



SPECIAL PRESENTATION

**“CLOSING GUANTANAMO:
THE KEY CHALLENGES AND CHOICES FACING
PRESIDENT-ELECT OBAMA”**

MODERATED BY:

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MR. RUDY DELEON: Well, good afternoon and welcome. My name is Rudy deLeon. I'm a senior vice president here at the Center for American Progress for national security and international policy. And on behalf of the panelists and my colleagues here at the center, welcome, and thank you for coming to today's event on closing Guantanamo.

This is an event we've had major response in terms of attendance today and want to thank the audience for their interest and their joining in and being part of our program.

After almost seven years, the end of the Guantanamo operation is near. The president-elect, in his statements that his administration intends to close the prison camp, has shifted debate away from an argument about whether it should be closed to a discussion about how precisely to close it. Reaching the decision to close Guantanamo is only the beginning of a process. Major questions remain: the trial transfer, release or resettlement of the approximately 230 remaining Guantanamo detainees.

We are fortunate to have with us three people who have thought and written extensively about the challenges involved in closing Guantanamo, and each of their organizations have produced reports outlining a plan to close the prison camp.

Our program today – and we'll have three segments. We'll ask the panelists to make their comments, I'll do a round of questions to the panelists, and then the final third of our program will be to open it up to the audience and to ask you to participate and to ask your questions. So our program begins with the opening remarks for me to the panelists followed by the discussion, followed by your questions.

Now, briefly, the members of our panel. Dr. Sarah Mendelson is director of the Human Rights and Security Initiative and a senior fellow in the Russian and Eurasian program at the Center for Strategic and International Studies. Dr. Mendelson led a CSIS-sponsored working group in an extensive review of Guantanamo policy that culminated in the report, "Closing Guantanamo: From Bumper Sticker to Blueprint," released in July, 2008.

Elisa Massimino was named chief executive officer and executive director of Human Rights First in September 2008 after having served for more than 10 years as the organization's Washington director. Human Rights First published in August 2008 a report, "How to Close Guantanamo: A Blueprint for the Next Administration."

Third, my colleague, Ken Gude is associate director for international rights and responsibilities at the center here. Ken has written numerous columns, papers and reports on Guantanamo, most recently, his report, "How to Close Guantanamo" published in June 2008.

So with that introduction, we will start our program and I will yield the floor to Dr. Mendelson.

MS. SARAH MENDELSON: Thank you. It's a pleasure to be here. I want to thank my colleagues from CAP. Ken is the recipient of anxious e-mails in the morning when I'm looking at the papers and (angsting?) over what people have said or not said on Guantanamo, so it's great to be here sharing with you my thoughts.

I want to do three things in the time that I have. I want to give you a brief answer on how to close Guantanamo and we can talk in more detail, but I want to then explain the larger foreign policy context and why I think that this is important. And if there's time, I want to offer a brief word about how this issue, and other issues related to human rights, ought, I think, to sit in the Obama foreign and security policy agenda.

So my view on what ought to happen with Guantanamo came from a lengthy and collaborative process that I'd like to recognize and tell you a little bit about. We first convened the working group in late November 2007, and the purpose was really to develop policy recommendations for what ought to be done with those currently detained at Guantanamo.

This was a nonpartisan working group and it combined executive branch experience, intelligence, military, human rights, and international law experience, and we didn't begin with either the idea that it ought to be closed or left open. Instead, we spent a lot of time trying to figure out what questions we needed to ask and then figuring out what sorts of experts were best suited to answer them.

Later sessions were spent with 15 additional experts exploring specific issues. Then we engaged in a lengthy debate within the group concerning the specific recommendations and policy positions. We met 18 times over seven months and then I wrote this report and we released a draft in July, got public comment, and met with members of Congress, and got a lot of feedback, and then issued a final version in September.

This report – we've left a few copies and an op-ed that came out of it out front – is not a consensus document but it was based on general agreement on the outline of the recommendations.

The first thing to say is, yes, the challenges to closing Guantanamo are considerable. There is no silver bullet. In fact, there are a lot of, frankly, imperfect options. And how the Obama administration closes Guantanamo is ultimately more important, I think, than the commitment to close it – that is, we don't want to see Guantanamo closed only to be moved to the United States.

Now, overall, the 18 sessions and careful review in a discussion with former prosecutors, retired CIA and FBI officers, uniformed service members and others, we

landed with a fairly straightforward policy: review the files, release and transfer some and try others.

Here are the nuts and bolts. During the first week in office, and hopefully during the inaugural address, President Obama announces his plan for closing Guantanamo and a blue-ribbon panel to shepherd the process. Now, why a blue-ribbon panel? After years of an administration that both called those detained in Guantanamo as the worst of the worst, but also released more than 500 of them, we need trusted figures to tell us who is there.

The president should ask the panel to put the 230 or so remaining detainees into one of two categories: those who should be prosecuted through the U.S. criminal justice system and those who should be released.

Once that sorting of the detainees is done, then the detainees would either be moved to the destination of release, or to the United States for prosecution, and there are a lot of different elements in that that we can get to in the questions and answers.

The final element of the new policy would be to prosecute these people through the U.S. criminal justice system and we came to that conclusion after a careful review – and I think Elisa will touch on some of it – but it seemed that the record of the U.S. criminal justice system was by far more substantial than that of the military commission, something like 145 convictions versus three.

The policy recommendation involves – that I've just made – making a cultural, and I would say, strategic shift in how the Obama administration will counter terrorist threats. It's a shift away from reliance on indefinite detention and interrogation and extraordinary rendition, which has been really characteristic of the Bush administration, and it's a shift towards diplomacy, intelligence, the use of intelligence and prosecution. But it also means a greater development of resilience, as our closest allies have done in countering threats which, frankly, are far greater, and we can talk about that more in Q&A.

Now, I want to turn to the larger foreign policy context in which I think this ought to unfold. Guantanamo torture, detention without charge, rendition of detainees from justice, these have all had numerous negative consequences for U.S. national security. According to flag officers, this includes the recruitment of insurgents in Iraq. According to researchers at West Point's Combating Terrorism Center, there are scores of references by top al Qaeda leaders referencing Guantanamo, and they were very generous to share many of these with me.

But this leads me to the consequences that you hear less about. These policies have done terrible damage to U.S. soft power, to our moral and strategic authority, and repairing that damage must be a top priority of the Obama administration and it will help with policies that frankly, have nothing to do with terrorism or al Qaeda, and let me explain.

You may be puzzled why a Russia specialist would be on a panel on how to close Guantanamo. Well, let me explain. I've spent the better part of 15 years working alongside Russian colleagues to support the development of democracy and human rights in Russia. Since 2001, this work became increasingly difficult, not only because of the actions of the Putin government, but because of specific policies adopted by the Bush administration concerning detention and torture.

Increasingly, I heard activists say to me, you need to get your own house in order in order to be able to help us. Increasingly, when I talked to American diplomats, they would say, our authority, our leverage, has been spent. When we bring up issues having to do with detention and torture in Chechnya, they bring up Guantanamo.

In fact, American authorities lost most, if not all, leverage concerning a variety of civilian disappearances and dysfunctional counterterrorism policies, not only in the north Caucasus of Russia, but in Uzbekistan's Fergana Valley or in encouraging increasing authoritarianism in Russia, including the desire to change internationally recognized borders in Georgia. Others point to the impact in Pakistan, Zimbabwe and China, all these governments drawing negative lessons from U.S. behavior.

