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## **Diplomacy, Alliances and War: Anglo-American Perspectives on History and Strategy in the September 11<sup>th</sup> Era**

*A Joint University of Texas-Austin and King's College London Conference*

### **Panel 3: History, Intelligence, and the Law**

**Panelists:** John Bellinger, Sir David Omand

**Discussants:** Theo Farrell, Mathew Burrows

**Moderator:** Robert Chesney

**November 1, 2013 | 2:15 AM – 4:15 PM**  
**The University of Texas at Austin**

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**[Note to Reader: When possible, speakers are identified by first name. If not, then Respondent is used for panelists and discussants, and Audience is used for attendees.]**

**[Begin File: Panel 3.mp3]**

**Moderator:** Okay. We're going to go ahead and get started if you could, please, claim your seats. Please, claim your seats. Welcome back. This is the afternoon session that integrates history, intelligence collection, and law — which, when I first encountered that matching, I thought, it's not obvious that these all go together. Then, of course, even a moment's reflection made me think, well, this is actually a wonderful integration and very apt for the post-9/11 period in particular. I want to begin by noting that just a few days ago — to relatively little attention — there was a drone strike in Somalia. Now, earlier this same month there was a much more widely discussed U.S. military operation in which Seals landed at Baraawe in Somalia and made an approach to an Al-Shabaab facility in which they hoped to capture a particular Al-Shabaab target. It was the same time, of course, as the operation in Libya. They grabbed an Al-Qaeda leader named al-Libi. In large part I think because that particular snatch operation resulted in the actual capture of someone who, then, it was known was captured and the question arose, "What was then going to happen to them?" [It] generated a lot of discussion of what the legal architecture was. There were questions as well being bandied about as to exactly what did this signify as to where counterterrorism policy was going. But the drone strike in Somalia a few days ago didn't generate any discussion really at all — just noted in a few places.

It's an interesting fact pattern, though, and it sets up our panel nicely in some ways. At least, I'm going to pretend that it does so I can tell you about it. The target appears to have been a man known as Ibrahim Ali, also known as Anta Anta, an Al-Shabaab figure that was previously known to us in the public eye as someone who was central to explosives — a senior explosives guy for Al-Shabaab. To the best as I can glean from the public record, there is not a public claim that Anta Anta was one of the no small number of Al-Shabaab-related figures who was himself separately — you might say, dual-hatted in the sense of being an member of Al-Qaeda writ large as distinct from Al-Shabaab. We've had prior uses of lethal force by the United States in Somalia before, most notably Saleh Ali Saleh Nabhan, who was very much of that dual-hatted variety. When those prior events have happened, the claim has always been it's not that Al-Shabaab is now considered to be an associated force of Al-Qaeda that we may attack in general. It's that these are specific individuals who are in Al-Shabaab, yes, but are targetable for their Al-Qaeda ties. The question with this week's attack with Ibrahim Ali is whether this is actually — once you know the inside information — another example of one of these dual-hatted guys, or does it instead portend an expansion of the conflict in the sense of the U.S. government deciding that

Al-Shabaab collectively is targetable within the scope of the legal architecture that we've been invoking for the past dozen years.

Moderator: Interestingly, *The New York Times* report on this — an Eric Schmitt/Mark Mazzetti piece — makes reference to the idea that JSOC officials have been pressing hard for the aperture to be widened to encompass Al-Shabaab coincident with Al-Shabaab's — as we all know — renewed interest in extra-territorial operations, at least in East Africa. Now, why do I dwell on all this as a prelude to our panel? Because, of course, it highlights the centrality of the legal architecture. We talked a little bit this morning about whether and to what extent the legal architecture actually matters. Of course, at one level that I think we can all agree on, it absolutely matters at least insofar as it leads into a bunch of other things that can — and as we've seen, will — confound one's policy if the legal architecture is not handled appropriately or carefully. But what makes it so difficult is that there's so much uncertainty that's woven into the legal architecture. To refer to it as legal architecture is almost to suggest a coherence to it that is not really there in the following sense. If the lessons of the past 12 years teach us anything, it's that there are profound disagreements as to what the relevant law actually is, both at the level of which bodies of law are relevant at the threshold, and even if you agree as to which bodies of law are relevant, what they actually mean or what they actually require or permit once you bring them to bear on these fact patterns. This is not a new problem. This is the problem that lawyers and policymakers in 2001 had to grapple with and, indeed, in prior years had to grapple with. But it is one that can't be addressed or even understood very well without taking into account history. A good knowledge of the history of the disparate legal doctrines goes far towards understanding why there seems to be such an unbridgeable gulf separating those who disagree on the legal issues.

Now, segueing over to the intelligence collection side of our mission on this panel, another aspect of what's interesting about the Ibrahim Ali situation is that it's another example, as we turn our attention to just where are we in terms of understanding where Al-Shabaab is as an organization, it's yet another example — if we ever needed one — of the centrality of intelligence to this particular approach to counterterrorism. Intelligence collection, of course, is important in all national security endeavors, but it seems particularly important in a context in which the object of your efforts is a clandestine network, or set of networks, or set of individuals and groups — however we want to conceptualize it — where having information as to who is whom, who is in contact with whom, who has pledged Bay'at to whom — these sorts of things — is both exceedingly difficult and exceedingly central to everything else.

Now, without further ado, let me identify who will be speaking — not that any of them need any introduction. I'll be very brief. John Bellinger, in addition to being my co-blogger at the Lawfare blog, has some other achievements as well. You may be familiar with them. He was the State Department's legal adviser from 2005 to 2009 and, I will say, was central in pioneering at long last outreach to the public and to our allies, especially in Europe, as to what it is we really claimed as our legal architecture. It's an incredibly important thing that he personally did and, as I understand it, not necessarily with widespread support from everyone who had a stake in that matter. He previously was National Security Council legal adviser and senior associate counsel to the President, and is currently practicing law at Arnold & Porter as a partner, and then also keeping his hand in the academic and policy worlds through his work with CFR, where he's a senior fellow in international and national security law. To his left, Sir David Omand, currently also

keeping his ties in academia with his visiting professorship at KCL's Department of War Studies; among his many accomplishments, Sir David was the inaugural UK Security and Intelligence Coordinator. He was permanent Secretary of the Home Office. He was Deputy Secretary of State for Policy in the Ministry of Defense, and last but not least, of course, Director of GCHQ. I can only imagine that Sir David is probably pretty happy to have been Director of GCHQ then rather than today.

