



**THE CENTER FOR AMERICAN PROGRESS PRESENTS:**

**“RESOLVING GUANTANAMO: A PROGRESSIVE PLAN  
FOR DETAINEES IN THE WAR ON TERROR.”**

**MODERATOR:**

**PETER RUNDLET, VICE PRESIDENT FOR NATIONAL  
SECURITY AND INTERNATIONAL AFFAIRS,  
CENTER FOR AMERICAN PROGRESS**

**FEATURING:**

**DAVID M. CRANE, DISTINGUISHED VISITING PROFESSOR OF  
LAW, SYRACUSE UNIVERSITY; FORMER CHIEF PROSECUTOR  
FOR THE SPECIAL COURT FOR SIERRA LEONE**

**TOM MALINOWSKI,  
WASHINGTON ADVOCACY DIRECTOR,  
HUMAN RIGHTS WATCH**

**KEN GUDE, ASSOCIATE DIRECTOR OF  
INTERNATIONAL RIGHTS AND RESPONSIBILITIES,  
CENTER FOR AMERICAN PROGRESS**

**12:30 PM – 2:00 PM  
FRIDAY, APRIL 07, 2006**

**TRANSCRIPT PROVIDED BY  
DC TRANSCRIPTION & MEDIA REPURPOSING**

MR. PETER RUNDLET: Good afternoon. I'm Peter Rundlet, vice president for national security here at the Center for American Progress, and it's my pleasure to welcome you here to the Center for this important discussion we're going to have today. We're hoping to make some progress on this debate of what to do with Guantanamo, an issue that's become a black eye for the United States. And we're happy to be joined by three excellent experts here to talk about this issue.

Before I start though, I want to mention that since the Center for American Progress opened its doors, we have made national security policy one of our primary issues and the war on terror one of our principal focuses. We try to gather panels like this and issue reports to come up with ideas that help solve some of these national security challenges, and today is another example of that.

We're very fortunate and honored to have with us three distinguished experts to help us through this current quagmire of U.S. detention policy. Before I introduce them to you, however, I'd like to please you to turn off your cell phones and your blackberries or at least set them to stun. (Laughter.)

Now to the smart people to my left; first sitting here is Ken Gude, who is associate director of an International Rights and Responsibility Program at the Center, and he's the author – he's the principal author of the report and recommendations that will kick off our discussion today. Before joining the Center, Ken was a policy analyst at the Center for National Security Studies, and he also worked at the Council on Foreign Relations and with the British Labor Party.

Next to Ken is Tom Malinowski, who has been the Washington advocacy director for human rights watch since April of 2001. Prior to this, Mr. Malinowski served as special assistant to President Clinton and senior director for foreign policy speechwriting at the National Security Council. In addition to that, he has also served as the speechwriter for two secretaries of state: Madeleine Albright and Warren Christopher. And he has also been an aide to the late Senator Daniel Patrick Moynihan.

Sitting to the left of Tom is Professor David M. Crane who has been a bit of a celebrity over this past week, given the recent capture of former Liberian president and evildoer Charles Taylor. David Crane is currently a distinguished visiting professor of law at Syracuse University. Prior to the lofty and comfortable confines of the academy, however, Professor Crane was chief prosecutor of the Special Court for Sierra Leone, an international war crimes tribunal. Appointed to that position by the secretary general of the United Nations in April, 2002, Professor Crane's mandate was to prosecute those who bear the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international human rights committed during the civil war in Sierra Leone during the 1990s. In March of 2003, David Crane wrote and presented the 17-count

indictment against Charles Taylor that has ultimately helped to bring him down. So it's a special pleasure to have him with us this week.

In addition to this work, it's important to mention that Professor Crane has also held several key managerial positions during three decades of federal government public service, including senior inspector general at the Department of Defense, assistant general counsel of the Defense Intelligence Agency, and professor of international law at the United States Army Judge Advocate General's School.

We are grateful for all of our speakers for taking their time and sharing their expertise with us today. Before I turn the mike over to Ken, however, I want to provide a little bit of background on Guantanamo. I know most of you probably are up to speed with this, but just to present the framework for his policy recommendations.

As many of you know, after we started our military operations in Afghanistan in 2001, the president of the administration decided to start sending prisoners of the war on terror to Guantanamo – the naval base in Guantanamo Bay, Cuba. Since the prison opened, about 790 men have been held there. And of these some 270 detainees, including three children under the age of 16, have been released. Soon after military operations in Afghanistan began, the Bush administration determined that the Geneva Conventions of 1949, which sets for the international rules and standards for prisoners and the treatment of prisoners, did not apply to the detainees of Guantanamo.

But after widespread criticism from human rights organizations and many foreign governments, President Bush shifted positions and announced in February of 2002 that the Taliban fighters would be covered by the Geneva Conventions, while the al Qaeda fighters would not. At the same time, however, President Bush declared that none of the detainees, including the Taliban fighters, would be granted the privileged prisoner of war status, deeming all the detainees to be unlawful enemy combatants.

Now the implications of this are that all these detainees could be held indefinitely without trial and even despite their eventual acquittal by a military tribunal. In November, 2001, President Bush issued a military order to set up a military commissions to try these people for war crimes. Now, these commissions have been roundly criticized and have been challenged in court. To date, no one has been prosecuted under them yet. In 2004, in the case of *Rasul v. Bush*, the Supreme Court ruled that persons that are deemed enemy combatants have the right to challenge their detention before a judge or another mutual decision-maker, and this was a direct challenge to this notion that they could be automatically deemed unlawful enemy combatants.

In response to the Supreme Court's ruling in this case, the Pentagon established procedures for what are called combatant status review tribunals to provide some ability to the detainees to challenge the determination that they're enemy combatants. I won't bore you with the details of this so-called process, but the *New York Times* likened them to a local arraignment court hearing, and there's virtually no chance that these individuals

have the ability to effectively challenge their determinations. In fact, of the 558 detainees who went through this process, only 38 have been found not to be enemy combatants.

Now that might sound reasonable if, as Secretary of Defense Donald Rumsfeld said, “Guantanamo holds individuals that are the worst of the worst of the detainees.” But since that statement, more than 7,000 pages of documents have been released by the Pentagon prompted by a lawsuit by the Associated Press under the Freedom of Information Act. And these documents seem to indicate that only a small handful of these detainees – perhaps less than 10 percent – are actually dangerous individuals. And I’m hoping that Tom Malinowski can talk about this a little bit because he’s recently written about these papers, which seem to reveal that less than half of the people at Guantanamo were actually caught on the battlefields in Afghanistan or by U.S. troops. It looks like a large number of them were turned over by Pakistan and often from people who were seeking cash bounties.

In February of this year, the United Nations issued a report calling for the closure of Guantanamo. And several of our major allies and other foreign leaders have called for its closure. Over a year ago, I remind you, that the International Committee of the Red Cross described the interrogation techniques at Guantanamo as tantamount to torture, which isn’t the focus of our conversation today, but I think it’s important to keep in mind that that’s an element here.

Clearly something is not working. I think it’s important to recall also that there are a number of detainees in Afghanistan at the base in Bagram and at other black sites around the world. At the same time, four years after September 11<sup>th</sup>, evil has not gone to bed and there is still terrorism. There are very dangerous people in the world, and we need to – we have every right to expect our leaders to take reasonable measures to stop them. That brings us to the discussion we have today which is intended to advance the debate on how to get out of this morass.

