptions there. I don't necessarily think it is in our policy interests, our strategic interests to detain these people. And why? I'll just briefly read from a paper I recently wrote because I think this is the fastest way I can get this out and then you can all come back at me in a minute.

So what do we do with this guy at Guantanamo or more importantly, elsewhere, who says, I am al Qaeda; if you let me go, I'm going to try to kill innocent Americans; there's no evidence he's yet actually done anything? Would detaining this guy help prevent terrorism? I think it's

not necessarily clear, and here's why. Imagine that this guy hasn't yet involved himself in an ongoing plot. Releasing him might allow intelligence to track him or law enforcement to track him and gain otherwise unavailable information about any plot, if it exists or is hatched. Detaining, on the other hand, will certainly prevent this guy from participating in any particular plot.

But if security analyses of the nature of al Qaeda and associated jihadist threats are to be believed, the whole problem is that men like this guy grow on the proverbial trees. He's replaceable. Worse, if the United States detains too many such men or detains the wrong men or detains men under a system believed to be illegitimate, we trade his particular incapacitation for the need to incapacitate many more. What this vision described is an approach to detention that fails ultimately to prevent an attack, but then that succeeds in enhancing terrorist recruiting efforts overall.

This is one of my greatest concerns about the prospect of launching a new regime geared toward detaining members of organizations. We can talk a lot more about the details why, but I'm going to stop.

MR. VLADECK: Thanks, Deborah. Gabor?

GABOR RONA: Thank you, Steve. I also want to echo the thanks that Deborah gave to the organizers. It's a real treat to be here.

So I decided that I want to talk about subprime mortgages and AIG bonuses – (laughter) –

STEPHEN VLADECK: And the bill of attainder clause?

GABOR RONA: All right. Well, not really, but – but my thought was that the economic issues that are eating away at us today have some strong parallels to how we deal with terrorism. For many reasons, we live in a climate of heightened fear and national victimization – or a sense of national victimization. The Civil War gave us Lincoln's suspension of habeas, and Pearl Harbor gave us FDR's internment of Japanese-Americans, and al Qaeda gave us the Yoo-Bybee memos which define torture to exclude torture. So economic insecurity on top of national security insecurity simply magnifies the risk of overreaction. That, I think, will potentially leave us with a massive hangover, much like the nearly universal agreement that suspending habeas and putting perfectly peaceable people into desert concentration camps was a huge mistake.

I do believe that the calls for national security courts and detention without trial or charge fall into this category. I think it's a counterproductive overreaction to a difficult but not intractable problem that is caused in part by the very nature of terrorism, but also in large part by the legacy of the Bush administration's illegal, incompetent, and irrational reactions to it.

Now, the Obama executive orders that bring us together here today, they wisely, I think, separated the question of how to deal with Guantanamo from the question of how to organize detention policy going forward. Guantanamo is a one-off situation and it's precisely due to the

error-filled approaches of the previous administration. The experiment failed in three major realms: detention, treatment of detainees and trial. And the solution to Guantanamo, I think, is not nearly as complex as some suggest.

Detainees who can be prosecuted, as Deborah said, should be prosecuted, and they can be in our normal federal criminal courts. David will talk more about the details of that. So you kick it down to me, I kick it down to him. But suffice it for me to say that our study – Human Rights' first study of over 100 criminal prosecutions of international terrorism in the normal course of the criminal justice system is strong evidence that we don't need to bring Guantanamo on shore by creating national security courts and detention without charge or trial to replace the discredited detention facility in Guantanamo and the discredited military commissions there. Detainees who will not be prosecuted, however, should be repatriated. Deborah went into the details of some of the problematics of that. I'm not going to take that any further. I think she's absolutely right about those problems and how they can be dealt with.

As for detention policy going forward, I think we need to retire not only the words "enemy combatant," which have no meaning in the laws of war, but also retire the theory of detaining persons that we have labeled as enemy combatants; a theory that the Obama administration appears to be taking on virtual whole-hog from the Bush administration. Because there is no war going on in the United States, persons arrested, persons brought here should be criminally charged. If they are not being criminally charged, they shouldn't be brought here under detention.

It is inconceivable that the evidence causing us to suspect that someone is too dangerous to release is insufficient to charge them with at least the crime of material support. And there may indeed be exceptions to that, as Deborah suggested; a person who just says, I'm going to kill Americans as soon as I get out of here. But I also think that Deborah made some very good points about the pros and cons of continuing to detain such an individual. In other words, I think we not only don't need a national security court; we also don't need a law to detain people without charges or trial.

As for persons detained abroad, if the context is war between two states, the Geneva Conventions govern their detention and trial. If the context is war with al Qaeda or not war, then it is the law of the country where detention occurs that governs. This may be criminal law or it may be an administrative detention law. In either case, that domestic law must conform to international human rights rules that prohibit arbitrary detention. It must set out a rational and non-discriminatory basis for detention and it must set out procedures for the detainee to be able to challenge detention in a court.

I think adherence to these concepts will result in a detention policy that is both good law and good policy. It will treat people fairly, it will be effective counterterrorism and national security policy in an age of asymmetric and counter-insurgency warfare, and it will re-establish the bona fides of the United States as a champion for human rights in dealings with other countries. If only the road to economic recovery were as clear. Thank you.

MR. VLADECK: Thanks, Gabor. Matt?

MATTHEW WAXMAN: Great. Well, thanks very much. It's great to be here and especially to be on a panel with so many friends as well as seeing a number of friends in the audience.