David: Too right.

Moderator: — though we all do love challenges. Theo Farrell, to John's right — head of the Department of War Studies at KCL, chair of the British International Studies Association — he has produced a slew of books and articles relating to military affairs, the prodigiousness of which is matched really only by the immense amount of fieldwork he has done in incredible settings — having done multiple tours, if you will, in Afghanistan working on commanders' assessments and strategic assessments of the situation in the field for commanders. To his right, Mathew Burrows, currently Director of the Atlantic Council's Strategic Foresight Initiative — Mathew was counselor to the National Intelligence Council and director of the Analysis and Production Staff and through that position became the principal author of NIC's *Global Trends 2030 Alternate World* study, which was a tremendous document. He's also part of the senior analyst service at CIA. We couldn't have a better collection of individuals to talk about these two pieces of the counterterrorism/history nexus. So I will turn it over now to Sir David. Thank you.

David: Thank you very much for that introduction. I have to say that having started the Internet modernization program at GCHQ before 9/11, I take my share of responsibility for the important capabilities that have been developed. I should also say, for those who haven't been following the news, I have just had a text on the iPhone that Hakimullah Mehsud, the head of the Pakistani Taliban, is finally declared dead — admitted by the Pakistani Taliban — in a drone strike.

The past leaves traces of three kinds on our lives. I want to talk about those traces and the way they shaped our strategic response in the UK to 9/11: traces in the material world — we inherited the existence of government departments, and intelligence agencies, and security infrastructure; traces in culture — collective habits of action, alliances, and laws relating to terrorism; personal traces — including lived and remembered experiences but also lessons that we think we gained from the experience of others. I speak from my perspective as having been the UK Security and Intelligence Coordinator in the Cabinet Office when the dust had settled on the first Afghan expedition and we were constructing the UK counterterrorism strategy, which we called *CONTEST*. This was an acronym, incidentally, I dreamt up in the bath, literally. My experience in the Ministry of Defense is that if you don't have an acronym — it stands for CounterTerrorism Strategy — if you don't have an acronym to give brand recognition, there is no way that all the disparate organizations — civil, military, intelligence, police — are ever going to remember what it is the strategy is supposed to be about.

I'm going to start with the positives, and then I'm going to move on to some of the problems of that historical legacy. I'll deliberately not go over the ground that Nigel has very adequately covered on the foreign side, so I will more talk about the domestic scene and intelligence. I will argue that it was these legacies that set UK counterterrorism effort in terms of law and intelligence, in many respects, on a different course from the strategy

followed by my colleagues in the United States. I'm drawing here on many discussions at the time with my old friends like John Gordon and Fran Townsend in the White House, in the UK/U.S. Homeland Security contact group that I co-chaired with Admiral Jim Loy, the Deputy Secretary of DHS and, of course, with the DCI, the heads of US agencies, and old hands like Charlie Allen and John Brennan.

David: Where should I start talking about the historical legacy? I think March 27, 1782 would be a good date. It was then that the British Home Office was set up. That meant that the UK had had over 200 years before 9/11 to build up effectively a 'Homeland Security' Department with responsibility for criminal justice. Responsibility for the police was added in 1829, immigration and borders in 1844, control of explosives in 1875, responsibility for the security service and domestic intelligence gathering after 1909, firearms control in 1920, and so on. So at the time of 9/11, we started with a 'Homeland Security' Department with a single Secretary of State, the Home Secretary — one of the great offices of state — who could, then, on behalf of the Prime Minister, undertake the heavy lifting across government on terrorism strategy and national resilience. The U.S. had, of course, at the time of 9/11 no federal equivalent of the Home Office. Organising homeland security and dealing with intelligence organizational issues (and the links between those sets of issues) absorbed and diverted valuable nervous energy in the Administration after 9/11. As has been mentioned, I've been the Permanent Secretary in the UK Home Office. I've been the Permanent Secretary in GCHQ and in the Cabinet Office coordinating intelligence and security. I've held senior positions in the Ministry of Defense. These are exactly the experiences that were actually needed to pull together a counterterrorism strategy for the 21st century. The British tradition of a permanent civil service can provide that. The American tradition finds it very difficult to grow people who have senior experience of both domestic policy and overseas operations, and law enforcement and intelligence.

Now, when we began to put together the UK counterterrorism strategy, we had some very intense debate about the desired end state. Was it the defeat of terrorism? Was it the destruction of AQ? Was it to prevent the follow-on attack to 9/11, as we heard earlier? What we did was to look at past terrorist campaigns and how they ended, and chose a different approach. We worked out what we thought was AQ's strategy and set out to deny them what we thought they were most seeking, which was extreme fear, dislocation of our lives to force changes in foreign policy, and to incite overreaction by the security forces, and thus, create the classic revolutionary conditions for radicalization and the mobilization of the Umma to violent jihad. We didn't want to fall into the trap set by all revolutionary and anarchist violence — of the sort described by Camus in *The Rebel* and in Pontecorvo's 1966 film, *The Battle of Algiers* (which, incidentally, I recommended to the FBI Director as essential watching). It followed that for the UK, in Madeleine Albright's words, we would regard terrorism as a criminal act that should be treated accordingly. So we built the strategy under the international human rights legal framework, not as did the US under the war paradigm using the international humanitarian law of armed conflict.