So I’ll turn the server now to Ken so he can present a summary of his report and recommendations, and I urge you despite hearing his presentation to read the whole report. Ken?

MR. KEN GUDE: Thank you, Peter. Thank you all for coming. And I want to thank Tom and David for joining us today. Let me start off by saying that I’m tired of talking about only what is wrong with Guantanamo and what is wrong with U.S. detainee policy, and I’m glad that were here today to talk about options for moving forward.

In my remarks I’m going to very briefly outline key elements of our proposal for a special tribunal for international terrorism suspects, then I will discuss why we reached the conclusion that the special tribunal option was the best way forward, and then finally I will return to the tribunal to discuss more thoroughly its specific elements. This is a very complex and difficult issue, and I will not be able to address every aspect of the proposal today, but you do have the full report in your packets, and we should be able to have a more complete and thorough discussion during the question and answer session.

As a necessary first step to putting U.S. detainee policy back on the right track, we recommend that the president close the prison at Guantanamo, but simply closing the prison does not solve enough of the problems of U.S. detainee policy and could actually create more if other changes are not made. Therefore, we recommend that the president negotiate a series of bilateral agreements with Afghanistan and other key allies that would lead to the creation of a special tribunal for international terror suspects, a tribunal that abides by the principles of American justice and incorporates the best elements of other tribunals that have dealt with crises in places like Yugoslavia, Sierra Leone, and the Pan Am 103 bombing over Lockerbie, Scotland.

The special tribunal should include the following elements. First, it should have two separate divisions to reflect the two general classes of detainees: one to deal with international terror suspects that pose an ongoing threat to the American people; and the second will hear cases of detainees connected only to the war in Afghanistan, but who were not combatants against the United States.

This proposal gives a special tribunal jurisdiction over the following crimes committed since al Qaeda declared war in America in August, 1996: crimes against humanity, acts of terrorism, membership in al Qaeda, grave breaches of the Geneva Conventions of 1949, and violations of the laws or customs of war. The tribunal should have an independent office of the prosecutor, an international team of investigators to develop evidence for trials. It should adopt internationally recognized trial procedures that reach reliable, accurate, fair, and legitimate verdicts and dispense the appropriate punishment.

Now, this was a very brief outline of the tribunal. I will now discuss why we made this recommendation. We have grown frustrated with the shallow nature of the debate among policymakers on Guantanamo. Supporters of current policy refuse to accept that the prison is a liability and harms our efforts in the war on terrorism. Opponents are quick to call for its closure, but are disturbingly silent about what to do next. We want to move the debate beyond the simple choice of “keep it open” versus “close it down” and put on the table a concrete proposal for dealing with detainees at Guantanamo and beyond.

In a previous report we issued last year, we recommended that Guantanamo be closed, that detainee operations be shifted to Fort Leavenworth, Kansas, and that the military commissions introduced by the Bush administration be scrapped in favor of courts martial.

This time we took a different approach and took a step back from the current crisis at Guantanamo and tried to identify what the objectives of U.S. detainee policy should be. We came up with the following five principles. The first principle should be to ensure that detainees who pose a real security threat remain securely imprisoned. Second, we must establish a system that is viewed as credible and legitimate and can make accurate determinations of guilt or innocence and then assess the proper

punishments. Third, we must restore the United States to its traditional leadership position in the promotion of human rights and the rule of law. Fourth, detainee policy must strengthen the alliance against terrorism. And finally, we must establish sustainable structures that increase the capacity of all countries allied against international terrorism to handle these types of cases in the future.

We believe that Guantanamo and the military commissions failed to achieve any of these goals. Some released prisoners have rejoined the fight in Afghanistan, and as a result of policies put in place after 9/11, future prosecutions of terrorists could be compromised. The military commissions are simply not working. And as Peter noted, after more than four years, no detainee has been convicted in them. And at Guantanamo, the United States bears the entire burden of detaining terrorists and it weakens the alliance against terrorism.

We've then examined the options that are most often discussed as alternatives to Guantanamo: using U.S. civilian or military courts or using an existing UN-sponsored international tribunal. U.S. criminal courts have successfully handled the prosecution of terror suspects in the past and the rules for courts martial include numerous due process safeguards that are far superior to the procedures of the military commissions. In our view, however, the credibility of the United States has been damaged to such a degree, that any trials operated exclusively by the U.S. would not likely be viewed as legitimate in many segments of the international community. Furthermore, the majority of Guantanamo detainees are not accused of engaging in hostile actions against the United States or our allies, and it would be extremely difficult to charge them with a crime in U.S. courts. This led us to conclude that the best solution to Guantanamo lies in working with our allies to share the responsibility of detaining, trying, and imprisoning terrorists.

When we turned to existing UN-sponsored international tribunals, particularly the International Criminal Tribunal for the Former Yugoslavia, or the ICTY, the Security Council established the ICTY to handle cases dealing with the atrocities committed during the violent breakup of Yugoslavia in the 1990s. It has demonstrated that it can cope with high-security detainees, and it has done so while strengthening respect for the rule of law.

Winning approval from the Security Council to expand the mandate of the ICTY, however, would be both tough and treacherous. Whatever goodwill existed at the UN towards the United States after 9/11 has long since evaporated. And going to the Security Council could be fraught with peril as governments could attempt to further broaden the scope of the ICTY to include the actions of the – of U.S. officials related to abuses at Guantanamo, at Bagram base in Afghanistan, or at Abu Ghraib.

We were left with the belief that we needed to internationalize the process in some way, but the existing international structures were not well suited to the task. So we explored the option of creating a special tribunal that builds upon the experience of other tribunals, but it is designed specifically to meet the unique challenges presented by international terrorism suspects captured after September 11<sup>th</sup>, 2001.

Transferring detainees from Guantanamo to the custody of a special tribunal would first require bringing each detainee before a properly constituted, competent tribunal, as required by the Geneva Conventions, to determine whether a detainee is a lawful prisoner of war, a noncombatant who should be released, or an unprivileged belligerent subject to the prosecution for his or her actions. As I said before, any tribunal must take into account that detainees fall into two general categories: a small group of al Qaeda and other international terrorist suspects; and a much larger group of detainees that are connected in some way to the war in Afghanistan, but most of whom are not accused of hostile acts against the United States. The competent tribunals will be charged with making determinations regarding which detainees belong in which category. Based on those determinations, the detainees will go to either division one, which will be led by the United States, or division two, which will be formed in partnership with the new Afghan government and other key allies.

The United States must maintain control over the proceedings in division one cases for detainees that could pose an ongoing threat to the American people, but our allies in the West and the Muslim world must have confidence in the impartiality and fairness of the tribunal for it to be a departure from the military commissions. Many of the procedures of the ICTY meet the security requirements of handling prosecutions of this nature. The United States and other NATO governments regularly provide the ICTY with intelligence, and the court has an excellent record of protecting the sensitive information even while maintaining the rights of the accused. The special tribunal should adopt those procedures that have successfully handled the prosecution of high-security detainees; and to find the appropriate balance, the presiding judge and the chief prosecutor for division one should both be Americans.

For division two cases who are not accused of hostile actions against the United States, determinations on guilt or innocence will be improved with the participation of the new Afghan government and other allies. The makeup of this division should reflect the contributions of all nations engaged in the struggle to ensure that democracy and the rule of law take hold in Afghanistan.

Now, the proposal goes through several other aspects of the tribunal, including what to do with released prisoners, where to house them, where to house convicted prisoners, and who should host the tribunal. And we can perhaps get into those in more detail – in a more detailed discussion in the question and answer session.