The question I often get asked is based on my experience in government; should the United States adopt, build a new national security court or system of preventive or administrative detention? And I want to explain why the answer is maybe, and why as framed that question can't really be answered effectively. And there are three reasons why it's very hard to answer that question, but I think are the critical sort of subquestions to ask.

The first is, compared to what? Should the United States adopt a new administrative detention law overseen by a special court? Well, compared to what? Let's take a hypothetical case of the kind that I worry about. Let's say that near Afghanistan is a hypothetical country called Waxmanistan. (Laughter.) And let's say it has a fairly fluid border with Afghanistan and al Qaeda is believed to be using it as a sanctuary. And we're able with some support from the government of Waxmanistan to locate what we believe to be high level members of al Qaeda or a spinoff.

And we get this information from the government of Waxmanistan on the strict condition that under absolutely no circumstances can we acknowledge publicly that they're assisting us. We certainly can't acknowledge that we are conducting any sort of operations within their border; there's no way they're going to make their intelligence officers available to us for a criminal trial. And so let's just stipulate that criminal prosecution would be extremely difficult in that circumstance. What is that we would do if we didn't have a detention authority or what is it we're comparing a new detention law to? Is the answer that that person – that we do nothing, which is a perfectly fine answer and I agree with Deborah's analysis, which I want to come back to around later, but I just want to – I want to put the options on the table.

One would be that we have no legal options. Another option might be that we would adopt the Obama administration's position in its latest filing that that individual could be designated belligerent who is detainable under the congressional authorization for use of military force. Maybe a third alternative would be to say that in an extreme case the president could rely on his Article II inherent authority as commander-in-chief and chief executive. A fourth option would be that we would kill that person with a Predator or a Reaper.

It's hard to answer the question do we want a new detention authority without considering what are the alternatives that might be used instead. And I think that's one of the difficult questions, but one that has to be confronted. I suspect the government is going to take some action in that case and I personally would like to see that action regulated by another branch of government. That's one of the principles that I would base my analysis on.

The second why it's difficult, besides the compared-to-what question, why it's difficult to answer in the abstract do we need a new detention authority is that the details are going to be really important. And much of the debate has focused on the procedural details, right? You see proposals for a national security court that would have three judges chosen from the FISA Court

who would use a preponderance of the evidence standard. And here's how you'd handle secrete evidence etcetera. Those procedural details are going to be extremely important, but there're also some important substantive questions. What is this new detention authority intended to do? Is it about long-term detention to incapacitate very, very dangerous people of the type that Deborah hypothesized? Is it about short-term detention to disrupt specific impending plots? I think there are a number of different ways that you could design a new detention authority, some of them much better than others. And I hope that's an issue we could come back to.

And I would say, by the way, to relate this to my first point about compared to us, I think where I would disagree with Deborah, if I understood her point, is I don't think habeas litigation is – should be thought of as sort of a Cadillac of procedural protection. I think, for example – when the Supreme Court in Boumediene said that a constitutional right of habeas corpus extends to Guantanamo, it said, oh, and by the way, we're also leaving it to the lower courts to figure out what that means in practice. What are the substantive rights that go along with that? What are the rules that apply?

We don't actually have much jurisprudence that would tell us what habeas corpus would look like as applied to individuals captured and held in Afghanistan. And that's because the 200 years of habeas corpus jurisprudence that we have here in the United States is all distinguishable based on the fact that it's premised on habeas statutory authority that we have here in the United States of individuals who were captured and held here in the United States with very different practical concerned and where the substantive rights are clear. What substantive law is that habeas court going to apply?

So I think, for example, that if you're worried about what kinds of procedural protections should somebody captured and held in Bagram, Afghanistan, have, I think that many of the proposed National Security Court or administrative detention schemes are much more procedurally robust and protective than judicially extended habeas corpus would be if it were applied at Guantanamo.

And my third point is the one that Deborah mentioned earlier, which is how does this fit into our strategy. We shouldn't let a legal discussion of whether a new national security court or detention authority is constitutionally or internationally legally viable drive our approach to combating terrorism. It should be the other way around. And I think detention is a very powerful tool of counterterrorism, both for incapacitating, disrupting plots, acquiring intelligence through interrogation, but it's not as potent as – I think as some of my colleagues in the Bush administration made it out to seem. It's one of an array of tools and we shouldn't exaggerate the value of detention.

But what we really need to do is think about, in the broad scheme, how do you best combat terrorism in the long term. And I think as an overarching principle terrorism is going to be combated more effectively not by worrying about around the margins is this person going to be detained or is that? Can we interrogate this person with these rules versus that. In the individual cases, those goals will be important, but ultimately this conflict with al Qaeda is not going to be won or lost based on that. It's going to be based on whether we can develop an

effective network of cooperative relationships, law enforcement, military intelligence relationships with our partners abroad, both a broad network of relationships and a deep one.

And so I'd like to bring this back around to the original question. Should we enact a new detention law? The answer is maybe, but it depends on compared to what other available tools are on the table, what are the details of this new authority, and how does it fit within our counterterrorism strategy. And all three of those questions are actually entwined.

MR. VLADECK: Good, thank you Matt.

Last, certainly not least David Laufman.

DAVID LAUFMAN: Thank you, Steve. It's an honor to be here with such distinguished company. Thank you for having me back to my alma mater. I'm here as the token former federal prosecutor today, so bear with me.