I would add that there's a lot of evidence that suggests that Russia, together with China, have increasingly been able to set the table concerning the rule of law and human rights, advancing a conception of hyper-sovereignty that challenges decades of international law that the United States has been central in shaping.

The trend in the United Nations Security Council is for China and Russia to block international responses to evidence of gross human rights violations and allowing for continued instability. In other words, human rights abuses by the United States has had a destabilizing effect, more generally in the international system.

Now, finally, let me just talk a little bit about the process of how I'd like to see the Obama team tackle this. I have an article that's coming out in a couple of weeks in the *Washington Quarterly* that looks at the state of the human rights movement, using the anniversary – the 60th anniversary of the Universal Declaration of Human Rights and it's a very somber time.

And there are many people that I spoke with who talked about the need for the Obama administration to have a team of leaders, senior leaders, that really are opting back into the international system, but who are leading the way in making human rights a much more substantial part of U.S. foreign policy, so that people understand it as a security matter.

And in this, personalities do matter. We're going to be looking for a team of dedicated people inside the U.S. government to advance the ball on a number of issues. They're going to have to coordinate policies across several agencies beginning, I hope, with closing Guantanamo.

I'd like to see a number of policies articulated that place a focus on human rights as advancing U.S. national interests vis-à-vis key relationships, whether it's Russia, China, Pakistan, or Iran. It seems to me we need a variety of these things in order to opt back in.

We might need new structures, such as a repair shop somewhere inside the U.S. government – whether that's in the NSC or at the State Department – some directorate that is thinking about human rights and international law that would not only coordinate policy concerning closing Guantanamo, but overseeing this off back-in agenda.

And it does seem to me a promising moment in the sense that, if you think back to 2002, when there were probably a handful of human rights organizations calling for the closing of Guantanamo, by 2008, you had all the retired or former secretaries of state, including Henry Kissinger, saying that Guantanamo was a bad idea and it needed to be closed.

So there is some momentum to be built on, some way of, I think, ensuring that the foreign policy and security community understands the very dire security implications of human rights abuse and that's a point of move off of. Thanks.

MS. ELISA MASSIMINO: Thank you. Thank you so much for being here. And I also want to add my gratitude to the Center for American Progress for convening this. It's very timely. And I also want to thank Sarah for all the work that she's done on this and for including us in her study and discussions leading up to this very excellent study.

First, I think I can make this pretty brief because I agree with so much of what Sarah has said, in particular about the importance of dealing with Guantanamo in the broader human rights context.

I also just want to add though another kind of context point. As a human rights advocate, I have often been asked by my friends in the administration and in public audiences about why an organization that purports to deal with international human rights abuses around the world would spend so much time worrying about a few hundred people in a prison in Cuba. And Sarah has answered that, I think, really well.

You know, almost all of the human rights colleagues that we work with in other countries are desperate for the United States to be able to lead again on human rights and Guantanamo is a big boulder in the road on that path.

But there's this other question of context that I think it's also important and, I think failure to think about it has very much been a boulder in the road for the current administration, many of whose leadership, including the current president, has said that, gee, we wish we could close Guantanamo, but the problem is that the people there are too dangerous and we don't have systems to deal with them. And there's been very little

attention paid to the broader context of how does a system like this fit into our broader counterterrorism strategy? What's the role of detention and trial?

And so I wanted just to point out that in the updated "Counterinsurgency Field Manual" that General Petraeus oversaw the production of before he left for Iraq, there are a lot of lessons in here and this reflects the lessons learned in Iraq and Afghanistan, but one of the lessons is how to treat captured insurgents and I want to just draw your attention to one piece of this that says, "To establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support. Using the legal system established in line with local culture and practices to deal with such criminals enhances the government's legitimacy. Illegitimate actions are those involving the use of power without authority, whether committed by government officials, security forces or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, punishment without trial and the like."

So I think it's important for us, as we get closer and closer to D-day on decisions, decision day about Guantanamo, to think about the role that Guantanamo plays in a broader counter-terrorism strategy. I think that that can help us get over the hump of the very difficult – I totally agree with Sarah that this is not an easy problem to solve. If it were, it would already be solved.

And I also just want to make one other broader point which is – and this relates to what comes after Guantanamo. We have a blueprint; it's out there. It gives you all the steps and it varies only in small details, I think, from the report that Sarah's outfit has put out, but I think it's really important for us to learn some of the lessons of Guantanamo so that we don't perpetuate them because in effect, a lot of the procedures at Guantanamo that we now have, CSRTs and ARBs and all of that are kind of latest Band-Aid on a previous mistake and really has made it much harder now to dismantle all of it, that we ought to be, I think, treating this in some ways as a sui generis, a thing unto itself, that we need to take care of and make some difficult choices about, moving as many people as we can who have committed crimes against the United States into the criminal justice system and figuring out transfers for the rest of them.

But one of the things that you so often hear stands in the way of prosecutions has been the way that detainees have been treated in interrogation or detention. And that's a problem that we've created for ourselves that was unnecessary, I think, and we're going to have to deal with it now and it is going to make some of the prosecutions harder, but one thing we can do is draw a line in the sand or turn the page and not persist in creating those same problems for us in the future.

And I think that on the legitimacy front, that's another major question, and many have said that the – or some, at least – have argued that one of the solutions to Guantanamo is to essentially move the system into our domestic system and to create a new court system and new powers for detention without trial with some additional due process protections.

I think there are a lot of lessons to learn from Guantanamo and the military commissions. One is that we've got a system that's working pretty well, and as we'll talk about later. This report that we did with some former federal prosecutors shows that the criminal justice system is working quite well to adapt to the challenges of terrorism cases. Then you ought not to jump in and create a new system which is undoubtedly going to have a lot of legal challenges associated with it and may end up perpetuating the international perception problems that we've had with Guantanamo, instead of solving them which is one of – really one of the key motivating factors for closing the place down.

MR. KEN GUDE: Thanks, Elisa, and thanks Rudy for moderating. I certainly have set myself a difficult task choosing to follow both Sarah and Elisa. I have come to know and respect each of them over the last several years, and I am very pleased they accepted our invitation to appear today and I am honored to sit with them on this panel.

And a special thanks to all of you for braving the elements on a really miserable day outside and for coming here to the center to hear our discussion. I think the sheer numbers here today emphasize the high level of interest and expectation really surrounding President-elect Obama's plans for closing Guantanamo and I look forward to a fulsome session.

Instead of going through my own plan for closing Guantanamo, which is broadly similar to both Sarah's and Elisa's, I'm going to address three points in my opening remarks and I will happily discuss my proposal for closing Guantanamo in the Q&A session.

The first point has a lot to do with those expectations that all of us have for the Obama administration and that is the timeline for what we can and should expect of action on Guantanamo.

Second, I will briefly discuss one option that Elisa just mentioned there, and it's getting a fair amount of attention in the media, and that is the prospect of creating a national security court or special terror courts for the trials of Guantanamo detainees.

And lastly, and somewhat with caution, I will raise the one point that I think Sarah and Elisa and I disagree on the most, and that is what role, if any, should military detention play in the closure of Guantanamo.

On the timeline, it's clear that Barack Obama's election has created a new sense of optimism in the United States and around the world about U.S. policy on detainees, as well as many other areas as well. That honeymoon is likely to be brief, however, unless he follows through with real policy changes. And as a result, some have argued that the Obama administration should close Guantanamo very quickly and perhaps even in the first 100 days, moving all the detainees into the United States.