But the battle over the military commissions will reach a head this summer when the Supreme Court will deliver its verdict on the commission's legality. The commissions could squeak through, perhaps even by a tie vote in the Supreme Court. But just as likely, the Court will strike them down and President Bush will face a stark choice about what to do next. He could leave the detainees locked away at Guantanamo until the war on terrorism is over, but I think even the Bush administration recognizes that that is not a sustainable solution. He could step up efforts to transfer detainees back

to their home countries, passing off the problem onto somebody else, or he could bring some of the detainees before federal courts or courts martial.

But we believe that the proposal that I have outlined today represents the best and most comprehensive policy alternative. Are there risks in opting for an international process? Absolutely. But leadership requires making tough and bold decisions, and establishing a special tribunal would strengthen the alliance against terrorists, help that coalition regain the offensive, and would demonstrate that the United States can protect itself and our allies while deepening respect for human rights and the rule of law.

Thank you and I look forward to your questions.

MR. RUNDLET: We're going to turn now to some – the comments of both Tom Malinowski and Professor David Crane. We'll start with Tom Malinowski, who will tell us – if I can borrow a line from Steven Colbert – whether this is a great proposal or the greatest proposal. (Laughter.)

MR. TOM MALINOWSKI: I think there's a lot of truthiness to this proposal. (Laughter.) Is this on? Can you hear me? Okay. Well, thank you very much to both of you for having me, for inviting me to comment on this, and thanks for your work in putting it together.

First of all, I think your diagnosis of the problem is 100 percent right on. Guantanamo is legally and morally unsustainable in my view, but also for purely pragmatic reasons, many of which you both outlined, it's a tremendous failure for the United States. I think in reality that the role that Guantanamo is playing right now in the war on terror is to give us false comfort: to create the illusion that we have in fact captured a lot of bad guys in this war on terror, that Pakistan is a great ally, that Taliban and al Qaeda were mostly rounded up at the end of the war there, and unfortunately those hopeful things are not true.

When all is said and done, I think the real debate about Guantanamo will be between those who think that it's primarily a story of injustice and those who think it's primarily a story of incompetence, and I think it's going to be a very close call between those two views.

But I think Ken is also right that it's not enough just to criticize what the administration has done. It's not enough just to call for the camp to be closed – to wash our hands of the problem. It's a very, very complicated problem. We need to be proposing solutions, and we can't pretend that they're going to be easy ones, as much as we may dislike what has been done.

At the same time, as he knows, because we've discussed it, I don't think that this proposal is a workable and realistic proposal if we're talking about the vast majority of detainees in Guantanamo. There are other categories of prisoners that I'll briefly mention at the end of my remarks, right? I think this may be a more workable idea. But if the

challenge is dealing with the problem of Guantanamo and the vast majority of prisoners there, I'm skeptical that this would work. And I think to understand why, it's useful to go back to the story of this place: how we got there, who these people are, where they came from, and you alluded to that, Peter, in your remarks.

You have to go back to the closing days of the war in Afghanistan. The Taliban had been routed, Kabul had fallen, and there were thousands of people running around the country who'd been associated in some way with the old regime, many of them foreigners who were running for the exits as quickly as they possibly could. Unfortunately, as we all know, we didn't put a lot of troops on the ground in Afghanistan, and therefore the administration outsourced the pursuit and capture of al Qaeda and Taliban forces to its allies, to Afghan tribesman, Northern Alliance, but most particularly to the Pakistani government. And it turns out the Pakistanis weren't really all that interested in helping us round up the leadership that – the worst of the worst that Don Rumsfeld later said were detained in Guantanamo.

In one infamous incident in the city of Kunduz, when it was under siege by U.S. forces and Northern Alliance, the Pakistani government in broad daylight flew out over 1,000 militants back home to Pakistan, people who presumably had connections with the Pakistani ISI, which we all know has longstanding connections to al Qaeda and affiliated militant forces. And after the war, instead of handing us the real bad guys – I think when the story is written, it will be said that they handed us the dregs. They handed us low-level Arab and Pakistani men who had at best a peripheral connection to bin Laden and al Qaeda, men who didn't have the connections or the cash to get their way out of detention by U.S. forces.

So we got these guys who were basically nobodies who were saying they were nobodies, but this was immediately after 9/11. We had very few qualified professional interrogators on the ground who spoke the languages, who understood the political and historical context. They were under huge pressure from Washington to get results, to round up bad guys. And so they ratcheted up the pressure on these prisoners using techniques like sleep deprivation, exposure to cold, sensory deprivation, constant interrogation by teams of people until a lot of these guys were broken. Some of them confessed. Many of them pointed the finger at other prisoners. And several hundred of the people caught up in this dragnet were taken to Guantanamo.

And as you mentioned, Peter, we now know a lot more about who they are because the transcripts of their hearings are being released. And we're able now to get a glimpse as to what we're actually talking about here. Most, as you mentioned, are not even accused by the U.S. government of engaging in any hostile acts against us or our allies. They are called enemy combatants, but they're not actually accused of engaging in anything that we would call combat. Most were not captured by our forces; they were given to us often for bounty by the Pakistanis or the Northern Alliance. What they are accused of for the most part – and we're talking about the majority here, not all – are things like they were in a house that was associated with al Qaeda or the Taliban at one point or they'd associated with somebody who we thought was a bad guy, or one detainee

claims that another detainee had been at an al Qaeda training camp and on the basis of that information – again, often obtained through coercion or torture – these people had been accused and labeled as enemy combatants.

Michael Scheuer, who is the head of the bin Laden unit at the CIA until a couple of years ago, says that the consensus in the CIA, as you've mentioned, less than 10 percent of the men in Guantanamo have any real intelligence value and were really engaged in anything seriously worthy of their ongoing detention by the United States. And of the guys captured by Pakistan, Scheuer said we absolutely got the wrong guys.

So in the final analysis, we got stuck with Gitmo, Pakistan got paid, al Qaeda and the Taliban for the most part got away. And as we all know now, al Qaeda and the Taliban are running essentially a mini-state of their own in Pakistan on the Afghan border. The problem has not been solved. And in a sense, Guantanamo shields us from seeing that clearly.

Now, all that doesn't mean that the people who were there in the camp – the majority – are necessarily nice people. These are mostly Arab and Pakistani men who went to Afghanistan to be part of this ugly Taliban experiment. Some went to help the Taliban beat the Northern Alliance militarily, some went to teach in Islamic schools, some worked for charities associated with that regime. They are precisely the kinds of people from which al Qaeda recruits its foot soldiers and cannon fodder. And some of them may, if released, go back to the fight, particularly after what they've been through after the last three years. But that doesn't make them, unfortunately, any different from probably hundreds of thousands of other young men living in the Middle East, Islamic communities in Europe, people who aren't friendly to the United States who are, again, potential suicide bombers. There is no shortage of potential suicide bombers in the world. That's the problem. Taking 500 of those hundreds of thousands and putting them in a camp in Cuba doesn't do anything to solve that problem. It probably makes the problem worse.

But certainly one thing that can be said for most of these people is they cannot be prosecuted because they aren't even accused of doing anything prosecutable. There isn't evidence that would allow anybody to prosecute them in any credible court. And that means we really have two choices. Choice one is we continue to hold them indefinitely, not because of what they've done, but because of a suspicion that they may come to hurt us if we released them. If we do that, though, let's give up the hope that any court, any tribunal, any legal system with any respect for evidence or due process is going to legitimize that. It will be seen as unlawful and unjust throughout the world, and we will continue to pay the price that we've been paying for Guantanamo.