I want to address the issues today both from a policy and a pragmatic practical standpoint and then provide a framework of how prosecutors look at these issues, and if there's time respond individually to some of the arguments advanced in favor of a national security court system.

I do believe that there was a small category of cases – terrorism cases – that involved current detainees that may not be viable for trying in an Article III court, either because the key inculpatory evidence may be classified or it may be derived from coercive means or for other reasons. And as to those cases, I agree with those who favor some alternative proceeding under established principles of law because assuming there is credible evidence of a threat to people in the United States or to people abroad, a release may be irresponsible.

As a policy matter, though, it's my view that terrorism cases should be brought, wherever possible, in Article III courts. These courts are the bedrock of our constitutional system of justice. The credibility of terrorism prosecutions has an important impact on maintaining a domestic political consensus regarding the legitimacy of our government's approach to combating terrorism. And it also has an important impact on fostering international cooperation in counterterrorism operations. And that can often be critical.

Article III prosecutions confer maximum credibility, in my judgment, on legitimacy of these cases and how they're handled by our government and they also provide an important educational – (audio break) – for our country and the world about the true nature of the threat that we face.

From a practical standpoint, the record shows, as I think the Human Rights First study extensively documented, that the government has largely been successful in bringing terrorism prosecutions in Article III courts without compromising intelligence sources and methods and in a manner that protects the fundamental due process rights of the defendant and balancing those rights against the government's interests.

Let me walk you through the analytical tree that prosecutors employ in assessing whether to bring a case because I think it provides a useful frame of reference. Prosecutors are pragmatists. They have their own passions and sometimes prejudices, but at the end of the day they have to make a clear-eyed judgment about whether a case may be brought in an Article III court and the chances of winning it. And the analysis runs generally something like this from the most basic level. Does the substantive content fit within an existing domestic criminal statute? Is there extraterritorial jurisdiction? Most of the statutes being used to make terrorism cases, particularly the material support statutes, all have extraterritorial mechanisms. What admissible evidence – and I put an emphasis on admissible evidence – does the government have? Can it satisfy all the elements of the offense? Can hearsay issues, which are often robust – can they be overcome? Can confessions be corroborated by independent evidence? Some of you may not know that it's not enough to have the greatest confession in the world if you don't have independent evidence to corroborate it under well-established principles of jurisprudence, that confession is not going to get into evidence.

Is any of the inculpatory evidence classified? What's the likelihood that the given U.S. intelligence agency will declassify the information? I can tell you right now. If it's communications intercepts, almost certainly NSA will not agree to declassification or to even summaries under CIPA. If it's classified information that CIA has generated, maybe, but it's going to be a spirited debate between the Department of Justice and our colleagues in agency general counsel's office as to whether they agree, and if so, under what circumstances.

How can intelligence information be authenticated? At the end of the day, you still have to abide by standards of evidence with respect to authentication and chain of custody. What information is the government likely to have to release under Brady or Giglio? Does the importance of the prosecution exceed any harm that may likely befall the government if that information is disclosed? Who are the government's witnesses? You do, in fact, have to have witnesses in criminal prosecutions. Who are these guys and what baggage do they carry? Did they cut deals with the government? Were they members themselves of terrorist organizations? What are their motives? Are there potential suppression issues? For example, were there confessions that were allegedly obtained under torture or other forms of coercion, and if there were, what independent evidence can you identify that is untainted?

This was a major issue in the Abu Ali case, which we can talk about later. If the key evidence was obtained by a foreign government, which may increasingly be a paradigm that we face in this conflict, how will U.S. prosecutors get it in? Will the foreign government cooperate? Will they provide security officers to testify in an American criminal proceeding? It happened in the Abu Ali case under extraordinary circumstance, but – and I believe in a Chicago case recently Israeli security officers came to testify, but that's – those cases are still outliers.

What about if the evidence was obtained by U.S. military personnel in some cave in Afghanistan or on the battlefield? Do you think the Department of Defense is going to blithely allow U.S. servicemen to testify in an American criminal proceeding? It hasn't happened yet and those issues present themselves too. And there are chain of custody issues even if they do because a ravaged Marine is not trained in providing a chain of custody for a pocket litter to a system that may be admissible in the criminal justice system.

If the defendant is in the United States, is there any lawful way to detain him without having to make that threshold judgment of charging? Is he a U.S. citizen? Is he an alien? Do you operate under an immigration, administrative proceeding, which when I was at the department was often employed not only because it was lawful but because it bought the government time, which is often a crucible in circumstances where individuals are picked up and you have some corpus of information that these guys are bad actors, but it has not matured to the point where an informed judgment can be made about whether to bring a prosecution.

What if there isn't a lawful basis to detain them? Can the FBI engage in sufficient surveillance to protect against the threat to our citizens? How long can they keep it up? How foolproof is it? Those debates take place every day. And how likely is that pre-trial detention can be achieved?

We have a rebuttable presumption against release now, but not every magistrate is keen to employ that. I've been in cases where they pretended as if the rebuttable presumption didn't exist. So those are some of the issues that prosecutors have to weigh.

I've seen some of the arguments advanced in favor of national security courts, so let me just address them real quickly. I have a minute.

One is that these prosecutions place an undue strain on Article III resources. Well, I don't know a federal judge or a prosecutor yet that agrees with that. Yes, there are strains, but I don't think anyone would agree that they are undue strains. If you talk to Judge Brinkema or you talk to Judge Lee or you talk to Judge Mukasey – or maybe not Judge Mukasey, but – (inaudible) – let's leave him out – the judges that I'm familiar with view these cases as important opportunities to demonstrate the flexibility and robustness of the Constitution in our criminal system of justice and as a teaching tool and the cases have worked.