I think doing this would be a mistake that would unnecessarily create new practical and logistical problems surrounding Guantanamo. The ultimate destination for most of these detainees is not going to be the United States, and it's unlikely that any one U.S. facility is capable of holding the 230-plus detainees that are at Guantanamo right now. In such circumstances, I think it would be an unnecessary burden to move all of these detainees and find a location capable of handling them within the United States. It's just not necessary to do it.

What I do think the Obama administration should do is similar to what Sarah's outlined. First, set a firm, fixed date for the closure of Guantanamo. I have recommended an 18-month timeline. I think both Sarah and Elisa favor a 12-month timeline. That's a little difference. We can argue about it, but I'm not really sure it's worth arguing over.

But then secondly, I think the Obama administration should immediately suspend all activity in the military commissions and that can be done on the first day – just stop them. Guantanamo cannot continue to exist with only an aspirational goal that at some vague point in the future, it will be closed, or else the Obama administration will justifiably lose the support of many of those who hope for serious changes.

Yet, we cannot expect that they will have all of the details of its Guantanamo policy worked out in the first days and weeks after it takes office. Setting a fixed date at some point in the future should satisfy those who rightfully demand action, yet still allow the necessary time to work through all the challenges surrounding closing a prison.

I think that we can all agree that the entire military commissions process has been a disaster. Seven years after they've been created, and only three detainees have been convicted and two of them have already been released, it's clear that the president-elect does not want to use this tainted system for the prosecution of any Guantanamo detainees, let alone for the very important trials of those accused of planning the 9/11 attacks.

If the commissions are still operating, then several important cases could move ahead in the next few weeks. The Military Commissions' Act grants the president, through the secretary of defense, the power to convene the military commissions and he can suspend them at any time. He should do so immediately upon taking office.

Despite all the troubles associated with the military commissions experiment, some, as Elisa said, are now recommending that the Obama administration create yet another new system of justice, this time in the guise of a new national security court system to handle terrorism cases.

I think this is a terrible idea that would institutionalize the failures of the Bush administration and in some ways, would be actually worse than the military commissions. Even under the most favorable reading, it is difficult to identify a single problem with the

military commissions that a national security court would solve and it would likely create new ones.

Any national security court system would have to be created by Congress, a process that will certainly take time. It is virtually guaranteed, after the experience of the last seven years, that any new trial system would face significant legal challenges, adding further delays. The first military commission did not begin until 2004; the first case was not resolved until 2006; and the first actual trial did not occur until 2008. A delay of even a fraction that long to begin a trial in the new administration would be unacceptable.

National security courts are designed with one objective in mind and that is making it easier for prosecutors to obtain convictions in terrorism cases. Any court established along those lines would become irresistible to prosecutors, likely drawing in far more cases than its proponents ever envisioned. Prosecutors are already far more inclined to describe their prosecutions in terrorism cases.

In an analysis that I think Elisa is going to talk about further, terrorism cases in U.S. courts from 2001 to 2007, the Executive Office of U.S. Attorneys – and that's the prosecutors – listed 3,094 separate terrorism prosecutions, while the Administrative Office of U.S. courts – which is the courts – identified only 99 such cases in the same period. If prosecutors are 30 times more likely than the courts to describe the cases involving terrorism now, imagine what would occur if there was a special court only for terrorism cases specifically designed to obtain a conviction.

It defies logic to attempt to fix the problems with one experimental trial system by creating another new trial system when a perfectly good one already exists. Federal courts have tried some of the most dangerous criminals and terrorists that the world has ever known, even securing convictions in extremely challenging circumstances against defendants not unlike many of those at the Guantanamo. Any trials of Guantanamo detainees belong in established U.S. courts.

Now I come to my last point: what role should lawful military detention play in the closure of Guantanamo? I strongly favor the general principle that those detainees that are accused of crimes should be put on trial in established criminal and military courts. But I do not believe that this should be the only option for the continued detention of the relatively small number of Guantanamo detainees that were captured in connection with the armed conflict in Afghanistan but are not likely to face trial in U.S. courts.

Preventive military detention during armed conflict is the foundation of the concept of a prisoner of war, and would normally not be controversial. The problem here, of course, is that Guantanamo has so poisoned the notion of military detention that any form of it has become toxic.

I think it is understandable after our experiences under the Bush administration to underestimate the prospect that new Obama team could craft a regime of military

detention that is firmly rooted in both U.S. domestic and international law and is only targeted at actual enemies and actual combatants. This program should not be used as a means of avoiding difficult decisions about many of the Guantanamo detainees, but I believe it can be an important and necessary tool to protect the United States and our allies and do so within the law.

I would like to close by echoing all of the important justifications that both Sarah and Elisa raised for closing Guantanamo. It is certainly true that Guantanamo has become a strategic problem for the United States. It has harmed our relations with our allies, it has aided the oppressive policies of some of the world's worst regimes, and it has served as a recruiting tool for our enemies and adversaries that are directly responsible for the death of many Americans.

But even if none of that were true, it would still be necessary to close Guantanamo because it is simply the right thing to do. The United States is not a perfect country, but we do possess the virtually unique ability among nations to correct our errors, learn from our mistakes and emerge as a country that is both stronger and more free. I believe that we can do so again. Thank you and I look forward to your questions.

MR. DELEON: Thanks, Ken, and thank you, panelists for you opening comments. Before I ask any questions, let me yield back to the panel and see if they have any additional comments they would like to make based on their colleagues' presentations.

MS. MASSIMINO: Look, I could maybe say one word about our small area of disagreement, although I'm not – I think even within that, there's a large area of agreement on this question of military detention.

Preventive detention is certainly a feature of the laws of war and is contemplated in the Geneva Conventions. It's lawful, so I think in theory had we started at the beginning complying with the Geneva Conventions, and treated people who were picked up in accordance with our own provisions implementing the Geneva Conventions and the Army regulations, we wouldn't be having at least part of this discussion today.

But that's why I meant when I said that I think Guantanamo is now a thing unto itself that can't be solved just by winding back the clock and saying, let's do it over and do it the way we should have done it. There's too much water over the dam for that.

And so while I think it's really important to say that going forward, certainly in situations of armed conflict, where the United States is picking up combatants on the battlefield, there is absolutely a role for preventive detention under the laws of war and we ought to use it. And part of the reason we're in this mess is that we didn't. And I think for all the other things that we talked about here, about the need to turn the page and all of that, that we need to kind of treat this problem in a different way.

MS. MENDELSON: I'd like to make just two points and they're both really directed to anybody on the transition team who happens to be listening and hasn't made up their mind about what to do. If this isn't done by – I think it's January 26 – then the Obama administration is going to own the military commissions because that's when Khadr's trial begins.

So some people said to me, you know, the inaugural address – I think it's 20 minutes long at this point – everybody wants their issue – why can't this wait, for example, for the state of the union address? Because it's too late. It needs to happen, if not in the inaugural address, it needs to happen in the first 48, 72 hours.

MS. MASSIMINO: When you say this, you don't mean closing it down. You mean declaring that it will be closed.

MS. MENDELSON: Right. What needs to happen – and I think we'll talk about this more in the Q&A – is that friends and allies are looking for more than rhetoric, but at the same time, I completely agree with Ken that we don't want a quick move everybody to the United States, essentially moving Guantanamo to the U.S.