Choice two is we release them. And that is exactly what any international court, like the court that you're proposing, would do instantly because there is no basis that any court would recognize as legitimate for continuing to hold the majority of these men. And if that's going to be the outcome for most of them, does it make sense to spend an awful lot of time – and it would take at least a year, if not years, based on our experience

with these kinds of international courts to set up a tribunal that, frankly, I'm skeptical our allies would cooperate in helping us set up for the purpose of ultimately a summary hearing in which the prisoners would be released.

And there's a political reality here too, that if an American president were to come to the conclusion that we've come to, that this place is a failure and that most of the people there, unfortunately, probably have to be let go, I think it would be even harder to explain that to the American people if the reason given for the release is that an international court has compelled us to do so. At the end of the day, this is a problem the U.S. government created and it's a problem that only the U.S. government can solve through political will.

Now, as I mentioned, there are other groups of detainees. There are some, the less than 10 percent in Guantanamo, perhaps, if that's a correct figure, and more importantly a much smaller group of detainees – a very small group that are held by the CIA who are in fact real bad guys, who are in fact the planners – some of whom are the planners of 9/11; Khalid Sheik Mohammed and his ilk, who should be brought to justice, who can be brought to justice and who are now being held in secret places of detention for the purpose of keeping them away from justice, ironically. And in principle, an international court could try such people. And I think that was certainly a viable option immediately after 9/11, and there were arguments for the United States to pursue that option. And in principle, I'd be all for it. I am a little skeptical that we could get international support after all the water that's passed under the bridge to set up a court to help us with those guys. In principle, it works; in practice, I'm not so sure.

There are also Afghan detainees – ethnic Afghans who fought for the Taliban who were in Guantanamo, and there you're absolutely right, they should be sent back to Afghanistan where the Afghan government should take the lead in figuring out what to do with: whether to continue to hold them or to release them or to prosecute them for crimes many of them committed as part of the Taliban regime. And it would be perfectly appropriate for there to be international involvement in that kind of process, as there was in Sierra Leone where you have a mixed tribunal involving both foreign and domestic jurists.

And then of course, there are the detainees that we haven't yet detained – people who we will capture in the future of this conflict. And there again, I think perhaps what you've laid out, Ken, is an interesting and potentially workable idea. It may be in our interest, and it may be workable to set up an international system that helps us decide what to do with the people that we capture in the future. But again, I think for the bulk of the people who are now in Guantanamo, this problem that we're facing, I think the bottom line is it's a bullet we're going to have to bite ourselves. I don't think anyone's going to help us.

MR. RUNDLET: Thank you, Tom.

Professor Crane, would you care to comment on the proposal and share some of your experience working with an international tribunal?

MR. DAVID M. CRANE: Well, thank you. Of course I've come to the table both from a domestic and national level as well as the international level, obviously, having just come back from West Africa. I appreciate Tom's comments. But, Peter, again, thank you for letting me come and talk to you about this very, very important aspect. Particularly, I'll look at it mainly from the international point of view. I've been a senior international diplomat who happens to be an American, and I can assure you over the past three years, I have a lot of nicks in my ear, my eye is a little swollen, and my nose has been bloodied quite a bit because I've had just wonderful allies who've been with us shoulder to shoulder through the Cold War saying, "David, what have you done? You've lost the moral high ground."

And it's interesting: just this past Christmas, I was having lunch with the senior member of the Department of Defense related to these kinds of matters. And I said, "I left for West Africa in 2002 secure in the knowledge that we generally have a very important policy and program, which we've put together after the massacre at My Lai, and we actually learned our lesson and we developed assiduously over most of my professional life as a judge advocate and was the DOD Law of War Program." And I looked him in the eye, and I said, "When did we stop following the DOD Law of War Program?" It worked, it was understood by all of our soldiers, sailors, airmen, Marine, what have you. It gave us a great deal of credibility throughout the world. The United States was considered the leading country in law of armed conflict matters and looked to train other armies. I have personally done that to several military organizations. And I just said, "When did this change?"

Well, I reflected on this, and really, particularly listening to Rudy Giuliani talk about what happened really brought it back home again. And you do have to – we do have to respect the visceral reaction and my reaction was visceral, too, of couples leaping hands joined together out of the towers. Just regardless of how you feel on this issue, it just gets to you, and that's important to understand.

In some ways, the Bush administration was reacting viscerally. Unfortunately, that's not what we've paid them to do. And I respect the personal concerns, but again, senior policymakers in the government, having been one myself, you have to swallow that visceral reaction – that bile that catches you in your throat – and think about it before you actually start doing something because as the world's "only remaining superpower", we have to be very careful as to how we approach this. I mean, I fully agree that a paradigm shifted when those planes went into the Pentagon and the Towers, but we didn't just pause enough to have a real careful discussion on the matter, not just domestically, but with our allies. The entire world was standing by to join us shoulder to shoulder in this, but the administration in this what, frankly, was one of his better speeches, even though I didn't agree with some of the ideas – he set the policy that on reflection made me realize this is going to hurt us.

Do you recall he said, “You are either with us or you’re against us.” And all of a sudden it occurred to me he’s not going to use the international community to join in the fight what really is mankind’s battle. Terrorism is a threat to mankind, not just to the United States, and we have to be very careful as to how we look at this. And I was really concerned about you are with us or against us. And then we see things like the attorney general saying the rules have changed – rules have changed.

And then, one I really became concerned with when I heard this, they’ll have flies on our eyeballs. And I went, whoa. We don’t go into combat with the concept of the rules have changed, you are either with us or against us or you’ll – they’ll have flies on our eyeballs, this, having been associated with the conflict in Vietnam in My Lai. In fact, Rusty Calley, when I was at Fort Benning, was being prosecuted for My Lai when I was going through training as a young infantry officer. This sounds just like the way they were thinking back in My Lai. And soldiers want to do the right thing. Having been one, I’m not there to kill civilians. I’m not there to do anything other than what is appropriate under my mission, which is carefully construed under the rules of engagement, which we have worked on for decades to insure that they comply with the law of armed conflict. And then they want to come home; they want to live. The last thing you want to be is captured.

And – but one of the things that I always felt comfort in, and I assure you the brave men and women that are on the frontline now knew that if they were captured they would be treated as a prisoner of war, which is then a central aspect of the Geneva Conventions. They don’t have that assurance anymore, do they? They might think that. They have their ID cards, it gives their Geneva code and says they must be. And I know, I realize we’re fighting a different kind of combatant, but if you show mercy, you will be given mercy. And that’s really the fundamental aspects as we begin the Law of Armed Conflict Movement that started back in the – after the Battle of Solferino, I think, in 1867 with the Red Cross movement through the Hague Rules of 1907, which governed the use of weaponry and how we could use it, unnecessary suffering concepts, and then in the Geneva Conventions and the protocols – what have you.

We have the international norm that allows us to conduct combat lawfully and in a way that is humane. And that was a principle that we had been following all the way up until we all of a sudden said that the Geneva Conventions are trite, and that is a very troubling, troubling concept.