What about if the risk that intelligence will be compromised? I think that is grossly exaggerated. I think Andrew McCarthy points to some molecule of experience from – actually he suggested he has a molecule of experience – but to a case at the court of New York where intelligence was compromised. I think that point of view is respectfully poppycock. I think CIPA works exceedingly well. It is a statutory architecture that has enormous flexibility, provides discretion to federal judges to balance the rights of defendants against the government's legitimate rights to protect sources and methods. I can get into the specifics of how it worked in the Abu Ali case. It worked in the Moussaoui case. FISA, too – Foreign Intelligence Surveillance Act, which is the statutory authority that enables the government to conduct electronic surveillance in counterterrorism and intelligence cases. It too provides mechanisms for the government to engage in ex parte filings with district courts to protect sources and methods.

Another argument advanced is that the rules of evidence and procedure are inadequate. I can assure you that those rules of procedure have been demonstrably up to the task so far. In the Abu Ali case, for example, Rule 15 – depositions under Rule 15 of the criminal rules of procedure was used to take depositions of Saudi security officers in Saudi Arabia, without the

defendant present, even though Rule 15 on its face manifests an expectation that the defendant is present. The application of standard principles of voluntariness in evaluating confessions. There's nothing mysterious about how those principles apply. You just take the facts you have to work with and judges make assessments of whether defendant's capacity for autonomy was overborne.

Protecting Saudi security officers' identities. This has happened in other cases. I mentioned the case in Chicago. The judges can construct protective orders to help mitigate the effects of – mitigate the consequences of foreign security officers testifying in American criminal proceedings. It's been done several times. Foreign-seized evidence, the same principles of authentic case and the same principles of chain of custody employed in these cases. We did it in the Abu Ali case and it can be done again.

I'll stop there and be happy to address questions later.

MR. VLADECK: Thank you, David. Thanks everybody.

So I guess I'm going to start with my best to be described as a bit of nihilistic question, which is to say it strikes me listening to this exchange and similar exchanges over the last few months that part of what we're fighting against is a lack of clarity and that maybe in that sense clarity is good for the detainees and bad for the administration, that whatever the answers to these vexing questions are, the longer they go unanswered, the more flexibility the government and whichever administration has with respect to the detainees and the harder will be for the detainees to vindicate whatever rights they do or do not have. I'm struck in this regard by the al-Marri case, where much of the case why the Supreme Court should have granted certiorari was not necessarily that the Fourth Circuit was wrong, but that the variety of opinions and the diversity of opinions in the Fourth Circuit left the law unclear and that the court should actually resolve this.

So I'm curious if each of you have a reaction to the notion that even if your view is not the one that ultimately prevails, the need for some kind of measure – legislative, executive – that actually finally resolves or at least finally categorizes these cases in a way that actually leads to results.

MS. PEARLSTEIN: So I think part of the problem has been a lack of clarity, but I actually think – two quick things in a longer explanation. One, with enormous respect for my friends on the Hill, it's not at all clear to me that involving Congress in resolving the questions will contribute greater clarity to decisions. And secondly, in fits and starts and against all intents in many respects, we've been working our way toward clarity over the last number of years and in fact on a number of fronts – and the Guantanamo detainees are, I think, a fabulous example of this – the courts have, in a very gradual and deliberate way, narrowed the range of options that are now lawfully possible under the law that existed in 2002 and they're about to make some further clarifying decisions in a matter of weeks and months. So I actually think – I actually think we're going to get clarity.

The last thing I'll say there is that clarity and flexibility aren't contradictory. That is, it's possible – and SIPA is a great example of this, the existing laws were a great example of this – there is a tremendous – it is possible to build a tremendous amount of flexibility and discretion into a very clear law. The clear law of CIPA is broadly classified information should be protected. The defendant's confrontation right should be protected within those parameters discussed. And it gives judges an enormous amount of flexibility to come up with creative solutions, as many of them have. So I don't want to make clarity the enemy of flexibility. I think we're on our way to having both.

MR. WAXMAN: I think clarity cannot be an end in itself. You can have – you can be very clear and very wrong. The problem, I think, in getting to a good solution lies not so much in the question of which institution we are going to entrust with giving us the answers, but rather who are the individuals that are involved in giving us the answers and are they sufficiently versed in the complementarity of a number of legal frameworks that are applicable to these problems. Are they well versed in constitutional law? The answer to that question for many, many, many of them is yes. Are they well versed in international human rights law? That's a smaller subset to which you can say yes. Are they well versed in the laws of armed conflict – the Geneva Conventions and customary rules applicable to armed conflict? That's an even smaller subset.

I think the answer to the question of how best to come out right on the issue of treatment, detention, and trial of detainees, therefore, requires us first and foremost to get a much better handle on the laws of armed conflict and international human rights law that have previously been brought to the issue and more importantly to the complementarity of these fields of law, these legal frameworks – complementarity to each other. And we have a long way to go in large part, as I said in my prepared remarks, because the Bush administration made such a hash of all this. They made so many wrong decisions concerning the way the United States has to deal with both its international and domestic legal obligations.

I'm confident that we will be coming a long way from those mistakes, but we – excuse me – we still need to have a much more detailed analysis of the application of the laws of armed conflict and the application of international human rights law obligations that the U.S. has by virtue of treaties that it is party to than what has so far been brought to the table.