I think there is a policy process that can be outlined and begun, including with getting somebody on a plane to Europe to discuss whatever kind of help and support can happen, literally on January 20th if not on the 21st. I think that this panel, or whoever is reviewing the files, should be making decisions on a rolling basis and I do think giving either a six-month or 12-month time period to do this, and showing periodic progress is going to be important.

I think it's important to reassure the American public that this is being done in a thoughtful, serious way, and for that reason, it can't be done in a 24-hour period, but I think it can be done in a 12-month period.

The other point – again, for anybody who's listening – is not to be afraid. There is a huge amount of fear language that we hear. I heard a report yesterdays on NPR that was all about fear and about people who haven't committed crimes, but are too dangerous to release. Again, I work on Russia. That sounds familiar. That's not something I want to really want to replicate in the United States.

But also, I think the Obama administration will find surprising coalitions that are very supportive within government of this policy. I think there are a lot of uniformed service members who don't put on a uniform every single day in order to defend detention without charge. They put on a uniform – at least the ones that we consulted – in order to uphold values that this country is known for, or was known for, and that that should be what the Obama administration carries around with them.

MR. DELEON: Okay. Well, thank you, panelists. So to get us going, because I think the whole focus of this is that the decision has been made to close Guantanamo, and so how to do it, and so, 12 months to 18 months, small ones, but let's start talk about

mechanical issues, and let's assume that the three of you have input to the next administration. You're experts in this field, and so, let's talk about the mechanics of closing Guantanamo and let me ask the panel then to look at it from three perspectives.

The first perspective is what can we reasonably ask our allies to do in terms of helping us close Guantanamo? I note that there's an article this morning where a senior UN official says that the United States can't do it alone, that it needs active support from its allies in terms of how to process some of the people. So the first issue is what can we really expect to ask from our allies?

The second – and I think Sarah raised the issue that there's an immediate question in terms of a tribunal scheduled to go forward – and so how to handle that, but then quickly, how to decide which of the approximately 235, and we'll assume that we're going to do the blue ribbon assessment so that we've got an inventory of all of those at Guantanamo. But second, quickly, how to process those where prosecution is the only path forward, given the nature of the evidence available on them.

And then third, more complicated, how to process that category called others. And in that pot are – just to note – we've got the plight of the Uighurs, how to handle that group of individuals. I note that we've got a *Washington Post* story that says that approximately 100 of the 235 at Guantanamo are of Yemeni descent. So what does that tell us about that group?

So let me ask the panelists to discuss these three issues. What is logically an expectation from our allies in terms of their support; how to quickly press forward in terms of dealing with those where prosecution is the only response; and then third, how to deal with that other category of persons that are at Guantanamo? So we'll start with Sarah and just work our way through.

MS. MENDELSON: When we convened this working group to tackle these problems, I think the people in the room thought it was important, but a lot of people I know sort of thought, why are you working on this? You've got a lot of other work to do. What's been amazing to me is how, almost immediately after the election, this has really become sort of in the zeitgeist. I mean, it's become this issue that everybody's focused on.

Now, in absence of actually knowing, we made an assumption that European allies would help, that they would step up and we didn't do it completely out of thin air. We'd had meetings with various senior diplomats. But frankly, to date, we have some commitments. Things have firmed up. The Portuguese and the German government have come forward. We know that there are E-level officials that are anxious to see something go on.

But my understanding is that the Europeans are looking for – there are some governments that are interested in helping in different categories, in different ways, but everybody's looking to make sure the Obama administration takes the first step. So the

Obama administration is going to need to go to the Europeans, rather than for the Obama administration to wait for the Europeans to go to them. So that's why I make the point that literally on the 20th, there needs to be a senior envoy going to Europe and using diplomacy to figure this out. And I'd like to see maybe some folks from the Justice Department alongside.

The Europeans are going to be looking to make sure that we are also taking some folks. So to handle the Uighur question, I would say that that is something that – there are communities in the United States ready to receive the Uighurs and that that should go forward.

It's also extremely important that as President Obama lays out the process that the process does not include this third category or national security courts. I think the Europeans are going to be looking at that as not the solution. So the willingness to help frankly depends on the way in which the Obama administration untangles the problem.

There's also a time pressure in Europe which is that – I think the EU is set to take up this issue also on the 26th of January. Now, my understanding is between now and the 20th, the transition team is either prohibited or reluctant to engage foreign governments on any specific details. So this literally means between the 20th and the 26th, this needs to be a high priority.

In terms of the prosecution – I'll just say quickly and then defer to my colleagues – we have team of diplomats going out and working this problem with friends and allies. I think we also need teams of FBI agents and prosecutors going out to gather new evidence. For those that we determine that can be prosecuted, there's probably going to be new information that needs to be gleaned. Having talked to former prosecutors and FBI agents, apparently this happens often, even for crimes that occurred several years ago overseas. So we're not reinventing the wheel, but we need to make sure that the process adheres to our own standards.

My one last point is that in dealing with the Europeans, some governments may be willing to take some people. Others may have better relationships with countries that have reintegration programs. Some governments may know much more about reintegration programs. Thinking creatively about how you handle people who you're worried about, our friends and allies have a lot of experience with this.

MS. MASSIMINO: Thanks. I guess I will speak to the prosecution question, and now would be the great time for to hold up our report called "In Pursuit of Justice," but I left every single one of them that I've brought out on the table there. So hopefully, you have that with you.

First, I just want to say and make clear at the outset, that while we believe that the smartest thing to do with those who have committed crimes against the United States, suspected terrorists, is to put them on trial in our own federal courts.

We don't think that the federal criminal system is the answer to terrorism. I think that's part of the way that we kind of veered off the track of really exploiting fully our own criminal justice system was – initially there was this desire to really put the whole thing on a war footing, and in doing so, sort of reject almost ideologically this idea that you could be issuing indictments to al Qaeda operatives. But actually, while all of that rhetoric was going on, the system was prosecuting terrorism cases and was doing a really good job of it.

This report that we did, which was researched and written for us by two former federal prosecutors, looked at – we had a narrower definition than the Justice Department has, but really looked at what we called international terrorism cases, al Qaeda-related, and looked at more than 100 of those over the last 10 years or so, and specifically looked at the issues that always come up when you hear discussions about well, our system can't handle it because you've got classified evidence problems and you have Miranda issues and you have the security of the courts and you have Brady problems and all of that. And so the report really digs down deep and looks at the underlying documents and how really did the courts grapple with these things?

And the answer is pretty well. You know, the federal courts were very adaptable and innovative. Now, some people might not like some of the innovations, but they found ways to deal with this in a way that produced really highly successful results in terms of putting very dangerous people away for a long period of time.

The other thing that the study found that I think is worth noting is that part of the impetus behind this shift from law enforcement to war was that while we want to focus on prevention and law enforcement is not really about prevention. Well, we've talked to the law enforcement people and they have a very different view. And in fact, what the report details is how much intelligence about al Qaeda structure operations, and even some details, was discovered through the process of prosecution and that plots were disrupted because of that intelligence.

The other thing that's important to note, I think, is specifically on the classified information issue. You hear a lot, including from the current attorney general, about how there's some information that would just be too dangerous to disclose in open court and that the courts would require us to do that.

But actually, what we found, and we looked pretty carefully at this, including some of the cases that have been cited as purported leaks, and found that there hasn't been a single leak of information that was sought to be protected by the prosecution under the Classified Information Procedures Act in any of these cases. So that's a pretty good track record, I think.