When you have a combat – I sound like a law professor, you have really three people on the battlefield; three types of individuals that the Geneva Conventions call for. And I think it’s really important to digress here because we have to understand the rules we had were in place to do this the way we needed to do, and which would automatically bring in the international community, which we need in order to defeat the terrorists. You have civilians in the battlefield, and we have a Geneva Conventions that really protects them. We have combatants, and we have unlawful combatants. The combatants are individuals who carry arms openly, have a uniform of some type, have a chain of command, and follow the laws of war.

Now granted, the paradigm has shifted, but combatants get a legal justification to break things and to kill people within the parameters of the Hague Rules and the Geneva Conventions: military necessity, unnecessary suffering, what have you. These rules are broad enough to really fit in any scenario that is thrown at us, and I would say that they still are.

Now, if you have these individuals who are caught in a net – something like Afghanistan – the Geneva Conventions already have a process by which you consider what their status is, which is a key legal term. Your status is what's going to cause a result related to what you have done on the battlefield. If you have a civilian, you go one of two ways, you either release them and protect them and remove them out of the battle area, or if you have a suspect that they may have done something more than that, you can take them before an Article V tribunal, under the Geneva Conventions which allows that, same way with a combatant. If you're not sure that they carrying arm openly, bearing arms, chain of command, following the laws of war; as well as individuals who picked up arms and were also fighting shoulder to shoulder with the lawful combatants.

Now there's even in the Geneva Conventions a term called "a levy en mass," and that is where civilians take up arms to defend their homeland. And they are automatically assumed to be prisoners of war until their status is otherwise determined under those tribunals. And so what I'm looking at here, and where I've – this is where we're getting into where I think is a type of mechanism to deal with a small category of what you find on the battlefield.

At the Article V tribunal, if you have civilians, combatants, and unlawful combatants, if you have a civilian who's found to be a civilian, you release and protect. If you have a combatant who's found to be a combatant, a lawful combatant, he is now a prisoner of war, and he has certain protections by which you have to abide by, and he's protected, and the rule is you move them out of the battlefield area and protect them. And then you have a thing called an unlawful combatant, and this is now where we're getting into, is this new paradigm where we have more unlawful combatants then we normally have ever dealt with versus combatants. Well, you still have an Article V tribunal. That sets the legal status by which then you can do other things with. And if they're found to be an unlawful combatant, the Geneva Conventions in international law allow you to detain them and to prosecute them because if you have an unlawful combatant status – if you've picked up a weapon and killed an American soldier or another person, you have committed murder. You no longer have a legal justification to do that. Therefore, you can under international law and, frankly, our domestic law, prosecute them.

Now this is where I think this is where we can fit in, I think, some type of mechanism, vis-à-vis Gitmo, and that, an international special tribunal of sort. You've got the ones that are detained and are eligible to be prosecuted, so we're looking at the unlawful combatants. If they would have done this right at Guantanamo at the legal level, then they could have justified what they had done. But as you recall, they didn't do

the Article V tribunals initially, they just cast this large net. As long as they were Arab, they were bad, and that's a very bad precedent. And they stepped outside the box, and they were called on it in a federal district court case right here, I think, a year and a half ago. They backed off and they went into those particular – that little tribunal that they set up. I don't know even why they changed the name. I mean, again, the mechanism is already in place, hence my comment to that DOD senior lawyer as to when did you step away from the DOD Law of War Program and had all of this in here, and which I taught at the Judge Advocate General School judge advocates and senior commanders this very very concept.

So, I will stop there as related to the concept, but I do want to say that this is a new Cold War. Those of us who fought the Cold War, it took 45 years to win the ideological war against what was called the evil empire of the Soviet Union. We did. This is the new Cold War. This is not going to take five or six years. This isn't going to be solved by the 82<sup>nd</sup> Airborne Division. This is going to be solved by all of the international community, and this is where I commend this particular approach of coming together and facing mankind's threat, not the United States' threat, because we are not going to win this war alone. I can assure you of that because it is going to be a decades-long struggle. And it's not going to take kinetic energy. Yes, we have a lot of guns, we have a lot of wonderful people who will risk their lives to do what they're country wants them to do, and I assure you I don't want to show any lack of respect for these brave men and women who are there. That's not the point.

But we're going to have to go out and do this together internationally with using ideas. And I will just leave you with this, and then we can have a – hopefully have a good, vigorous discussion, and that is is that when our country was founded, we founded our country on freedom and justice for all. Now, currently we're losing the war on ideas. This really is an ideological war. We're losing that war. Yes, in the short-term strategy, we may be moving other people around Iraq and other places because we have bigger guns than they do, so to speak. But the bottom line is, we will lose this war on terror if we do it alone and if we don't start letting the world know that the United States stands for something far greater than what they stand for, and that is freedom and justice for all. And we have used this idea because the world respects that idea.

And the things that we have done in Abu Ghraib, Guantanamo, where we have “changed the rules” and have announced publicly by this chief legal officer of the United States saying, “the Geneva Conventions are trite,” lost the moral high ground. And with that, I look forward to discussing all of this with you.

Thank you.

MR. RUNDLET: Thank you. Before I go into questions and then open up the floor for questions from the audience, I wanted to give Ken a chance first to respond to the comments he heard in particular from our two other panelists.

MR. GUDE: Sure. Thank you, Peter. And thank you Tom and David for those comments. I wanted to pick up on a couple of things that Tom said in particular, both this notion that a lot of prisoners will have to be released from Guantanamo in any kind of process, particularly the one that I envision, and that it will be politically difficult, regardless of how you want to set up this tribunal.

We have contemplated this question of what do you do with the admittedly very large number of prisoners that you would have to release from Guantanamo. And we looked around to see if there were any other examples in history where we have had to do that type of thing. And we've found that after World War II, the allied powers faced a somewhat similar problem. They were required to release a large number of German prisoners that they had been held in custody throughout the war. They were mostly low and mid-level Nazis who were not going to be prosecuted for their actions on the battlefield. But it was feared that some of them could commit acts of terrorism or sabotage against any new rebuilding German government. It was impossible to determine then which were real threats and who actually just wanted to get on with their lives.

But what the United States, Britain, and France was – came up with, was a system of intelligence sharing on these released prisoners where they created a database where they put all fingerprints, photographs, biographies – as much detailed information on these prisoners as they could, and they created this system where they've pooled their intelligence resources – their police officers, their military forces, their intelligence agents – and they've created this system that would monitor these released prisoners ultimately until their death.

So we recommend doing a similar system that would pool the resources available to us now, which are admittedly greater. We could put a lot of biometric data in, like iris scans and voice prints to go along with the photographs and other information that would – that we've compiled on these detainees since we've captured them in some cases in 2001 and 2002. We could share that information with those countries that are allied against terrorism. It could induce more cooperation among those countries than currently exists. And it would – it wouldn't necessarily eliminate the risk that is involved in releasing prisoners, but it would mollify it to some degree.

And secondly, if I could pick up on the notion that it would be politically difficult, I think that's exactly right. It is going to be politically difficult to try and move towards an international process, but especially given what's happened in the last four years. But that's not reason enough for me, I think, to at least – to try, especially because we believe that international process, as David illustrated, is the way forward. It's the best way to address these questions that affect us all, not just the United States. The system that is established now, there's just no – there's no incentive for other countries to cooperate with us. But if we were to move some way forward – some way towards an international solution, I think that you would see a lot more willingness on the part of our main allies, certainly in Europe, to move with us and work together on this problem.