MR. LAUFMAN: Yes, I think some degree of clarity in the law is necessary from a legitimacy standpoint, but also from an operational standpoint. We sort of owe it to the military and our intelligence services who are planning counterterrorism operations to tell them what the scope of their authorities are and give them some clarity of what's going to be expected to back up a detention, for example, down the road in litigation.

As to sort of where best to or who is institutionally best suited to provide that sort of clarity, I would differ from some of my colleagues up here and say I think it is primarily an issue in the first instance for the executive and legislative branches working together and then for the courts to take a look at.

I think judicial review of individual detention decisions is an extremely critical procedural device and protective mechanism, and I say this not as a legal scholar but based on my experience inside the government and seeing what happens when you don't have external review. The reality is just that your work is going to be sloppier. I don't mean to malign the work of extremely dedicated professionals who were taking very, very seriously individual decisions about detentions, releases, etcetera. Nobody wanted to make mistakes, but you operate differently when you're being overseen by a judge.

That said – and also, I think in terms of promoting certain principles abroad, I think the principle of judicial review is one that we ought to embed very centrally in any detention scheme.

As to who sets the basic parameters, though, of what's the scope of the president's detention authority and sort of what are the basic rules of the road of what kind of judicial review according to what standard of proof, those sorts of things, I'm not comfortable leaving them to the judges to just work through habeas litigation. I think it's going to be 10 years of litigation before we have clarity just for Guantanamo as to the procedures there, standards of proof, how you're going to – what other substantive constitutional rights besides habeas and some piece of due process apply there. A decade before you get clarity through that system just for Guantanamo, let alone Bagram or beyond Bagram.

So I'd rather see legislation than continued evolution through the courts, I think, on at least some of those questions.

MR. VLADECK: Although, if it's a decade for Guantanamo, we're seven years there, right?

MR. WAXMAN: Actually, I mean, Guantanamo is going to be closed. It will shut that off, but then leave – you've left Bagram completely unanswered. You haven't even answered the first basic question of whether habeas even applies there. So the Guantanamo litigation isn't going to even provide useful precedent.

MR. LAUFMAN: And look, I know there's a lot of pent-up energy that's gathered over the last eight years, but I think people need to give the Obama administration some time to work through some enormously complex issues. They've got a new team in effect. Matt Olsen and his crew at DOJ are assessing these cases now. They're going to do a scrub on these cases to figure out what categories they fit into.

Clarity is useful to an extent, but clarity can be the enemy of preserving options for having a menu of decisions available to you. Notwithstanding criticisms of the last administration, I think it's important for the executive branch to have some time to work through the issues that's facing in consultation with the Hill, bounded by the jurisprudence that has emerged over the last few years and let the courts exercise the oversight that is appropriate for them to exercise in cases that have been brought as right for controversy.

MR. VLADECK: I have one more brief question and then we'll turn it over to the audience. Let me just warn audience members now. We're going to ask you to please line up

behind the microphones at the front of each aisle, so if you'd like to ask a question, now may be a good time to start moving in that direction.

My question which I hope that our panelists can answer briefly so we can turn over to the audience has to do with a lot of David Laufman's comments about the value and the ability of Article III courts. There are concerns voiced from people really on both sides of however side – whatever lines we're drawing that there's a risk of overreliance on the Article III courts in that we might set dangerous precedents that might actually have a seepage effect, that might actually pollute the Article III criminal process in non-terrorism cases. This has been documented, for example, with respect to antiterrorism prosecutions in Britain among other places.

And so I'm curious how viable a critique each of you sees that as being and if you think there are ways to mitigate its force.

MS. PEARLSTEIN: The great thing about the seepage argument is that it's an empirical question, so you could find out the answer, which is to say –

MR. VLADECK: But we're lawyers. We don't do empirical work.

MS. PEARLSTEIN: Yes, I know. It's a problem. Thus the Woodrow Wilson – no. And that is to say, for example, we've carved out in organized crime law just sort of its own massive little field, niche field with specialized procedure rules and so forth within the existing criminal justice system, have those specialized hearsay rules and organized crime prosecutions and so forth seeped into the rest of the criminal justice system. I wish somebody would do a Ph.D. thesis on that.

But you know, I think that answer is discoverable. And I think whatever the answer is, the odds, to me, that one can – that it looks like a solvable problem. I actually am skeptical that seepage is that big of a problem. We still have sort of organized crime rules and not organized – you know, conspiracy cases and non-conspiracy cases. So I'm skeptical, but we could find that out and I think we should.

MR. RONA: Steve, I think you're describing a hostage situation. You know, don't bring these guys here because if you do, we'll blow up the place including ourselves. I don't think the bomb in that situation is in the hands of either the terrorists or their defense council. It's in the hands of all of the – everybody who's responsible for maintaining the integrity of the criminal justice system, and I would much rather trust in the integrity of those who are responsible for maintaining the criminal justice system than to create a separate process which no doubt will be a compromise of the process that's due in the regular criminal justice system and may in and of itself cause seepage into that system.

MR. WAXMAN: What was the question again?

MS. PEARLSTEIN: Seepage.

MR. WAXMAN: Seepage, oh. I mean, I think that –

MR. VLADECK: Not to be confused with (steerage ?).

MR. WAXMAN: I think there probably is some concern about that. I don't think we've really seen it yet. I think it was an excellent study by Human Rights First that was outlined – that was referenced earlier on the effectiveness of the criminal justice system since 9/11 in handling – is that up there? Yes. It's an excellent report but I'm going to explain why. It is limited in a critical respect. It talks about how effectively the criminal justice system has operated in dozens of cases since 9/11, complex terrorism cases and shows that it is up to the task in those cases and worked reasonably effectively in those cases.