The formative experience for me was Northern Ireland. For part of the 1970s I was the Ministry of Defence desk officer for military support to the civil power in Northern Ireland and for countering international terrorism after the Black September attack on the Munich Olympics. Those experiences led to the formalization of the concept of military support to the civil power — a UK doctrine which you can compare and contrast with the problems that the *Posse Comitatus* doctrine creates for the Federal Government in contemplating

the domestic use of military force. Those experiences led to the setting up of a standing special forces capability in the UK to support the police in resolving terrorist incidents at home (and, later, abroad) and the setting up of a more effective central crisis management machinery. Now as has already been mentioned this morning, in the bad days in Northern Ireland, the authorities effectively lost control of the streets with rioting every night. We had intercommunal violence and terrorism mixed up. It turned into a counterinsurgency campaign by the army. But lacking pre-emptive intelligence, precision could not be used to arrest suspects and enforce the law, and the bludgeon of state power had to be deployed — large numbers of troops on the streets, with armoured vehicles, house-to-house searches, and roadblocks. The introduction of detention without trial and the coercive interrogation of a small number of suspects using white noise, hooding, war standing, deprivation of sleep, and deprivation of food and drink was a disaster. The result was hunger strikes, and what today we would call the radicalization of the community. No intelligence of real value was obtained, and we were found guilty as a nation by the European Human Rights Court of inhumane and degrading treatment of the small number of suspects who were coercively interrogated. The propaganda battle was lost and the Provisional IRA ended up being bankrolled in Boston. The five interrogation techniques were banned by then Prime Minister Edward Heath from use by UK Armed Forces or intelligence authorities for all time, and you can imagine our reaction when we discovered that our American friends were using those techniques and worse. The US policy was not a topic — and this, I think, is for the history books — that was ever shared at the time in the very many transatlantic discussions that we had, since I suspect our interlocutors knew what our response would have to be. So they spared us the embarrassment.

David: The objective we set for CONTEST, therefore, was different in strategic intent from that of U.S. policy. The UK objective was normality. The formal objective was set ‘to reduce the risk from international terrorism so that people can go about their normal lives freely and with confidence’. We set those two boundary constraints very deliberately — “freely” meant you didn’t have to give up essential freedoms under the law; and “with confidence” related the strategy to the concepts of resilience and fortitude, which have already been referred to. Would people use the London underground? Were markets stable? Were tourists arriving? Was there inward investment? If you take normality as your goal, then it has clearly succeeded as the 2012 Olympics in London demonstrated. As a strategy, it’s still in force ten years on. It’s on its third Prime Minister. It’s on its sixth Home Secretary. I’ve counted. The driving logic of the strategy - borrowed from the experience of the PIRA attacks in Great Britain was risk management, not risk elimination — again, a key difference, I think, across the Atlantic. We defined risk as likelihood of attack times vulnerability to the attack times impact should an attack succeed times duration of resulting disruption if you have an attack. The strategy was then mapped onto the risk equation with campaigns to ‘pursue’ terrorists, to ‘prevent’ radicalization, to ‘protect’ key infrastructure, to ‘prepare’ for sweeping up after the inevitable attack that we knew would eventually get under our radar. That risk management logic is really the reason why this ‘4P’ strategy is still in force today. It was the strategy behind the 2012 Olympic security effort, and it worked.

Reverting back to the legacy of British history, another key date is March 1883 when the Irish Special Branch was formed inside the Metropolitan Police to combat the Irish Republican Brotherhood. Now, Special Branch was an inspired concept. It linked national level intelligence work with local police forces that each had their own small dedicated



special branches with handpicked officers who wore the cap badge of the local area but who were trusted with the national intelligence picture. That key link between local and national was almost entirely missing in the United States at the time of 9/11. Another UK key date was 1909 when MI5, the domestic security service was set up. Here again, there was Northern Ireland experience to apply. There was initially deep mistrust between local law enforcers and national intelligence people. They just thought differently. This came to a head in the late 1970s and was eventually resolved. Twenty years on — after twenty years of getting used to living with each other, by the time of 9/11 - we had an extremely effective counterterrorism investigation system with joint operations between the police and the security service. It wasn't the much-touted Templer solution from the British experience in countering the insurgency in Malaya, which would have had a single security supremo in charge of the armed forces, the civil authorities and the police. That, we thought, was unworkable in a peacetime democracy particularly where the police are operationally independent of government.

But — and I did say there were a few “buts” — this historically-informed approach was not without its problems. The legislation we inherited from the Northern Ireland emergency predated the Internet. It predated the use of the web for radicalization and terrorist communication. It didn't provide sufficient time before the legal time-limit on the decision to charge or release suspects for the authorities to examine their computers and electronic devices. It took six separate pieces of legislation to fine tune British counterterrorism legislation to the realities of AQ-type terrorism.

Another ‘but’: the use by AQ of suicide bombers made the physical security legacy from the Provisional IRA era inadequate. More fundamentally, it was necessary to have preemptive intelligence, not just effective post-attack investigation after counting the dead. A key to unlocking the Northern Ireland peace process had been high-grade intelligence leading to so many terrorists on both sides being captured or killed that they concluded they could not win.

That level of intelligence attack on hard targets had required some quite major innovations. The experience was invaluable when it came to the jihadist targets after 9/11. This is one of the great success stories across the Atlantic. The U.S. and UK cooperation in developing advanced intelligence techniques especially for digital intelligence since then has been outstanding. It's just a pity that Edward Snowden has revealed a little too much about the global reach of some of those innovations.

David: Combating violent jihadism requires a consistency of domestic and overseas policies. Iraq was a very hard case in that respect. The occupation caused radicalization blowback within the UK. You'll have detected from Nigel's talk that the overseas agenda and the domestic agenda were not really fully joined up. Nigel and I spent a lot of time discussing this. We made it work, but it's only now that we have a National Security Council and National Security Staff that cover the full range of threats, and the same change was of course made in the United States, that I think I feel confident that a holistic view will be taken.

Finally, from our history in the old British Empire there was a lot of historical experience of Wahhabism, of takfiri salafism, and so on we could have drawn on, but initially, at least, I don't think we did as much as we should have. I am not sure that we really understood the nature of what we were up against in the early days after 9/11 of the violent jihadist

movement. Finally — and this point has already been extremely well-made by others — the lessons of the past were of little help when it came to public information. The shadow of Iraq hung over public discourse, as has already been explained, and it was very difficult, I think, for ministers in particular to explain to the public why we were being attacked, what it was that was driving these committed ideologues. I think our previous experience really gave very little guide as to how you manage to warn the public when necessary, alert them to evident dangers, muster public support for counterterrorism measures but avoid scaring the public to the point where confidence in public safety is shaken and, thus, avoid undermining the very strategic objective we were trying to achieve — which was normality.