MR. RUNDLET: Okay, thank you. Well, despite trying to confine Tom's answers to great or greatest, he managed to point out a couple reasonable concerns about the plan. Touching upon what David mentioned with respect to these images from 9/11 and the seriousness with which we need to approach these issues, I want to turn back to the issue that Tom raised at the end of his remarks which is that we have basically two choices: indefinite detention of people that may not be nice, and releasing them. And to the point of about them being nice, I saw an interesting quote recently, that Guantanamo has helped take a ball of mercury and smash it with a hammer, sending anger and splintering groups – and kind of focusing the mind of some of these people that were not nice to begin with, but now may actually want to hurt us.

I'm interested in if – in hearing whether you have any thoughts about which of those two routes we should take, and how we make the determinations as to whether we release or indefinitely detain?

MR. MALINOWSKI: Well, I don't think we should indefinitely detain. I can make a moral argument for that. I can make a legal argument for it. I think the practical argument in and of itself is sufficient because I don't think – you know, if the problem we face in the war on terror is that there are hundreds of thousands of young men in the Muslim world who are recruitable by al Qaeda, we don't solve that problem by taking 500 of them and holding them indefinitely. We do absolutely nothing. And to the extent that this is a public relations disaster for the United States, a problem that's seen as making the United States appear to be a hypocritical country, we probably make the problem worse. So I don't think indefinitely detain is the solution.

I think for those who cannot be prosecuted, I think we have to bite the bullet and find the most appropriate, the most safe, the most realistic process for release. And I think actually Ken's comments, going back to the German POW example, are very, very interesting. And I think it's something that we should – I would love to see a – more than two paragraphs about that, but a much more serious study of that historical example because my sense is that's essentially what we need to replicate. I don't think if we're determined that 400 of the 500 people left in Guantanamo fall into this category, that the answer for those 400 is to set up an international court for the purpose of coming to a determination that we've already made. I think we have to bite the bullet and find the best way to release those people.

Now, then there are others who can and should be prosecuted, and the question is do you try to set up an international mechanism or do you do it yourself? Again, I think it's probably more realistic that we would have to do it ourselves.

MR. RUNDLET: To respond to that answer, one thing that appears in the report that maybe Ken can talk about a little bit is despite the procedures that the administration has set up right now, which is essentially to detain them, Ken makes the point that under the current processes, something like 5 percent of those that they had detained have gone back into the battlefield to fight against us. And I – if you could talk about that, those

facts a little bit, Ken, and again, how we should adjust that concern, and how even in their restricted approach they've been able to release dangerous people.

MR. GUDE: Well, this is a – one of the most difficult, if not the most difficult question to handle here, I think, by the administration's own admission. About 15 or 20 of the people who have been released from Guantanamo have rejoined the fight in Afghanistan or in some other way. That's about one in 20 of the people who have been released. Evidence is lacking in so many of these cases that it's very difficult to make these types of determinations. The solution that – or at least a better way that we have tried to come up with is to establish a – an international team of investigators that would work under the office of the prosecutor in the tribunal that would try and develop their own lines of investigation into exactly what happened – exactly the circumstances that surrounding the detention of many of these prisoners.

As Tom mentioned earlier, the circumstances are very murky. A lot of them were simply in Afghanistan to work with the Taliban in some capacity, but were likely not combatants and when the Taliban fell, they – or was in the process of falling, they tried to get out. And he as he noted, many of them were captured by Pakistan or the Northern Alliance and were shipped to our doorstep. If there is a system that we can create that would expand the contribution and the participation beyond simply U.S. military investigators, I think we would have a much better chance.

Also, if we use that system of intelligence sharing on these prisoners – on the released prisoners that I just outlined, we might be able to dissuade them if they know that they're being monitored, if they know that they're – that they face surveillance for their actions for at least a significant period of time. It might be much less likely that they would seek to rejoin their groups or that if they are alive with some insurgent faction or terrorist organization, whether those terrorist groups would actually take them back.

MR. RUNDLET: I'd be interested to put this question out to the whole panel, but I'll start with Professor Crane. If we should capture Osama bin Laden later today, what process should he get? (Laughter.)

MR. CRANE: Well, it's interesting, having actually gone after guys that don't (have almost?) Osama bin Laden, but people like Charles Taylor, Foti Sanko (ph), (unintelligible), and others kind of are up there, so to speak. Charles Taylor is individually criminally liable for the murder, rape, maiming, and mutilation of over 1.2 million human beings, so I would say that he's probably up there with Osama bin Laden.

The key to this type of situation is that he should be shown that he will get a fair trial, whatever that may be or whatever process that may be. So we really need to show the world – this will be an opportunity possibly, actually, to do this fairly openly with the appropriate due process that both international and our domestic will allow so that we can show the people of the world that we haven't lost the moral high ground, that there is freedom in justice for all, even if it's an individual who we abhor, for it's in fact the rule

of law by which we govern ourselves. Because I have lived three years in a place where there was no rule of law and I've seen the results of that.

So that again, the current administration needs to take a deep breath before they start launching and throwing him into a deep dark hole and we see him 10, 15 years from now. We really need to do this openly and fairly to show the world that we haven't lost the moral high ground because, again, this is a war on ideas – an ideology, not guns, and what we see in Guantanamo is that we're playing their game, and this is exactly how they're winning the war on ideas is because we've lost our better idea, which is freedom and justice.

MR. RUNDLET: Can I get your views on that, Tom?

MR. MALINOWSKI: I completely agree. I just also would add that it's interesting and sad that 4.5 years after 9/11, the administration doesn't actually have an answer to that basic question. They don't know what they would do with Osama bin Laden. There is no – military commissions haven't worked. They presumably don't want to bring him before a federal court. They would presumably want to put him in a dark hole somewhere in a prison in North Africa or – Eastern Europe is out now. (Laughs.) But that would be very difficult to sustain because this would be the most prominent prisoner we've ever captured. It would be a huge dilemma for them. The answer is I think your answer.

MR. RUNDLET: Is it possible – would it make more sense for us to approach him in an international forum? Is this – would this be an opportunity to put it out of our hands alone and bring our allies together and is that even possible at this late stage?

MR. GUDE: I think a strong argument could be made that that would be very much in our interest; that because it's a war of ideas, because the way in which we deal with a man like that is going to have to be seen as legitimate by people all around the world, that it would be in our interest to invite our allies to participate in that process. I mean, it is in our interest to persuade the world that this isn't just America's fight, it's the world's fight. And, therefore, it's in our interest to bring the world into the prosecution of that fight in this way and in others.

Obviously, I'm skeptical the administration would see it that way, and there's the added issue that many Americans would presumably favor the death penalty for bin Laden and an international tribunal would in all likelihood not permit that possibility.

MR. CRANE: Well, I think we have a perfect example and that is the unfortunate trial of Saddam Hussein: wrong forum, wrong location, et cetera. We would probably do the very same thing, and it's not going to be very helpful to the advancing of the concept of the rule of law because it will polarize, once again, East versus West, and I think it's really critical that the East and West join together to prosecute someone who has both destroyed East and West, and if we take him off and we try him in a Western setting or –

such as an American tribunal of some sort, we will lose once again the war on ideology of the concept of freedom and justice for all.

I think it would be very prudent, because it would be a win/win for the United States, to turn him over to an international tribunal either set up to try him or, dare I say this, the international criminal court does have jurisdiction over Osama bin Laden and I'm sure that it would be very easy for the prosecutor to take that and present that to an investigatory judge for prosecution. We're ready to do – they're ready to do that. I've had this conversation with Luis (sp) and his eyes glisten at the thought. (Laughter.)