It is limited in its dataset, which is these are cases that were brought by prosecutors. It doesn't talk about – it's not an analysis of what cases were not even sent to the Justice Department at all, or were considered by the Justice Department and prosecutions were not brought for the various reasons that were outlined earlier.

So I think we have some information, empirical data that we can look at to evaluate how well the criminal justice system has operated, but we're limited. It's sort of a limited aperture through which we can view the problem.

MR. LAUFMAN: I think as far as I know this is a worry in search of a problem. The judges – if you look at the Eastern District of Virginia just across the river, I don't think Gerald Bruce Lee or Leonie Brinkema are applying circumstances that confronted terrorism cases in run-of-the-mill criminal cases. These cases are largely sui generis. There are different sets of government interests at stake. There may be some greater bend in the court's balancing of competing interests in terrorism cases but that may be appropriate in circumstances where, in the worst case scenarios, the crimes alleged involve the commission of mass casualties or potential crimes that have a greater impact on society. But I don't see this spilling into decision-making on the applicability of rules of evidence or the procedural rules in non-terrorism criminal cases.

MR. VLADECK: I'll just say, for those of you who are interested, Judge Brinkema actually was the keynote speaker last year at a conference that we hosted at American University on national security courts and her speech is actually available online. I won't tell you the whole link, but if you look at the Human Rights First report, it's cited in footnote 336 and you can also find it online.

We have about 20 minutes for questions from the audience. So we welcome anyone and everyone to come down to a microphone and ask away.

MR. RONA: Steve, can I make an observation? While people are lining up, just one more thing in response to your question. A lot of times we're talking now about the obstacles facing the criminal justice system. And I think we really need to examine not only our minds but our hearts about what it is that we mean by obstacles. Do we mean obstacles to justice or do we simply mean obstacles to conviction?

If we're thinking about this concept of terrorism in the sense of something – a scourge that has to be wiped off the face of the earth, it's very easy, I think, to let ourselves involuntarily getting to a frame of mind where we think that the purpose of the criminal justice system is to convict people.

And when did we come to that conclusion? I think for 200 years, the premise has been no, the purpose of the criminal justice system is to do justice. So if there's evidence that's gained through torture, if there are other problems that go to the integrity of the prosecution, then we have to look at those as being ones that should not be resolved in the favor of conviction. So I think it's really important to look at how we're thinking of that concept of obstacles.

MR. VLADECK: I just want to say, the premises behind the question do not necessarily reflect the views of the moderator. We have a question over here.

Q: Okay. Great. I had a question about Bagram. We talked about how the – (inaudible) – decision might affect the rights of the detainees, if any, of Bagram. I was curious though, because Bagram is again near an active theater of hostility, wouldn't that affect the legal status and also the nature of the property interest at Bagram? Wouldn't that affect the legal status of the detainees in Guantanamo, in contrast, they were far away from the theater of battle and also we had a lease hold interest in the property. So I was wondering if any of the panelists could shed some light on that.

MR. RONA: I'll try. Well, the first observation about the property interest I would say lease hold, shmease hold. The important thing I think is who's doing the detaining and who's being detained, and in this sense the point is that obligations under humanitarian law and human rights law simply do and should follow the flag.

As far as the comparison between Bagram and Guantanamo is concerned, two points. The present litigation that's taking place concerning Bagram has to do with individuals that the United States brought into Bagram from other countries, and they did not go there voluntarily.

So I think unless you are willing to tell the United States that, well, you have to give habeas rights for people in Guantanamo, but you don't have to give them in Bagram, especially to people who were not caught up in what you might call the field of or the theater of battle, then you're virtually telling the United States simply that they could close Guantanamo but everybody that they were sending previously there, they could send to Bagram with impunity. That's a significant problem.

Second, I would say, again, look to the laws of armed conflict and international human rights law. I disagree with Deborah on the idea of how to categorize this armed conflict. I think quite clearly it's not an international armed conflict to which the Geneva Conventions simply allow detention of either POWs or civilians, absent judicial review. It's a non-international armed conflict in which it is domestic law that determines the power, the right and the basis for detention, and so it is and it should be in Bagram as well.

If there is a domestic legal basis, then it has to be by virtue of the United States acting as a proxy detention authority for the Afghan authorities, and it would have to be under that law that the power to detain and the right to challenge detention is determined.

MR. VLADECK: Great. Matt?

Q: Sort of related. I guess I'm curious about – in Deborah's third category, the category of people who can't be convicted, we're often told that there have been a number of successful convictions, a number of successful trials and so that is evidence that this third category maybe doesn't exist.

I guess in thinking about that, I'm curious to what extent the successful convictions merely represent a selection bias on the part of the people who are deciding whether to try these people. They say, well, we have this group of people that we think we can secure convictions against so we're going to try them first.

So clearly we have a number of very successful prosecutions, but I'm wondering to what extent that simply reflects that we've prosecuted the ones that we can prosecute and the rest of them – or maybe all category three.

MS. PEARLSTEIN: Sure. The answer to your question may there be a selection bias problem in the use of that information, yes, almost certainly there is because we're selecting only on the cases about which we have any information. So the first answer to that question is the more information available about who is remaining, the more able we'll be to sort of give a meaningful answer to that question.