John B: Thank you, David and Bobby. I'm going to focus my remarks on the legal framework that was adopted by the Bush administration after 9/11. I think, as most people in the room know, the legal decisions that we made were amongst the most controversial of the Bush administration and, together with the Iraq war, came to define the administrations legacy around the world in some unfortunate ways. I'm going to focus on four of the most controversial decisions: the decision to treat the conflict with Al-Qaeda as a war rather than as a criminal law enforcement enterprise; I'll briefly touch on the decision to set up Guantanamo; the use of military commissions; and then finally, the CIA interrogation program. I want to end with how those policies evolved in the second term of the Bush administration and then how they have evolved or not evolved in the first term of the Obama administration.

John B: Just two points by way of background — one, I did serve all eight years of the Bush administration from, really, the beginning till the very end largely as Secretary Rice's lawyer attached to her. I was in the White House situation on 9/11 and spent the next seven and a half years working on all of these issues. There are two things, though, I think, that people know — one, that there was enormous disagreement amongst principles amongst many of these decisions. That has been, I think, well-documented. If Peter Baker's here, Peter has documented it even more in his book. I think you also know that there was even more disagreement amongst the lawyers in the administration to the point of real bitterness and exclusion of one another when some of these decisions were made, and I will touch on that. I tended to be on the more moderate side of these debates, perhaps reflecting the views of my boss.

I just want to say one other thing by way of background. We touched on international law this morning, and a lot of the debate about the legal decisions made by the Bush administration has to do with international law. There were, in fact, great divides in our administration about the role of international law, and there were certainly some in the administration who did not believe in international law at all or, at least, that it was a hazy concept. There were others who believed in international law. I would put myself in that camp, although I would agree with Doug Feith that there were a lot of things that other people said were international law that we didn't necessarily agree with. But the President believed in international law. One of the very first decisions made by President Bush in the second term in February 2005 was to order this state of Texas to review the death sentences of a whole group of Mexican nationals, because the International Court of Justice had required us to do so. They did this on the recommendation of Secretary Rice, because we had to comply with international law. It was domestically a very difficult decision. It was extremely unpopular in Texas where he had been the former governor. The, then, present governor of Texas who is still the governor, Rick Perry, and the, then,



attorney general of Texas — a man whom you may have heard of, Ted Cruz — then challenged President Bush's decision, saying that it was unconstitutional. They took that all the way up to the Supreme Court. Actually, we lost before the Supreme Court. But the point here is, in fact, when necessary to comply with a clear international law mandate — which in that case it was clear to comply with an ICJ ruling — President Bush made the difficult decisions to comply with international law.

All right. Back to the narrative here, though — first, the decision to treat the conflict with Al-Qaeda as a war — this was perhaps the most momentous decision and from which everything else has flowed. It was touched on, I think, by Phil Bobbitt and others that it was a decision that was made very rapidly after 9/11, and in part because of the analogy of Pearl Harbor, the President and his advisers saw this really not just as another small series of attacks but as a major attack like Pearl Harbor, to which the only appropriate response was going to be a military response. That, then, justified as a legal basis the right to use military force to kill and to detain, and that remains the legal basis to this day for many of our operations against Al-Qaeda and the Taliban. Unfortunately, although we used that as an organizing principle, we did not apply some of the traditional laws of war like the Geneva Convention — something that we were much-criticized for in Europe. In February 2002 we had great debates on whether the Geneva Conventions should be applied. As a purely legal matter, something that was not understood, I think, by almost anybody in Europe — of course, the Geneva Conventions don't apply, technically. They apply — the very first two articles make clear that they apply to conflicts between states. A conflict between the United States and Al-Qaeda is not a conflict between states. It's a more difficult decision as to whether the conflict with the Taliban — who, of course, were the national army of Afghanistan — should result in the application of the Geneva Conventions. That was actually a decision that I did not personally agree with.

John B: A problem, though, for the administration in the first term which continued in the second term was that by using the laws of war to kill and detain — essentially the rights under the laws, customary international laws of war — but not applying the written Geneva Conventions that gave privileges to detained persons, it looked an awful lot like we were cherry-picking under the laws of war, using them to our advantage when they worked to our advantage but rejecting them when they would appear to put burdens upon us. We were accused of cherry-picking. Lord Steyn — whom I have never met but was much-quoted against us — accused us of putting detainees into a legal black hole.

Let me turn quickly to Guantanamo. Guantanamo — the narrative there is essentially that that was a mistake from the very beginning, that we should have recognized that. President Obama, even, in a speech earlier this year said that Guantanamo was a facility that should never have been opened. Certainly in a lot of ways, given how it has become an albatross around our neck, it looks that way. The problem was there were not a lot of other alternatives to hold people who were detained. Our commanders in Afghanistan said, "This is a hot war in Afghanistan. We don't have a place to hold people, much less a place to interrogate people. There is no facility. You've got to get them out of here." There was not an appetite to take them into the United States. There really was no place to hold them in the United States. The naval base at Guantanamo Bay, Cuba was a convenient place to hold them that was near the United States. Of course, it also helped in the minds of our Justice Department that that way our Constitutional protections of those in the territory of the United States would also not apply to them. But the point there on Guantanamo is that, while amongst critics it looks like a very easy decision that could have

been avoided, in fact, there were not a lot of alternatives as to where to hold people. This is one of those things that in retrospect looks like an awful decision but at the time looked like something that was convenient to do.

Military commissions — this was one of the earliest decisions made by the Bush administration to use military commissions to prosecute detained persons who we believed had committed war crimes. It was, in fact, clearly based on historical precedent. Military commissions had long been used in different wars going back to the Revolution, in the Civil War, in World War II to have tried Nazi saboteurs — who, then, actually challenged their convictions under military commissions all the way up to the Supreme Court. The Supreme Court clearly said that military commissions could be used. That was the historical precedent that those who had developed them had clearly looked to. So in that case, we really had looked clearly to our past use of history for prosecution of war criminals. The problem was, as some people know, this is one of the worst processes in the administration to make any legal decision. This was where we saw, really, the divides amongst the lawyers. There was an interagency group that was working in October to look at different ways to prosecute terrorists, whether it be federal courts, court martials, military commissions, or even an international tribunal.