MR. RUNDLET: Before we open the questions up to the audience, I wanted to give Ken a chance to respond to that because I think his proposal would have Americans doing that investigation and prosecuting it in the division for international terrorism.

MR. GUDE: Well, I think very quickly, if I could, I echo the points raised by both Tom and David. But I would say that I think it's very important that we get the answer to Tom's question about what we would do with him before we capture him because I think one thing that I – in doing a lot of the research for this paper, I came across Supreme Court Justice Robert Jackson's admonition when he came over to become the chief prosecutor at the Nuremburg Trials, and that is the world yields little respect for tribunals that are organized to convict. And it would be hard to create a situation – or at least it would be hard to create the impression that we were doing anything but organizing a special tribunal to create Osama bin Laden if we waited until after we captured him.

MR. : Sure.

MR. CRANE: Okay –

(Cross talk.)

MR. CRANE: – if I could just say a –

MR. RUNDLET: Oh, please.

MR. CRANE: I think the key aspect of Ken's point here in a study is internationalization of it. How we tweak and adjust it to make it palatable both at the U.S. domestic level which is a problem, but also to sell it to the international community. But I really think this is a path which we need to do carefully move along.

MR. RUNDLET: Okay, with that we're going to turn the microphone over to you all. Antoine Morris in the back there has a microphone. If you could please raise your hand and state your name and who you're affiliated with for our transcript, I would greatly appreciate that. And we'll first take questions from anyone from the media, if there's anyone from the media.

Q: Hi. My name is Adnel Qutb (ph). I'm a freelance journalist. Mr. Gude and for the other distinguished panelists, given the fact that Guantanamo has been completely challenged by international law and has been declared as a violation of human rights by the United Nations and other human rights groups, to what extent do you think the fact that these detainees also have been held against their will – to what extent do you think they would fit the legal, political, and the psychological definition of being called or classified as hostages?

MR. GUDE: Well, I'm going to say that this is a – something I've never considered before. But I think that this is the problem, and as David outlined very clearly, where the serious failing of the administration was early in the process when they threw aside the established rules and procedures for handling detainees of this type, if they had gone down the route that is well articulated and has been done before of creating these Article V tribunals to make determinations about whether or not these detainees could be legally detained as either prisoners of war or as of unlawful combatants, we wouldn't be in a situation where the legal status of the detainees is very – is unclear.

I think the reason why they did that is that – you go to the point that David made is that they were eager to change the rules after September 11<sup>th</sup>. They thought that it was a paradigm shift and that the old rules were simply not suited to the fight we were in. But if we were now to go through that process and create an actual Article V hearing, as opposed to the combatant status review tribunals that they have – they put together in, I believe, 2004, we wouldn't have that problem that the detainees have been held against their will and that these types of allegations could be made against them.

Q: Yeah, I'm Ed Spannaus from *Executive Intelligence Review*. Ken, I think you raised what you saw as a problem of going to the UN Security Council because there might be charges brought against U.S. personnel, but my question would be will we ever have any credibility as a nation on this question unless there are U.S. personnel, particularly policymakers, who are held accountable for what's happened at Guantanamo and Abu Ghraib and so forth?

I mean, at the very outset of this process, if you remember the infamous Addington-Gonzales memo of early 2002, the concerns were expressed even before that that not abiding by the Geneva Conventions would give a defense against possible prosecution for war crimes. It seems to me that that concern was well founded at the time. So can we just wash our hands and say we're going to find a nice way to prosecute these other guys without having some accountability here for those who were responsible in terms of policy – not the low level people, not the guards, but those who set the policy that went against our own laws as well as others?

MR. GUDE: Well, I think it's very important that some process of accountability is at least started and carried through on this question of holding high-level officials responsible and accountable for their actions that led to the types of abuses that you outlined.

I would like to try and separate the two questions because if we can move forward on resolving some of the problems that are associated with Guantanamo in terms of the indefinite detention and in terms of exactly what you do with the detainees, I think it might make it a little bit more – a little bit easier to follow the road of accountability on the interrogation techniques and other things as well.

MR. RUNDLET: Do either of you have any comments on that question?

MR. MALINOWSKI: I totally agree.

MR. CRANE: You know, it's interesting. Again, I have to go back to My Lai. I think the United States admitted a huge error of the killing – unlawful killing of over 535 men, women, and children – mainly women and children. They held courts martial and they also went after the commandant of the United States Military Academy, demoted him, and et cetera, et cetera. They investigated from the top down. And I think that was the correct way to do it because, again, the Geneva Conventions say that if you are – have allegations of war crimes, the signatories prosecute themselves or turn them over for other prosecution.

I think that what has happened here is that because we've got it – we've lost the moral high ground, we've got ourselves into a really a ticklish corner because if we in fact go after those who are essentially culpable from a command responsibility point of view, then we're in some ways implicitly admitting that we've lost that moral high ground and it's a political challenge for the administration. So they've got themselves in a moral box.

Now, technically speaking, a signatory of the Geneva Conventions – boy, do I sound like a law professor or what? (Laughter.) But typically, the Geneva Conventions say, well, a signatory then, if they're not satisfied can bring charges under their own domestic law if they've incorporated the Geneva Conventions against anyone who violates international norms. So technically there is a legal liability related individuals who have potentially violated international norms related to Abu Ghraib, Guantanamo – what have you.

I find it interesting that General Miller now is using his constitutional rights, and if I was his lawyer, I probably would have advised him the same way. Many of these people need to be very careful of traveling because, again, we have seen countries who have vigorously used their rights under the Geneva Conventions. Belgium certainly comes to mind immediately. They're not shy about it. Spain has done it. So again, all the world wants to see is accountability, and if it's done fairly under domestic law, then the world will back away from it. Unfortunately, we've not done that.

MR. RUNDLET: Any other questions? Yes, sir?

Q: My name is Josh Dorner (ph), and I'm working with the so-called Tipton-three group of British nationals that were detained for over two years and then

subsequently released. Two of them are petitioners in *Rasul v. Bush*. I'm just curious if you have any opinion if there's even now any rhyme nor reason to – perhaps other than nationality – who's still being kept at Guantanamo and why, and who has been released seemingly just as mysteriously as why they were kept in the first place?

MR. MALINOWSKI: I don't know if there's – oh, do you want to –

MR. : (Off mike.)

MR. GUDE: Well, I think one of the reasons why you see the number of detainees that are still at Guantanamo is I think the U.S. government has attempted to transfer many of them back to their home countries, but in certain cases there are a number of barriers. One is that – for a large number of them, those host countries – those home countries just don't want them back. And particularly, the Pakistanis who have had us do their dirty work for a lot of the people that they didn't want in Pakistan, they wouldn't be eager to receive those back at their home countries.

Another problem that exists is that we are bound by the UN Convention Against Torture from not transferring detainees back to countries where they could face the threat of torture. And let's be honest about it, a lot of these countries don't have sterling records on their human rights, particularly countries like Saudi Arabia and Yemen. So I think that answers partially some of the question, perhaps Tom could – (off mike).