I also just want to mention, whether you do it through a blue-ribbon commission or you just task the Justice Department to dive into the records in these cases, and figure out what can we charge these people with, I think that – we pulled together in a meeting of former federal prosecutors in November, and a bunch of them former U.S. attorneys,

and some who had tried terrorism cases, to talk about this issue and specifically to talk about do we need a new system, a new court system, and they were fairly familiar with the challenges that terrorism cases posed.

But they looked at what we know just on the basis of public information about some of the people we want to try who were down at Guantanamo. And largely their reaction was, let's have at those guys in our system. I've tried a lot harder cases than this. A couple of those people have been under federal indictment in the Southern District for more than a decade and based on evidence we had before we ever laid a hand on them, if that's part of the issue.

So I think that that's encouraging – not to say that there won't be some real challenges and maybe some we don't even know about yet, once they get into the middle of all this and look at the evidence, but the substantive law has changed pretty dramatically over the last five or six years in terms of its flexibility to deal with all kinds of conduct relating to terrorism. So I think we can be pretty confident of that.

And then, just one last point I wanted to mention – I couldn't agree more with Ken about the necessity of shutting down the military commissions right away and not – I know that the incoming administration wants to be very careful not to overstep in all of that, but really I think some signal ought to be sent right now because if these things progress any further, we may create more problems for ourselves in terms of double jeopardy attaching and all of that, if these people are allowed to plead guilty. We want to make sure that we can have that kind of flexibility to turn the page when the day comes to do that.

MR. GUDE: I just want to raise one quick point on prosecutions before I get on to the really fun questions of the Uighurs and the Yemenis, and that is, I can't imagine a federal prosecutor that wouldn't be desperate to prosecute Khalid Sheikh Mohammed, and if they're not, they need to get another job. So – and there are numerous – Ahmed Ghailani has been under federal indictment in a case that has already secured convictions. I think he would be the perfect candidate for the first trial. The case is already there. They could just move it right back to the Southern District of New York and get going very quickly.

On to the slightly more intractable problems of the Uighurs and the Yemenis – elaborating a little bit more on what Sarah said, the Uighur question – and for those of you who don't know, I'll very briefly describe. They're of Chinese nationality, but ethnically, they are Muslims from Western China who were captured in either Afghanistan or Pakistan and have been at Guantanamo for almost seven years now. They have never actually been suspected of being enemies of the United States.

The Justice Department actually now has formally submitted to a U.S. Court that they are not enemies of the United States. They are, however – either are, or perceived to be, enemies of China and that has presented a significant problem with finding new

homes for them. The Chinese government has resisted just about every effort to send them to other countries. Albania has taken five of them, much to their chagrin, I think.

There really is no prospect of sending them back to China because they would face torture, abuse, or execution and so they're stuck at Guantanamo. They are about the only category of detainees that you could imagine that would be easily transferred into the United States. They've never been suspected of being enemies of the United States. There is a Uighur community here in Washington, D.C., who, as part of a judicial process, was ready to accept some of the Guantanamo detainees into their communities and allow them and help them reintegrate.

Going to Sarah's point about how the United States needs to take the action first, I think many of our allies, both in Europe and elsewhere, are going to look at the Obama administration and their efforts to resettle a lot of detainees outside the United States with some justifiable caution under the guise of Europeans or others solving all of our problems for us, unless the United States is willing to take some of the responsibility, and hold not only those detainees who are going to be incarcerated, but accept some detainees that are going to be released into the open in the United States. And the Uighurs are the perfect group for that, or at least the best group, I should say. There's never anything perfect associated with Guantanamo.

As to the Yemenis, as we already said, there are about 100 remaining at Guantanamo. They were 109 that were originally there, so only a very small number have been released. It's a popular misconception that that is because the Yemenis don't want them back. There are very real concerns about whether the Yemeni government has sufficient control over its prison population to allow some very dangerous detainees to be sent back to Yemen for further incarceration. And that is exemplified by the fact that of the dozen or so al Qaeda operatives who were convicted in Yemen of complicity of the USS Cole bombing in 2000, all of them have either been released or escaped under suspicious circumstances.

So there is a very legitimate concern about whether or not the Yemenis can handle this, and that is the primary reason that so many Yemenis are still at Guantanamo. Not all 100 are going to be sent back to Yemen. Some of them are likely to face prosecution in U.S. courts, but we're probably talking about certainly the most sizeable group of detainees to have a solution for, to need to find a solution for.

I think it's going to require a broader set of partners than the United States and Yemen to figure this out. We need to draw on as many allies, maybe even in countries that we don't consider allies, who have better bilateral relationships or multilateral relationships with Yemen or with countries in the region that can help us out. Many countries in Europe do actually have better bilateral relations with the Yemenis than the United States does.

What can they do? There isn't a whole lot of options. It's going to either come down to some capacity-building measures, which is essentially giving money to the

Yemenis to build new prisons, but new prisons aren't necessarily going to solve the problem if there isn't the sufficient will within the government to detain these individuals, if that's appropriate.

And so I think one thing that we could do is to not ask for simply the capacity-building in the nature of money, but to ask for some kind of monitoring program to be established, alongside with the commitment to build new prisons or to improve the prison facilities that they have. That could be – take many forms. It could be simply an international monitoring team that exists in the prisons for some period of years that's gradually reducing their numbers, as it becomes more successful, or something more permanent and more structured.

Now, whether or not the Yemenis are going to be willing to accept those kinds of terms, I'm not sure, but I don't think anything like that has been tried to date. If we cannot come to a solution to this problem, we are going to have to look elsewhere beyond Yemen for the ultimate home of these detainees, and some of them are going to need to be incarcerated and we're going to need to look – and it's a much more difficult to ask, I think, to some countries in the region, particularly to ask them to incarcerate further their non-nationals.

We need to go to some of our best allies in the region, and whether that's – I hasten to suggest who it should be, but we've got to find the solution to the Yemeni problem and, as I think, as we get down towards whatever timeline is decided, if there are still large numbers of Yemenis at Guantanamo, we're going to be in trouble.

Oh, and I just wanted to add one final point here over on this question of practical solutions. If you all take one thing from this panel, I think it's important to know that, yes, these are very serious challenges. They are real challenges. They can't be waived away simply on January 21st because we have a new administration, but just because they're hard does not mean that they don't have solutions and does not mean that a lot of people – three of us – but a lot of other people who have been working on this issue for a number of years have been considering all of the options that are involved, and have come up with some really reasonable and practical solutions to get around them. So when you hear reports in the press saying, it's hard, it's hard, it's hard, and all these things that we should be afraid of, that is all true. But that doesn't mean, and that should not be used as an excuse, to not do anything to address the problem.

MR. DELEON: So panelists, I'm going to do one more round and then we'll open it up to questions because again, our focus point here is – this is about closing the facility. We're looking at this from the interagency perspective and having sat through countless interagency meetings, they always are important to focus on the details.

So just, one, I think I'm hearing a clear approach from the panel that there is – A, action has to be taken prior to January the 26th and that that will send a signal to our allies that we actively are requesting the engagement and participation of our allies.

Next, I'm hearing from the panel that very clearly, we need to use the U.S. criminal justice process to the maximum and that there are a category of persons that are incarcerated at Guantanamo that need to go into the criminal justice system for prosecution and that we have a system that knows how to incarcerate dangerous people as they're awaiting trial.