John B: Frankly, we were lurching towards probably some combination of court martials or military commissions when a smaller group of lawyers from the Justice Department, the Defense Department, the Vice President's office, and the Council's office simply decided that the main group wasn't — of which I was part of the main group — wasn't moving fast enough, and so they secretly went to the President, having drafted their own order to set up military commissions. They took it to the Staff Secretary of the President, who said, "Gee, this looks like a momentous decision. Has it been run by the Secretary of State, the Director of Central Intelligence, even the National Security Advisor?" The people who had it said, "No, the President has already decided he wants to do it. Just take it in to him." So that's what happened. The President signed the order creating the military commissions. The Secretary of State, the Director of Central Intelligence — who was responsible for interrogating some of these people — and my boss, the National Security Advisor never even knew about it — so one of the most momentous decisions of our administration made behind the backs of half of the principles in it. Although, over time there were changes made to the military commissions, I think this bad process is what contributed to at least part of the problems.

Let me move to what's clearly the most controversial decision of the administration, which is the CIA interrogation program — which has resulted, of course, in charges of torture and calls for prosecution of Bush administration officials. The story 12 years later — and this is where, I think, history is important — even 12 years later the real story, I think, has really not come out in part because those who supported the program and those who now oppose the program are so vested in their narratives that the real discussion of what actually happened and why it happened has never come out. So we have those who are strongly opposed to it saying, "This was clearly torture. Unless those who supported it admit that it was clearly torture and that it was wrong, we're not going to have a discussion." That has resulted in those who originally supported it saying, "This was clearly the right answer. We're not going to admit that it caused any damage to the country or might not have been effective, so we're not going to have a discussion either."

So 12 years later there has really been relatively little discussion of how the program came about. In fact — and Philip Zelickow, my colleague, referred to this — the White House was

put into a difficult box here. The CI proposed this program to the President. The DCI, George Tenet, said, "We must do this. There will be further attacks. Khalid Sheikh Mohammed has in his head the information that will prevent those attacks. But we have a nifty program that has been developed from years of use against our own people that is safe and effective, and I recommend to you, the President, that this is what we use." Of course, this was the Director of Central Intelligence recommending this to the White House. So the White House staff asked the attorney general, "Well, is this legal?" The attorney general came back and said, "I have reviewed this and have concluded that this is legal." That, then, puts the President and his White House advisers in a difficult position when the person entrusted with intelligence operations says, "I recommend this to you," without offering other alternatives, and the attorney general says that it's legal. You would be in a difficult position if you rejected that.

The OLC opinion — which has now become famous — written by John Yoo concluding that the program did not constitute torture, interestingly, left out a good bit of history. Now, arguably it's not the role of an OLC opinion to be talking about historical context, but interestingly, it did talk about the programs of Great Britain and of Israel — the similar interrogation programs — but used those programs for an unusual purpose. It said both of those had gone up to the European Court of Human Rights, with respect to the British program, and with respect to the Israeli program, to the Israeli Supreme Court. Those two courts had concluded that those aggressive interrogation programs did not constitute torture. So therefore, the OLC opinion presented to the principles said, "See, these other programs were found not to constitute torture. Therefore, they are okay." In fact, what was left out was how controversial these two programs became, how the European Court of Human Rights and the Israeli Supreme Court concluded that they constituted cruel, inhuman, and degrading treatment which resulted in the dismantlement of the programs.

John B: So here's a bit of history that, in fact, principles — as Phil Zelikow said — really were not — the principles were not aware of at the time. Hard to know had they been aware of that whether they would have made a different decision. I am not aware until years later whether my British colleagues or Israeli colleagues were actually even raising this with our principles — in part, as David has said, perhaps because they didn't know what we were doing. Congress throughout this period of time was continuing to approve the program. Hundreds of members of Congress were briefed on the program over the subsequent number of years, and virtually none of them have raised any concerns. So this was something that all the highest levels of our government were largely aware of but allowed to continue to proceed. For those of you who read or know Irving Janis' book, *Victims of Groupthink*, I think there's possibly some analogy here — senior levels of a government extremely concerned about a threat really caught in something of an echo chamber. Of course, that was also another CIA program that was proposed to President Kennedy.

I want to briefly turn to the evolution of these decisions. Those are all the decisions in the first term of the Bush administration. By the second term we realized that we had problems in a lot of areas, particularly having to do with detention and terrorism. With Secretary Rice at the helm of the State Department, and Steve Hadley, who's not here today, as the National Security Advisor, we worked very hard to try to pivot. There was significant evolution in all of these areas. Much of this was overlooked, I think, in Europe and even in Britain, in large part because people at that point were so disillusioned with the Bush administration that they really didn't notice what was going on in the second

term with respect to the legal basis and the legal rights, significant changes with respect to detention, new review mechanisms for detainees. Congress passed the McCain Amendment, which prohibited cruel, inhuman, and degrading treatment of detainees. Our Supreme Court got into the act and issued a number of decisions including, most significantly, in 2006 the Hamdan Decision concluding that Common Article 3 of the Geneva Conventions applied to the conflict with Al-Qaeda.

Guantanamo — we started working very hard in the second term to close Guantanamo and reduce the numbers. We started from 775 or so people and by the end of the second term had transferred out more than 500 with very little help from most other countries. Britain — I was in many negotiations with the British over the return of the British nationals who were actually happy to take back their nationals, but many other countries were not. The military commissions were substantially revised. The CIA program was substantially scaled back on the State Department's recommendation. Just a brief vignette there — after the Supreme Court's decision in Hamdan concluding that the Geneva Conventions applied, or, at least, Common Article 3 applied and, therefore, that any detained persons could not be subject to cruel, inhuman, or degrading treatment or to outrages on their personal dignity, I wrote a, then, highly classified memo which has not been, of course, made public to the Justice Department with Secretary Rice's backing saying that the CIA program, in fact, was not compatible with international law, that holding people naked and shackled could not be said to not constitute cruel, inhuman, or degrading treatment. As a result, the program was held up for several years.