MR. MALINOWSKI: Well, that's the rhyme and reason. (Laughter.) Nationality also – I mean, it is a factor. It's not an accident that citizens of European countries were all released – the UK, Sweden, NATO allies have made high-level diplomatic efforts to get their citizens out. They've largely succeeded. Beyond that, there's also just – there isn't much rhyme or reason. If you look at the transcripts of the hearings these prisoners get, it's clear that some of them just get more sympathetic panels than others. And there is no consistent body of law that's being applied to determine who is and who isn't an enemy combatant, who is or who isn't fit to be released. They're basically making it up as they go along because, as you mentioned, David, they threw out the old rules without really putting a new set of rules in place to guide their positions.

MR. RUNDLET: Spencer, and then –

Q: Hi, Spencer Boyer from the Center for American Progress. I actually have two questions about the international criminal court. The first following up on Peter's question about what we would we do with Osama bin Laden if he were captured today, and Professor Crane's comment that perhaps we use the ICC as a tool. From my understanding, given that the ICC only has jurisdiction over crimes since – committed since July 1<sup>st</sup> of 2002, how do we get around that? Would we just be trying to connect Osama bin Laden to criminal acts since then? And secondly, do the panelists think that we really need to change our hostile stance towards the ICC to ever have future international cooperation with a special tribunal or any other international tribunal?

Thank you.

MR. CRANE (?): Let me go ahead and address that first. Now, again, I mentioned the ICC. In reality, in my mind, I think a hybrid international war crimes tribunal is probably the best solution where you bring in both American and international judges, prosecutors and mix it, which is very similar to what Ken has done.

You're right, the jurisdictional issue is a problem with Osama bin Laden. What you need to do though is you need to remove it from the American process. And the American process would have been readily accepted had we not lost the moral high ground. But now since we have, and that anything that we do related to individuals like Saddam or Osama bin Laden is automatically suspect because of the Abu Ghraib debacle and the Gitmo debacle. So we now have to – in order to cleanse this to where we can get some type of justice and try to regain or begin to regain the moral high ground, that we do something that is of an international quality so people can live with the judgment, whatever that may be.

Now I agree with you, I think legally it's – it would be problematic, but I think that a – an – a hybrid international war crimes tribunal for trying him in a place that is – well, again, I'm intrigued by the idea of a neutral Arab country such as Turkey or something like that would advance the idea of this individual getting some type of fair justice. So at the end of the day, whatever is decided, that it would be considered a just result. And he would not get the death penalty: the international standard is life imprisonment. But that's a real problem, and it's a political problem for the U.S.

Americans want this guy, just like Iraqis want Saddam Hussein, executed for what he did to them. And it's a visceral reaction, but that's where the rule of law balances the visceral reaction of the populous. That's why we established the rule of law or we would drag anybody out that was a problem to us and execute them. So again, the rule of law is important, and in this situation I think it would advance – we would win and win if we turn it over to some type of international arrangement, and I think the UN Security Council and the United Nations (should?) step up immediately to do something appropriate.

MR. MALINOWSKI: I could – I'm not sure if I agree that the American system has been discredited. The problem is the American system hasn't been used. We haven't used our domestic system of justice. We haven't used our military courts martial which are world class and respected throughout the world. And that's been the problem. And I think for the vast majority of people who can and should be prosecuted, I don't think the option of using the American system should be taken off the table. I think bin Laden is a special case. The international stakes would be so high that I think what we do need to consider whether or not it would be in our national interest to create a special and more internationalized process, including perhaps jurists from the Islamic world, which would give us much more political authority where it needs to have it.

I don't think the ICC is the best option for the reasons that you've stated. I agree with you, David, that some sort of mixed tribunal would probably be the best option, and I also agree with Ken that we should decide before we get him. (Laughter.)

MR. RUNDLET: Okay, we'll take one last question.

Q: John Bradshaw, Open Society Policy Center. I share Tom's skepticism about how difficult it would be to get allies and others to participate in the international tribunal that you propose, but I wonder if you thought through the possibilities of some kind of coalition of the willing, something less than a full consensus or something that's not blessed by the UN. We could always, I'm sure, get the British, the Israelis, the Marshall Islands or our other good allies – (laughter) – and maybe some others – El Salvador or whatever – to participate. But do you have a baseline for what would represent credibility, legitimacy for the international tribunal you propose?

MR. CRANE: Don't forget Poland. (Laughter.)

MR. GUDE: Well, I agree with you that getting full international support is just not feasible. And in the report, I lay out in more detail that I think the model that we could follow is the Lockerbie tribunal model that was essentially a bilateral agreement between the British and the Libyans with the support of the United States and the Netherlands who was the host. In the report, we recommend that Turkey could host this tribunal. So, obviously if we go down that road, you would need the Turks.

Obviously, again, the key international player in our view in this is Afghanistan and we (were able?) to have an agreement with the new Afghan government there and then bring in some of our – certainly some of our NATO allies: the UK – Britain, France, Germany. I think that would lend credibility to it there. And I would think that if we made that overture and if we went down that road, we might be surprised to see how many countries want to actually come with us and participate in this program or in a tribunal such as this, and that the effect could actually build support for this process.

MR. RUNDLET: Tom?

MR. MALINOWSKI: Well, my job is to be the downer here today. (Laughter.) Just to give you an example of how difficult it would be to get anyone to help us on this, Ken, you mentioned there's a group of prisoners in Gitmo who can't be sent home to their countries because of the fear of torture. There's one group in particular that we've been working on, they are ethnic Uighurs from western China – Muslims from western China who got caught in the wrong time, wrong place, in Afghanistan. They were sold to us by the Pakistanis – completely innocent and they've been cleared by the U.S. government in these tribunals. They are considered not to be enemy combatants. They're still sitting in Guantanamo a year after they were cleared because, rightly, the administration won't send them back to China where they'd be tortured, and no other country in the world wants to take them. One year of effort by the administration, begging every single country in Europe, all the countries that have criticized the United

States over Guantanamo, please take these people who are totally innocent, not a threat, take them for humanitarian purposes and zero – no country, not the U.K., not Germany, not France, not Turkey wants to help.

Human Rights Watch has been negotiating with some of these countries and we think that after maybe several more weeks or months of this, we may be able to find one place that may be willing to take them. But if it's been this hard to get countries to help us on these prisoners, to make a simple humanitarian gesture for a group of folks who are totally innocent, I think the idea that we would get NATO allies to step up to do something as ambitious as what Ken proposes, as good an idea as it may be in principle, I think it is not realistic. I continue to think we made this problem; we're going to have to fix it ourselves.

Q: (Off mike.)

MR. MALINOWSKI: Well, it should. (Laughter.) It absolutely should. And we've said that to the administration, take these people yourselves now. In terms of the interests of the detainees, they may be better off in a European country than being – you know, hanging out in California as former Guantanamo prisoners who have been called the worst of the worst by Don Rumsfeld. So I'm frankly hopefully that we can find a third country to take them. But in principle, you're right.

MR. GUDE: I might take one moment to respond to that. And I think Tom raises excellent points. And it is going to be a difficult challenge. I think the one difference – and there's a very large difference in my mind between the situation that Tom just outlined and the proposal that we make is that of course Guantanamo still exists now. The U.S. policy is not any different, and by asking countries to accept the Uighurs or any other of the detainees at Guantanamo who may be innocent but can't be sent home, is in essence asking them to bless our policy on Guantanamo and alleviate a problem that we may have, we may have created, without going anywhere – any farther along on the process to solving that problem. So I just wanted to add that.

MR. RUNDLET: With that I want to thank you all for coming today and hearing this important discussion, and I'd like you to join me in thanking particularly Professor David Crane and Tom Malinowski and Ken Gude for this presentation.

(Applause.)

(END)