But for the reasons I articulated at the outset about Guantanamo in particular, if there are people that fall into that category at Guantanamo for reasons of our past bad acts toward them – in other words, if there is somebody there who should be, would be, would have been prosecutable but for the fact that we tortured them, it seems to me the right solution for that case at Guantanamo, given the flexibility in the law and so forth, is to try to find a solution that allows that person's continued detention within the bounds of the law that existed in 2002 while doing as little violence to the rest of the law as possible.

That is to say, so, for example, you bring this person here, this person is deportable, probably, almost certainly, right, because whatever we think this guy has done would be a basis for that person's exclusion. So then you put them into deportation proceedings which allows you to detain them for an additional length of time while you work out a diplomatic solution or something else or a prosecution that might be lawful in another country because they haven't tortured them, for example.

So ultimately, at Guantanamo it's a mess. There are no good solutions. There are only less bad solutions. The Obama administration is going to have to be a little creative in resolving some of those cases but I think there's creativity that exists within the bounds of the law for them to do that. Now, as for the sort of going forward question, for back to the beginning of my answer, we need to know who those people are and what those facts are.

Q: First of all, thank you. It's a wonderful panel, sort of continuing the conversation. And I guess I have a range of questions and comments. The first is, in Afghanistan there are actually three legal regimes. So if you're the Marines being deployed there right now, they have to figure out whether or not you're under a 72-hour time clock, if it's picked up by an Afghani authority. The ISAF has a 96-hour time clock because they have to get it to a different jurisdiction in order for them to figure out what's going on. Or you can detain them under the U.S. authority. So we are deploying people under an international law regime of a great deal of ambiguity and, like all prosecutors, with a little bit of discretion to figure out what you want to do. So the idea that it's clear is even in a battle zone is less clear.

Second, you know, Gabor, that we're not signatories to Protocol One or Protocol Two, which most of the allies are which causes another whole set of division problems for us. And the Obama administration is going to have to figure out how they feel about Protocol One and Protocol Two. They'll have to figure out about a whole other sort of international conventions with a vast majority of our allies are signatories to and we haven't chosen to do that yet.

The next issue is the seepage issue. When I used to teach criminal evidence, we used to say that if you look at the Fourth Amendment, you see the introduction of first certain types of crimes – liquor, then drugs – have completely revamped the Fourth and so those of us who worry about seepage think national security concerns in the Fourth will also create the possibility. So I think we have empirical evidence of when the state decides to assert its power under the Fourth, that's the concern.

Thirdly, there's a lot of comparative evidence of many other countries that have created this type of courts. The British experience, the French experience. You might like it or don't like it, but we do consider them democracies. We do think that they've come to the conclusion that there's something which is part of the filing – which I think the committee and you guys can address – which is very instructive in the following, they say this is novel form of war. It's a novel form of projection of force that they're confronting. If you think it's not novel, then Article III – (inaudible) – works. If you think somehow it is novel, then how do we have an institutional response? And that's sort of the part of the debate that is what we're all concerned about trying to think through.

MR. RONA: Okay. The fact that there are different legal regimes within Afghanistan is not a complexity in relationship to the question of what is the applicable law and what is the applicable logic. It really means that there may be different mechanisms that have to come into compliance with whatever is decided is the correct legal regime.

If one authority has 72 hours, the other has 96 hours, the other one is indefinite, that simply means that there are separate jurisdictions that are exercising authority, but that has, I think, nothing to do with the question of well, what does the law require and what is a good idea. Those things are eminently determinable by looking at international human rights law and looking at the law of armed conflict.

But as far as the law of conflict itself is concerned, getting to the second point about the U.S. not being a party to AP One or AP Two, I actually think that that's irrelevant because – well, AP One is irrelevant because we're not involved in an international armed conflict in Afghanistan. It's not a war between state A and state B. It was at one point, but it no longer is. So it's now a non-international armed conflict and AP One is about international armed conflicts.

I think AP Two is insignificant as well because although it is about non-international armed conflict, it says nothing about authority to detain, and that's precisely because authority to detain is a question of domestic law in non-international armed conflict situations.

As far as whether or not it is a novel form of war, I was particularly struck by the U.S.'s filing last Friday on its concept of detention power that they spoke very directly about the concept of international armed conflict, but never mentioned the word "non-international" armed conflict and I thought that was curious because if they had done so, if they had recognized it, then they would have been able to and would have had to concede that under the laws of war, anything that – any armed conflict that isn't between state A and state B is a non-international armed conflict. Non-international doesn't mean internal. It simply means armed conflict that does not involve two or more states fighting against each other.

So I think if you simply look at what the laws of war demand, what they imply and what they require of states or parties to armed conflict, then it should become quite apparent that this may be a novel manifestation of a form of war, but that doesn't take it out of the category of non-international armed conflict covered by the laws of war as far as the use of force is concerned and covered by international human rights and domestic law as far as detention authority is concerned.

MS. PEARLSTEIN: Two just real quick points on the – first, the Fourth Amendment is a sort of illustration of seepage. I don't know. That's interesting but I don't know. And I don't know how you would tell the difference between the Fourth Amendment as case study in Supreme Court shifts in jurisprudence where drug laws, etcetera, are just the nose under the camel's tent for shifting the doctrine from exception – a warrant requirement and exceptions thereto to a reasonableness determination, which is sort of where we are now. It's not at all clear to me that what was driving that was sort of some seepage phenomenon as opposed to something much more directed. But we can have a conversation about that.