That third category, though, that category of persons that are not identified for the criminal justice system and prosecution, this may be the most complicated. How do you process those, given the fact that we have an obligation to maintain one of the most cherished concepts of the country and that is the rule of law, and at the same time, a responsibility of the U.S. government to provide for the common defense, which means to protect American citizens, American citizens at home, American citizens overseas, U.S. military personnel that are engaged in combat operations.

On September the 11th, I was 200 yards from the Pentagon, so I did not see the airplane, but I felt it. I felt the impact going in. So it's still an issue that is fresh in our minds. And so of those remaining, if there is an element that is easily identifiable for criminal prosecution, how do you process the others because I think that will help gauge the speed at which you can close Guantanamo completely.

MS. MENDELSON: Well, as you stated, you get a team that starts immediately to review the files. You have a group of people, a tiger team that are on the plane going to Europe to figure out who's got what resources and who's willing to help. One of the things that they might pursue – and it's an idea that has come to me as I'm sitting on this panel – is that one of the first things they need to do is in February, say, have a meeting with different allies that brings together different kinds of expertise – intelligence, military, judicial – that thinks creatively about this issue.

We do this all the time in the non-governmental sector. I don't see why governments can't do it as well. The former intelligence officers I've talked to have a lot of interesting ideas. There are a lot – you'd want people who really know, for example, the Saudi program at the table. You'd want ones that have really deep knowledge of Yemen and you get two days and brainstorm, come up with some creative ideas. So that's one place to start. The world is filled with very difficult problems. Surely, this is one that can be solved. I'll stop there.

MS. MASSIMINO: I guess the only thing I would add to that is I would think – I would approach this as a problem that has two parts. You have – you've got to have risk assessment and risk management. So you – I think one of the first assignments is you get an interagency team evaluating individually the people who fall into that category. Once you've weeded out the ones you want to bring charges against, and start to identify secure facilities to move them to and get that process, then you do an individualized risk assessment for each of these, and then you put a team on saying how are we going to manage this risk?

And there are lots of – some of it's going to be a problem that can be solved by money and investment and law enforcement resources in some of the places that we're sending people to. I would get that kind of team together, both in our own house and internationally, and come up with those – no one's been tasked with doing that. We say that oh, gosh, that's hard and it will be hard and it will require doing things that aren't perfect that don't give us the perfect set of answers on any front – on the rights front, on the security front. But that's the problem that we've created for ourselves, but we could do that and we just haven't – no one's been tasked to do it yet.

MS. MENDELSON: May I make – if you don't mind. This issue of risk management I think is really critical and it involves in some ways, I think, a cultural shift for us. In the UK, the British government can't, for a moment, pretend that the British population is invulnerable after anybody who knows anything about the bombing of the UK during World War II. But for Americans, there has been this idea that you can have total security and a lack of planning almost even around this. And I think the Bush administration has presented Guantanamo as a risk-free strategy, when we've been trying to argue that it is anything but and there had been huge costs. But so there's going to have to be some conversation with the American public that begins to talk about risk management.

MR. DELEON: Is that what you meant, Sarah, in your resiliency comment?

MS. MENDELSON: Yes, absolutely.

MR. GUDE: I'll make two quick comments, first on risk management. Of course, this would not be the first time that detainees who have been engaged in conflict have been released. The most – the largest example, of course, is World War II. The end – the cessation of hostilities means that prisoners of war must be released, and our experiences as the allies in Germany at the end of World War II illustrate, they had some difficult questions about what you do with some of the somewhat hardened German soldiers that they had some serious concerns about what would happen should they be released. But they were not guilty of any crime, so they must be released. Well, they established a system of monitoring those released prisoners that was extremely successful.

Now, it's obviously a little bit more easy to do that in an area where there's military occupation, but of course, in the intervening 65 years, there's been a significant amount of advances in technology that may enable us to do a much better job. So I don't think – there's a lot of things that we can do to mitigate the risk of detainees being released. It's not simply a case of opening up the doors to the jail and waving them goodbye and never seeing them again.

Secondly, on the question of how do we go through the process, I'd like actually like to focus the process on the detainees themselves and what they stand accused of now. There are a lot of federal crimes associated with terrorism and international terrorism, and

in addition to that, it is completely lawful to detain somebody who is captured during an armed conflict as a preventive measure.

I'm sure it could happen, but I would have a much less sense of an individual detainee's actual dangerousness if we cannot find some law to prosecute them under or we cannot use a lawful form of military detention. If they don't fall under those two categories, it strikes me that we have to reassess our own belief about how dangerous this individual could possibly be. Clearly, they can be dangerous and certainly, some may feel rather grieved about their detention over the course of the last seven years, to say the least. However, it's far more likely that most of these people just want to get on with their lives if they were wrongfully incarcerated.

And if we can't actually find something to prosecute them for or incarcerate them for, it's probably because they're really not that dangerous at all and it's not to say that there is no risk because certainly, there is. But I think if we shift our attention away from what they may do in the future to what they stand accused of now, we will have a much more solid foundation to assess what their future dangerousness may be.

MR. DELEON: Thank you, panelists, very helpful. So now, we'd like to open it up to the audience for questions. And so what I'd like to do is ask each of you when you ask a question to identify yourself; if you're with a media organization, to identify your organization. And then, we have a little bit more than 20 minutes time available. So what I'd like to do is recognize three people and put three sets of questions out there for the panelists at a time.

I know everyone's got views on this, but I used to always remind folks as they're about to testify before Congress that remember to differentiate between a speech and a question and so I'd ask you to really focus on the questions. So with that, let's do a round of three and we'll start with this gentleman in the blue shirt and then we'll go to this lady on the center aisle, and then we'll go to this gentleman over in the corner. So one, two, three.

Q: Thank you so much. My name is Richard Gerding, Embassy of the Netherlands. Just as a point of information, the European ministers of foreign affairs are meeting on Thursday and over lunch, they will discuss the question if the Obama administration comes to us, how will we react? So this panel is very timely and the questions are very timely.

I have one specific question, especially for Elisa, and that's about bringing the Guantanamo detainees to trial if necessary. In your report, you recognize that maybe not all can be tried within the U.S. and you say perhaps they can be tried outside the U.S. In Europe, there has been some discussion whether a special tribunal would be a proper solution to try these people outside the U.S. but still within the realm of international law. And I would like to hear the views of you and the other members of the panel. Thank you.

MS. MASSIMINO: Well, that's an –

Q: I'm Helen (Rifel?) at the moment with Resources for the Future. I have a law degree, however, and I was particularly interested when I studied law to study the law of different countries, as well as international criminal law. And when I say the law of different countries, I mean primarily criminal law – Islamic law, Chinese criminal law – European law is different again – South American law, all different from American law.

So the expression “the rule of law” is so ambiguous, don't you think? But I've heard you talk about two kinds of law. One is the law of war and do you mean by that, that if our soldiers were captured overseas in some kind of war going on, that the country that captured them should try them, or are we talking about extraterritoriality?

The second thing you talked about was criminal law, which is again, a very different thing. The criminal laws of different countries are different. International criminal law and the International Criminal Court that has recently been established again has different kinds of law and we pay different attention to it. Don't you have to establish a particular legal basis or can you keep switching around according to how you want to treat different people who are our captives at the moment?

MR. DELEON: Thank you. This gentleman.