John B: Interestingly, at the same time that we were holding up the program at the State Department, Congress was continuing to fund it. So my view on that is Congress could have read the same Supreme Court decision that I read, but for whatever reason, they chose not to take any action. At the same time — as Bobby mentioned — we realized — and Doug Feith had sort of set this up from the first term — we realized that we had not done a very good job in explaining what we were doing across any of these decisions to our allies and began a dialogue — multilateral, bilateral — with the British, with smaller groups, larger groups. Seven years ago last night I gave probably the most comprehensive speech given by any administration official at the London School of Economics explaining all of our legal decision-making to explain the legal basis for our decisions. This began to sink in. I know John Reed gave an important speech in April 2006 talking about the Geneva Conventions being out of date. The Foreign Affairs Committee in Britain, as part of a report on Guantanamo, said the Geneva Conventions needed to be revised. So this began to sink in a little bit. I need to wrap up. I will just simply make the following point that, one, the Obama administration, of course, has maintained almost all of these policies — to the surprise of European allies. Of course, it has stopped one CIA program — the interrogation program — but replaced it with another — the drone program, which has resulted in a good deal of discussion as to is it better to subject people to very aggressive interrogations, or is it better just simply to kill them.

In conclusion, I think certainly we can say that the Bush administration made a lot of mistakes in the legal decisions that were made. A lot of these were adopted very rapidly after 9/11. As one person said, there really was no book on the shelf for us to turn to that had the answers on how to make decisions in a conflict with a non-state actor like Al-Qaeda who did not fit neatly into the criminal laws or into the traditional laws of war. These decisions ultimately, I think in my view, seriously damaged the U.S. brand around the world for commitment to rule of law. But there were not — this does not mean there

were easy answers to these decisions. The problem is not just that the U.S. refused to follow the clear rules or even bent the rules. In some cases maybe that criticism might be fair, but in many cases there were no rules or the rules were unclear. This is one reason why 12 years later — and Bobby Chesney alluded to this — you line up 100 of the leading experts on the laws of war or international human rights and ask, “All right. What’s the law that’s applicable that the U.S. should be applying in the Bush administration, in the Obama administration,” and they will still give you 100 different answers. This is where I will agree with Dough Feith that if the international law is so clear, then you shouldn’t line up 100 people and end up with 100 different answers.

The Obama administration, of course, has adopted many of the same policies even after having criticized them. So I think what this means is that, in fact, there is a lot of work that needs to be done still to develop the appropriate rules for a conflict between a state and a non-state actor. The Obama administration, I think, could never have guessed in a million years that four years in, in the beginning of its second term that it would then be accused of violations of international law and of war crimes. I think the challenge now for them as it was for us in our second term of the Bush administration is to work harder on the outreach to allies to try to reach some consensus on what the rules ought to be going forward. That was the challenge for us eight years ago. It remains the challenge now. Thank you.

Theo: Okay, folks. As a British national of Irish origin with a French wife and a Swiss mother, I thought I’d offer some European perspectives on John’s paper, actually, which was sent to me in advance. I want to just focus on two things. I’m going to offer some perspectives on international law, and I saw this as somebody who is not an international lawyer. However, for my sins I coauthored a book on my wife on international law and international relations now in its second edition with the Cambridge University Press, inexpensively priced. So I found myself about five years ago reading a lot of stuff on use of force and international crimes — which are the two chapters I first drafted. So I’m going to suggest — albeit recognizing that I’m not an international lawyer like John — that there’s not so much difference in terms of European legal opinion on some of these issues. Then I’m going to switch hats and as a war studies professor, I’m going to reflect on the implications for strategy. So I’m going to deal with the law bit and not the intelligence bit, because I know even less about intelligence.

So with regards to four developments that John discusses in his paper, I want to suggest that two of these are not at all controversial and two of them are very controversial from a European perspective. So the first development, which is going to war against Al-Qaeda and the Taliban in Afghanistan, it simply is not controversial whatsoever. It seems to me the Nicaragua case of 1986 pretty much nails it. If you’ve got a terrorist group attacking from a state and the attack is of a scale that would be similar to an attack by another state, then you’re perfectly entitled to use force in self-defense. In any case, as John points out in his paper, you’ve got UN Security Council resolution 1368, which recognizes the attack as a threat to international peace and security. So that one is just no problem whatsoever.

Then there’s also the extension of the war from Afghanistan to this global war on terror. I have to say the discussion this morning has been really fascinating for me. I mean, it has been really interesting to just hear about how senior policymakers have been grappling this issue. So the insight we have about where the “Gee, what?” label comes from I just thought was fascinating. I think there are obviously also some controversies around it as



Sir Michael Howard weighed in, saying it was nonsense to wage war on a tactic. I think that discussion this morning was very enlightening in that respect. But it's not at all controversial, I think, in legal terms. I mean, it could be, because credibly there might be implications with regards to a claim for use of force in self-defense against terrorist attacks, and the Israelis and Americans have been outliers along with the Russians on this. Most of the international community, I think, would be more cautious about claiming that — you claim self-defense in this respect. But the “Gee, what?” label in and of itself has no immediate legal controversy around it.

So it's the other two things that John raises where I think if you put 100 international lawyers up against a wall and 99 of them were European, they'd all be nodding their heads going, “This is against international law,” with the exception of some people in the [British] foreign office. So the first — the third, then, one, which is controversial — the third development which is controversial is this thing about initially declaring members of Al-Qaeda and the Taliban to be unlawful enemy combatants is just a makey-uppey [sic] term. In your paper you say there's a long historical providence under the laws of war, but most European international lawyers just shook their heads and thought, no, no, we don't recognize that. Then as you write — you point out in your paper — it's reviewed in early 2002, and it's decided that the Common Article 3 of the Geneva Conventions does not apply to these enemy combatants. It seems to me here the one thing you don't discuss in your paper is the Tadic case — the appeals chamber of the Tadic case in 1999 that basically says almost the entire corpus of laws of armed conflict rules that apply in international armed conflicts apply in non-international armed conflicts. So as the ICTY says in a subsequent case, there are no legal loopholes now. It's closed. Then as the ICRC subsequently follows up on, it says that almost all 168 rules specified in convention law, the laws of armed conflicts now apply to all armed conflict without exception, period. So you don't discuss that. But it seems to me, basically speaking as far as European international lawyers are concerned, with the exception of perhaps certain people in the foreign office, the Common Article 3 applies. It just does.