Secondly, our allies' experience, I agree, is enormously useful but a lot of those examples are bad ones, right? So the experience with the diplomatic courts in Northern Ireland, the U.K., those were not only from the human rights point of view but from sort of counterinsurgency counterterrorism point of view sort of disastrous, I think, experiences. So I think those can be really instructive, but they tend to make me even more frightened than this as a separate point.

Q: (Off mike.)

MS. PEARLSTEIN: The French standard court system is different. And you know, I'm no expert – comparative expert (in the ?) standard have some prosecutions approaches different enough and far enough removed from what I feel comfortable with as a sort of a baseline that

I'm not sure their even further comparative example is necessarily a good one. I think the Israelis and the British are better, but that's just me.

MR. WAXMAN: Yes, I'd just add, I think the Israelis have an interesting unlawful enemy combatant statute. The Israeli case I think it's interesting because it's another Western country that's used a war framework for regulating its legal authorities, detention authorities with a terrorist organization, with Hezbollah, but has legislated – as a result of Israeli Supreme Court decisions has legislated a statutory framework that melds sort of law of war based detentions.

We're holding these people as enemy combatants in an ongoing war but with judicial review, so after 14 days and then every six months a district court has to hold a hearing and see that certain criteria are met, that the individual is indeed an enemy combatant and continues to pose a danger.

I think there are some useful models. I think I'm skeptical of some of our other allies. I mean, having worked at the Defense Department on detention issues, I always get angry at this 96-hour rule that our European allies have adopted in Afghanistan where they essentially say, we're there for part of the fight. We don't want to do the messy stuff so we won't detain. That doesn't mean that people aren't getting detained. That means that they're getting detained either by us or by the Afghan government. But anyway, that's another story.

MR. VLADECK: And that panel will be – I think we have time for two more brief questions so we'll take the two people who are already at the microphones.

Q: (Off mike) – French system, if I may.

MR. VLADECK: Well, why don't we – we have people who are waiting so why don't you get behind them and we'll take your point. So yes. You're next.

Q: I just have a clarification. You said that the legal basis for detention in the non-international armed conflict is domestic law and I was wondering if you were referring to the – (inaudible) –law of – for example in Afghanistan, of Afghan, their administrative detention law, or U.S. detention law?

MR. RONA: It would have to be Afghan.

Q: Okay. Then my follow-up question is considering sort of the state of the Afghan and Iraqi judiciary and the fact that NATO forces in Afghanistan and U.S. forces in Iraq are delaying and resisting and in some cases refusing to turn over detainees to the judiciary sort of the terrible state of the trials and those proceeding, how that would mesh.

And a follow-up question is whether or not a Security Council resolution could be some sort of bridge in those circumstances?

MR. RONA: Well, a resolution itself, of course, would not bring due process to anybody. It would – so I'm not sure how helpful that would be. But I think that it is important that the

United States, having the presence that it does in Afghanistan and especially if it wants to stay there and to get out with something that it calls a victory, also has a responsibility to make sure that it's not making more enemies than is necessary.

And I think the key to that, and again, consistent with international humanitarian law and human right obligations, is to help the Afghan legal system improve and to be able to do what it is obligated to do under international law. Since it is a non-international armed conflict, the U.S. is not at war with Afghanistan. It is there as a guest of the Afghan government, as an international legal framework and so it can only be acting as a proxy for the Afghan government.

The obligation is primarily on the part of the Afghan government to make sure that it complies with its international legal obligations and that includes by virtue of foreign countries operating militarily and operating detention facilities and processes on its soil.

MS. PEARLSTEIN: I think domestic law has more to do with it, but we can talk afterwards – U.S. domestic law.

MR. VLADECK: Yes, sir. Please be brief.

Q: I will. Ms. Pearlstein, you mentioned several times the term "international diplomacy," and I was wondering are we or should we be in communication with the detainees' home governments about the issues regarding their detention? And what sort of bearing should that or does it have on how we act?

MS. PEARLSTEIN: The very short answer is, to my knowledge we have been and should be in communication with these governments. It is certainly the case with respect to the governments of all our allies who've had detainees at Guantanamo – the Australian government, the British government and so forth. I don't know the full extent of our communications with the Chinese, for example, about the Uyghur detention, but we certainly have a position on the likelihood of their facing torture, prosecution if they're sent back to China. The Chinese also have a position that is contrary to that.

I'm confident that our respective governments are aware of the other's positions. I absolutely think so and I think one of the promising, although dicey, but promising developments we've seen over the last several months is at least some European countries sort of making noises that they have not been making previously that they're prepared to share some of the burden of finding homes for some of these people.

So I absolutely think that has been and should be part of the ongoing process of closing Guantanamo. Yes.

MR. VLADECK: Last point.

Q: Thank you. I just had a clarification on the French system. We don't have specialized courts. We scrapped the only specialized court we had, which was the Court for the Security of State in 1981. What we have now is specialized magistrates like Brigaire (ph), for

instance, and specific procedural rules. For instance, there are no juries, only professional judges, so as to protect the individuals who might be part of a jury against threats, but that's the situation at the moment.

MR. VLADECK: Great. Thank you.

I hope you'll all join me in thanking our panelists for what has been a lively and fascinating discussion. (Applause.) Thanks also to our hosts, the Georgetown University Law Center, the sponsors, the Constitution Project, Human Rights First, Center for National Security and the Law. Now there's actually lunch and it's, I believe, out there in the foyer. So I'm sure we would all be happy to talk more with all of you, and thank you very much for coming.

(END)