Q: Thank you very much. My name is Alec Walen. I'm actually with the University of Maryland, Institute for Philosophy and Public Policy. This question is directed primarily to Ken. Ken, when you said that you thought there might be some call for a continued use of military detentions, I wanted to know more about when you thought that call might best be answered and in particular, my concern is with how you would define combatants because you seem to be wanting to use it in the context of traditional sort of POW detention.

But of course the problem is that under traditional international law, al Qaeda members would generally not be considered combatants. They'd be civilians. And this is, of course, a very contentious issue now on the al Omari case coming up in front of the Supreme Court. Just how do you define a combatant?

MR. DELEON: Okay, panelists?

MS. MENDELSON: I'm going to make one political point and I'm going to turn it over to the lawyers to answer the legal questions. I am so happy to hear about the EU meeting on Thursday. I will say again, as I said to you before, it would be terrific if, for example, senior members of European governments would publish soon an op-ed that lays out perhaps some of the plans. It needs to be public. It can be private, but messages should be sent so that those who are trying to figure out their plans have some sense, because of the legal implications of having the transition team meet with foreign governments is problematic, at least present a kind of a menu of options and a willingness to help.

MS. MASSIMINO: And I have a feeling that Ken's done – (audio break) – issue of a special tribunal than I have. I jumped in to answer it because I found it so intriguing, but I guess the short answer would be, it would kind of depend on what that body looked like, how we would feel about it.

In our report, when we were talking about transfers to other countries for prosecution, our focus at the time was on the idea that there are some of these people who have committed crimes against – either against other countries or in other countries, and that there might be some justification for transferring them for prosecution there. So I'd be eager to hear more about it, but I think I'll let Ken deal with that in more detail. But I do want to touch on your question about the rule of law and what does it mean and how do you pick a system?

I think that – law school was a long time ago for me, but my sense of a rule of law system and the way we think about it in this country is that you've got predictability as one feature. Like cases are treated alike. Some basic – no ex post facto kind of laws, which is the problem with the military commissions, I think.

But really, a lot of the problem of Guantanamo, as I sort of alluded to in my opening remarks, stems from a problem of – I think initially, groups like mine had the sense that we don't really care which system you pick as long as you pick one, but the assertion was really that no legal – it wasn't international human rights law. It wasn't the laws of war. It wasn't the laws of Cuba and it wasn't the laws of the United States. Which one governs?

And I think the baseline is that there is this idea and it's the idea of, I think, of the American system, but it's also the idea – the international human rights concept is that nobody falls outside of the law. There's no – there're no people who are above the law and there're no people who are beneath the law, and that whether it's the laws of war or the international human rights law that applies during wartime to fill in the gaps in-between, or domestic law, you've got to have a system that has these features of predictability and knowing in advance that something is a crime, so that you have a chance of avoiding committing it and knowing what the punishment is.

MR. GUDE: Richard, I'm very pleased to hear you bring up the notion of the special tribunal. I actually wrote a report in 2006 called "After Guantanamo" and it recommends the creation of that very thing, a special tribunal for international terrorism suspects. I – at the time, and I still actually do believe – thought that it was the United States going alone that was the significant problem in how we were handling this issue of terrorism in general, but also prosecuting or bringing to justice terrorists.

And looking at the question of international terrorism, particularly in the context of al Qaeda, but broader than that, no one country can take on for itself the power or ability to simply prosecute all of the international terrorists. That would be silly. And nor should it, because international terrorism really affects all of us.

If the United States were to capture Osama bin Laden, we would have a very strong case for prosecuting him in U.S. courts. I would support that. I think that's a fine notion. However, I think that we also have to look at the question of whether or not a prosecution of Osama bin Laden in a U.S. court is enough. Does it satisfy many of the claims that other countries would have on Bin Laden himself, and other senior al Qaeda figures, who have caused just as much or more damage to their countries in terms of death and destruction?

I think if we look at the example of the Saddam Hussein trial, which was not handled particularly well, in my view. It was a rushed prosecution in one system, whereas Saddam's crimes affected many other countries. And it was a missed opportunity, in my view, I think, to draw some of those other participants into the process, and particularly with Iran, particularly with Kuwait, we missed those chances.

And should we look at that as a warning sign for what we would do should we capture Osama bin Laden? I go on in great detail, which I won't bore you with here, about how we should do it. But I recommended a hybrid international tribunal system that was kind of similar to what we did in Lockerbie, but anyway, you can go to our wonderful website and look up "After Guantanamo" and you'll get all the great details.

Alec, on your question, this is the crux of the question. How do you define combatancy? I think that it's not – your knowledge of international military law is probably greater than mine and despite Sarah's suggestion, I am not a lawyer, but I think that it's not a cut or dry, black or white situation, that you're either a combatant or you're civilian in terms of POW status. I think that there are numerous provisions in Geneva that assign for associated forces who are fighting alongside a force in the field that would certainly apply to the members of al Qaeda who are captured in the field.

And when I'm talking about – one of the things that we have lost sight of in this discussion of unlawful enemy combatant or enemy combatants, as it's applied to such a broad category of people in detention in the United States and abroad, is the notion of combatancy itself. We need to focus not only on our enemies – military detention, not only on our enemies, but on those enemies who've engaged in combat against us.

And how you define combat, of course, is a difficult question, but I would think that we can look to how it's defined in other contexts, whereas it's not necessarily on the battlefield, but the general is considered a combatant, whereas the person who pays taxes supporting the forces of that general is not a combatant. And I think that we have some ways of defining that just doesn't include everybody, but actually defines it on not only the enemies, but on the combatants. And so if we have a regime of military detention that is enemy combatant and actually is meaningful about that combatancy, I think that's the way to go.

MR. DELEON: Let's try to do another round. Let me just check the front row and make sure – a question? Okay, let's –

Q: Hello, I'm Robert Iafolla with the – excuse me – *Los Angeles Daily Journal*. Supposing a portion of the detainees are prosecuted using U.S. laws and U.S. courts. I was wondering if the panel could talk for a moment about the fruit of the poison tree problem – that is, if there's evidence that has been obtained through torture, how do you deal with that? How thorny of a problem is it?

Q: My name is Martin Klingst. I'm from the German weekly newspaper *Die Zeit*. I have observed some trials we had in Germany and the fruit of the poisonous tree doctrine and especially the torture question was the main question. I think there's the Damocles sword over all the trials that will happen here. And my question is how can you find not tainted evidence?

MR. DELEON: On the center aisle, about two-thirds of the way back,

Q: My name is Dave Richardson from the Cato Institute and I'm also a former Special Forces commander with three tours in Afghanistan. And this is certainly in response to the international tribunal question. If we're talking about message and condemnation of the message and the audience, isn't it stronger to have a federal trial with higher standards of proof and tighter rules against hearsay than to use the international one, where as in Nuremberg or Rwanda, greater hearsay and looser rules of evidence might damage our message? Thank you.

MR. DELEON: Three great questions.

MS. MASSIMINO: Well, the first two are very closely aligned, so maybe I can start with that, but I think my colleagues will also have something to say about it. This was – obviously, this question of fruit of the poisonous tree and what do you do with evidence obtained by torture is one of the key issues that comes up when we talk about can we proceed with the people currently in our custody, particularly those who were in the so-called special program, the special CIA program, with enhanced interrogation techniques that constitute torture.

I think there's no fancy answer to that problem. Evidence – we don't accept that evidence in our system. We find it unreliable. We made a decision that it's inherently unreliable, even if you can find some evidence of it actually producing a true fact in interrogation, it's not acceptable on our system. So we can't use it. So that's one of those challenges that our people are going to have to figure out.