Theo: The fourth development, which is also very controversial — and you quite rightly discuss this in detail and, again, in very interesting detail in your paper — and I learned an awful lot — are the enhanced interrogation techniques that were applied in Guantanamo and in the CIA rendition program. It seems that it's fairly obvious to almost every European international lawyer with the exception of those others, as I mentioned, that these are certainly in breach of Common Article 3 of the Geneva Conventions. These are probably in breach of the Convention Against Torture. As you right point out, these techniques are certainly outlawed in Europe by the European Court of Human Rights. Therefore, the European view is that these are, on balance, torture. You're basically talking about torture. What you don't talk about in your paper, though, is that you, therefore, America — if it is, indeed, engaged in the business of torture in this period — is breaking a peremptory norm of international law. I think, therefore, the comparison of the drone program doesn't apply. I mean, crudely put, is it better to be engaged in torture or engaged in drone attacks against terrorist? It's far better for the U.S. brand to be engaged in drone attacks. Torture is such a grievous offense against the norms of civilization. You're breaching a peremptory norm of international law, and I would say, on balance, your brand is better off doing what Obama's doing. But, hey, I'm perfectly prepared to be proven wrong in that type of discussion. Nevertheless, what the Bush administration does is break a peremptory norm of international law. It gets away with it for fairly obvious reasons, but many other states wouldn't.



So what we have are these four developments — two which are not controversial and two which 99 European international lawyers out of 100 would say are controversial. We could say, “Are these manifestations of this new powerdom [sic] that you mentioned?” — this memo that President Bush writes and authorizes in February 2002 where he says, “We need new thinking on the laws of war.” This is something that Lord Reed and Douglas Feith have both spoken about this morning. They’re also — both Lord Reed and Douglas Feith were saying, “It’s time, really, for international law to get real, for international lawyers to do a bit of work here and connect law with the new realities that we find ourselves in.” I would suggest, actually — ironically enough — there is a bunch of international law that you could apply, and that is the New Haven School — the work of McDougal and Lasswell in 1940s and 1950s — and even Richard Falk in the ‘60s and 70s, because the — and these are, of course, liberal international lawyers, and there’s the irony. But, you know, use what you can — because these liberal international lawyers right at the end of the Second World War where you were facing the threat from the Communist Bloc were saying — they were rejecting the moral equivalents of the democracies in the West and the Communist states in the East. Just as today many policymakers reject the moral equivalents that sovereignty seems to extend to dictatorships and democracies. These liberal international lawyers were saying that international law must serve a progressive purpose and must ensure strategic stability. So you have to — it has to evolve to meet the needs and demands of a progressive world order, which is what many policymakers would agree today. So in this sense, conducting a global war on terror, promoting democracy as a way to promote stability and progressive values would be entirely consistent with this New Haven School of rhetoric.

Theo: Okay. I’ll quickly switch hats and put on my war studies hat and discuss the implications for strategy. I would respectfully suggest that for many people in my department, in the war studies department — we talk about war quite a lot, and we talk about history quite a lot — Iraq is the greatest strategic blunder by a major military power since the Japanese attacked Pearl Harbor. Guantanamo and the CIA rendition program are as strategic [unintelligible 1:02:27] of the United States. So before I go on, I just need to say a word about strategy. Here, I find myself — I’m really convinced — I agree entirely with what Douglas Feith said earlier about strategists. Some people get strategy, and you can’t really teach it. So all those books that are in the airports, they’re just rubbish. Don’t bother buying them. You either instinctively are strategic in how you think about things, or you’re not. I also agreed entirely with what Lord Reed was saying over lunch in his comments about [how] strategy is not really about thinking. It’s actually about the practice of strategy.

As it happens, my colleague, Sir Lawrence Friedman, has just published a rather slim volume about strategy. It’s about 600 pages long. For those of us that are keenly awaiting the Chilcot Inquiry Report — and Sir Lawrence is the primary author of that, actually — our hearts might sink when we realize that, (a) his latest book, like his last book, is 600 pages long, so the Chilcot Report is going to be quite long; and (b) this book on strategy took 14 years to write. The joke in Britain is we’ve been waiting for the Chilcot report for quite some time. What Sir Lawrence does in the book about strategy is he says, “Well, we have this way of thinking about strategy — ends, ways, means.” Most books about strategy that think about strategy present it like this. But what he does in his book is he looks at the practice of strategy in war, politics, and business. When you look at how

people actually engage in strategy when they practice strategy — and they don't really go about the process of ends, ways, and means.

He makes three basic points, so I'm just saving you a lot of reading, actually. This is like that joke in *Cheers* where Sam really wants to impress Diane, so he reads his way through *War and Peace*. At the very end someone says to him, "Why don't you just see the movie?" He goes, "What? There was a movie?" Sam was somebody who struggles when he reads. That's the joke. Anyway, the three big points coming out of Sir Lawrence's book are: (1) when you practice strategy, for people practicing strategy, it's really shaped by the starting point. It's not where you want to get to. It shapes the challenges you face now, because most strategy is defensive, not offensive. Senior leaders and policymakers or leaders in industry and business, they begin to engage in strategy when they're faced with a challenge that requires their attention. They have to engage with it. So most strategy is actually not ends-oriented. It's beginnings-oriented.

His second point is: because you're grappling with an immediate challenge, strategy is actually invariably about getting to the next step. So it does tend to be very often operationally-focused. So that's why you get the drift to the operational space. But obviously, you need to resist that temptation — which gets to his third point, which is really the point about strategy is just to create options for yourself, to constantly be creating options, and if possible, closing down options for your opponents. Invariably, this rotates around allies. So when he gives his talk about his book, he invariably invokes the example of Churchill, who breaks open his third bottle of champagne in the morning when he realizes that the Americans have joined the war. He said, "That's it. The war's over." His whole purpose was to get the Americans into the war, because that would increase options and bring a powerful ally in.