How can we – and Sarah mentioned a little bit about going out and obtaining further evidence about people who we already have. There's a lot that we can do – there's a lot of evidence we had about the people we have in our custody that we got before we got them, and so we wouldn't have to rely on evidence obtained by torture or evidence obtained through – evidence obtained by torture.

But there may be a situation where we come up against that brick wall and prosecutors make this kind of judgment all the time in our system where we have to make a choice. Can we go forward or do we have to shift gears, or do we have to put this prosecution aside?

And I am skeptical that that's going to be the case in the majority of these, but I can't say because I haven't seen the evidence and I don't know, and we want the current – and the incoming administration won't know until it digs in and learns more about this. But I don't think that's – I think that's one of the big lessons we ought to learn from this, is that let's not create that problem for ourselves going forward ever again. We can't afford that, but I think there's not a compromise to be made on that question in terms of using evidence like that in our own system.

MS. MENDELSON: I would really want to hit home the point to both your questions that we should listen to the prosecutors. Probably the thing that I came away from this whole process was how much the conversation about Guantanamo was driven by people who hadn't prosecuted terrorist cases and who hadn't run on through the challenges but also the opportunities and I think I was very heartened.

People basically said, yes, you've got to go out and get new information, and guess what, you can do it. It's not going to be a walk in the park, but it happens and so on the agenda of things to do immediately, I'd really like – I know Patrick Fitzgerald is involved in another case right now, but there're many prosecutors who mentioned his name. He has experience. He's done this and he would be my number – put him in charge, get the team together, get your dream team and go out and get the information.

But also build a cadre – item number three, maybe – start a program where you're developing a professional group of interrogators that can be deployed at a moment's notice and that use professional interrogation techniques, not physical interrogation techniques, so that again, we're not in this position.

On the issue of where and how, I would say one of the big questions that we have to balance is between vaunting these people as warriors and treating them as criminals. I understand the logic of international – I think I understand the logic of international tribunals and accountability. And I think it's extremely important for the development of rule of law internationally, but on a lot of these cases, I think there really is something to be said for criminal justice system in the United States in the case of these guys, as opposed to internationally, so that they're not held up as some further martyrs.

MR. GUDE: Very quickly on the fruit of the poison tree question. I think one of the things that's often overlooked in these discussions and concerns about how we would prosecute a lot of these people is physical evidence, which a lot of the people that we want to prosecute, we want to put on trial on U.S. courts, were captured by U.S. forces. A lot of the Guantanamo detainees weren't, but the ones that weren't are primarily the ones that we don't want to prosecute.

And I think it's something like 30 or 35 were captured either by U.S. forces or in a U.S.-cooperated operation that are the dirty 30, the bodyguards who were captured with Khalid Sheikh Mohammed or captured with Abu Zubaydah. There's a significant amount of evidence that exists in association with those cases and it's never going to be easy, but I think we often discount the amount of evidence that was collected at the time – it led them to the arrest and at the time of arrest.

And on the question of the special tribunal, I agree with Sarah. I think that one of the things that we have done so badly is to elevate a lot of these criminals into holy warriors – no question about it. And I've happily revised my view on whether or not I think a special tribunal is the best way to go for all of them.

But I think that there is a slight difference in the guys like Osama bin Laden, who has committed crimes, or at least is accused of crimes, that touched so many different countries, individuals, populations that it's at least worth exploring whether or not a special tribunal is merited in his case, or other cases of serious international terrorism that have a hard time – you would have a hard time pinning down one particular jurisdiction where it would be most appropriate to try that individual.

The concerns about hearsay evidence are certainly one that I grappled with in the report that I wrote and it's – interestingly, about my concept of a special tribunal was one that could borrow – and maybe this isn't possible, but I thought it was at the time anyway – that could borrow a lot of the best practices that we've learned from other tribunals, which is why I said a hybrid special tribunal. It wasn't an extension of ICTY or Rwanda. It was one that built on some of the experience that we had with Lockerbie, which was essentially a Scottish prosecution in the Netherlands using Scottish law, and whether or not we could identify some innovative way of adopting a very respected and legitimate trial process and creating an international tribunal around it, or at least a broader set of prosecutors or prosecuting countries than just the United States.

MR. DELEON: Time for one last comment from each of our panelists.

MS. MENDELSON: I want to suggest on the – not only that we should be listening to the prosecutors, but there's a whole stream of retired intelligence officers who retired precisely because they didn't like the techniques that were being used. And I hope that some of those people will come back into the U.S. government.

Some of the things that I learned in talking to them were things about biometrics and how that might be useful with some of the so-called other category, strategic communication – there may be ways when we release somebody that we can thank them for their help in a way that makes them not likely a target for joining al Qaeda if they were ever a part, but also that the best information that is gathered comes right when you pick up somebody, that a lot of these guys found – if you had a cell phone, then there were numbers. There was physical material on the body, which I hadn't realized, but the idea of holding somebody either indefinitely or for years and years and that you get some kind of important intelligence seemed absurd to them.

And lastly, and it's a larger point, I think, on the one hand, if we leave all of this – with all due respect to my lawyers; I don't like to go anywhere without lawyers around – if we leave it though all to the lawyers, we could get into as much problem as we got into in 2001. There needs to be in some ways a broadening of legal culture in the United States that we need to know more about our laws and we need to know more about international law.

And we need to demand more, that we are compliant with it, and I think that understanding how the rule of law means something, certainly to me, having studied a country where rule of men is so institutionalized, and we need to be demanding that our government is in compliance because it brings us greater security.

MS. MASSIMINO: I guess I just want to reiterate a point that's been made throughout and that is that it's time for us to start having some confidence as Americans that we can solve a problem like this. I think President-elect Obama said, I think, in the campaign "Fear is a bad advisor," and it makes people do things and nations do things that are out of character and not smart and that they later regret.

So we – I think that a lot of this moving forward has got to be an attitude shift in this administration. And we – this is a problem that is not nearly as complicated as some of the other problems that we need to solve in this world and in our own country. So I think if we step forward with a large dose of that, that we can sort this out and move on to bigger problems.

MR. GUDE: I'm not (fully?) sure this is less complicated than some of the other ones, but I hope so. I would just like to leave you with the thought that I think we all who have been working on this for so long, and struggling with it for years and years, may be overlooking the significance of what we think is about to happen after January 20th. And we simply now take it for granted that Obama – President-elect Obama is going to close Guantanamo when he takes office.

But I would admonish you to believe that that wasn't a foregone conclusion not very long ago – not President-elect Obama, but it wasn't a foregone conclusion that on January 21st or whenever it happens in 2009, that the United States was going to actively pursue a policy of closing Guantanamo. And that is a significant, important step that we have to recognize the significance of.

It is not enough. We obviously will begin a whole new series of discussions and arguments and debates about what particular path the new administration chooses to go down as it pursues its policy of closing Guantanamo, but something big is about to happen here and it's very rare that you see a president or a country take such a significantly different step than it has been pursuing in the past on a issue of such significance as protecting the country against terrorism.

So if you leave with one thought, leave with that.

MR. DELEON: So let me thank our audience for their participation and their very good questions. Let me thank the panelists for their expertise. For those who say that this issue is too hard to solve, too hard to take first steps, I think our panelists have offered very practical ways to take a step forward to close Guantanamo and at the same time, keep our country safe.

So I thank you for your participation today. I thank our panelists. (Applause.)

(END)