Theo: So if we apply Sir Lawrence's approach to thinking about the strategic implications of the kinds of developments that John talks about in his paper, well, we have our starting point, which is 9/11. We have our great challenge that, as we know, of course, Al-Qaeda was on the radar for senior leaders, but, oh, my gosh, all of a sudden it requires very senior attention and immediately. But I would suggest that the next step is not a global war on terror. The next step is finishing the war in Afghanistan. As much as — and I think there's — obviously, we realize now that's a — those of us who have been looking out inside the policy machine — that, of course, policymakers are very concerned not to repeat the mistakes that the Soviets made. There's a fine balance between being seen as an army of occupation — flying so many forces that you get drawn in and stuck — and sending in such little force that you cannot complete the mission. If you look at the analysis of Tora Bora, there are lots of criticisms to be made about the failure, actually, to capture the senior Al-Qaeda operatives around Tora Bora. The army units that went in for that mission were grossly under-resources, actually. It's quite abundantly clear that the decision to extend the war and pursue a campaign against Iraq draws off resources from Afghanistan in 2002 before the mission had been completed.

Finally, in terms of creating options, here, too, I think criticism could be made about the kinds of developments that we've seen in the American approach in the first Bush administration, that there isn't a unilateral instinct in the Bush administration, [that] there is a — that leads to a creative approach to international law, which perhaps was necessary in retrospect. But the net effect is that the U.S. brand gets hammered, actually. This does foreclose options for the United States, because allies become grossly disillusioned.

Moderator: Thank you. Mathew?

Mathew: I wanted to take a slightly different tack to where we've been going, and do some reverse engineering here, and think a little bit about the question, "Could it have happened differently? Could we have done a different strategy, adopted different tactics, adopted a different approach legally?" I had a professor — one of my first — I was trained as an historian. One of my first history professors spent a lot of time on counterfactuals. Obviously, there are an endless amount of things that could have happened differently, that could have led to an infinite number of different outcomes. But I wanted to look at two particular issues. A lot of this, I think we've been talking about here. The first one — and it gets to a little bit on the strategy question — is the analysis. Sir David talked a little bit about, where the British were with their different approach, they may not have completely understood this threat — which I think is the case for both of us, this transnational threat that we were talking over lunch. But because of what they had been doing with the IRA and so on, they were maybe in a better position. But obviously, we were caught flat-footed. The intelligence community — here you could talk about not connecting the dots, which was the big charge against them after 9/11. The fact that internally within the different bodies of the intelligence community, they weren't connected in a way that — with the dots that they had, they couldn't connect. But I think there was a bigger issue here, and that's why I use the word "analysis." That is really getting to the nature of the threat, which we did not understand. I'm not sure that, actually, the public completely understands. Part of this is the network basis. Part of it is to understanding that it is an ideological coalition and understanding the kind of historic inflection point that the large part of the Muslim world is going through — that modernization phase that we went through probably in the 15th, 16th, 17th, and 18th centuries.

Mathew: So that kind of dislocation, the fact that the radicalism, these ideological ideas, the complaints about the West would really have a huge audience even when they weren't prepared necessarily to engage in the violence. That, probably, is a message that we're still not completely grappled with. We spent a lot of time thinking about winning the hearts and minds, but certainly that was because I don't think the analysis was completely there and because I think bureaucracies, once they get started on a certain footing — and that footing was the global war on terrorism where we were going to stamp it out, completely uproot it — that we didn't venture down that particular lane of thinking, how do you fight this ideological battle. So that's the first point — is really on the analysis.

The second point is really looking at some of the structures, and certainly, John's paper talked a lot about certain times when the administration had little time to reflect on what it was doing, on the measures, particularly on the CIA engagement program where there was an end-run around the rest of the bureaucracy. Certainly, those were features. I think, as I mentioned in the intelligence community, the lack of sharing that certainly characterized pre-9/11. I think we — Will, and Tom, and a number of us in here — worked during the second administration really on developing a network where we actually tried to get more of a strategic approach. That, I think, is more than ever needed. Again, I think this is because we don't realize the inflection point we are in. It's just not about terrorism. It's about a lot of other things that are structurally, in very big ways, changing. Lord Reed talked this morning about the fact that individuals now have the capabilities that normally were reserved for states for doing harm. That's something that

we haven't, actually, in the kinds of structures that we have really adapted to. I think there's a great — I keep saying this — there's a great book out there that — or a study that Leon Firth did looking at what you would need to do in terms of the decision-making to really begin to tackle these, what he calls, "wicked problems." These are much more complicated problems than we have had before in government and, certainly, getting the structure right so you, actually — when you're combating these networked threats — you're actually on your side also in a networked mode, and you're actually thinking through what each different part of that network needs to do in order to confront the other network. That certainly has not happened.

So I don't want to take up too much time, but in thinking through, then, this bigger issue of, "Could it have happened differently?" I'm of two minds in one way. I think, obviously — and Sir David's paper shows that the U.S. could have adopted a different approach. You had the law enforcement that there were certain things that Britain had been engaged in — principally on the IRA and also its Home Office that's of a two-century vintage by that time — that prepares it to take that approach. But in the U.S. case, I would say, "Were we prepared intellectually?" I think so much of the '90s was this end-of-history mentality. We really thought globalization was going to equate to Americanization. We had these — everything seemed to be also going that way. We were breaking out. The previous decade had been one where we talked about decline all the time. Suddenly in the '90s, if you look at the charts where, actually, in terms of GDP, World Bank actually making up time. So things were going all in the right direction. We didn't have an understanding except maybe Sam Huntington in terms of *Clash of Civilizations*, what was brewing underneath.

Mathew:

So on that side, I'm not sure — I think it may have been a bridge too far to really have, certainly when the attack happened, of suddenly changing our whole analysis, thinking through this problem. Certainly, at the time I can still remember people thinking that there was another attack right on the way and that sort of panic that when I remember being in discussions of treasury when senior officials were talking about, "We will have to dump our civil liberties. This is a different kind of world." It was a real panic. I think it's really too late in some ways. On the other hand, as I said — and it's something that we — again, Will and a few others — were exploring is I think there are ways of putting brakes institutionally in government. So you can actually get people to pause and think through some of the consequences. Certainly, I think by the second term of the Bush administration, that had happened largely because of some failures and blunders.

The final thing I'd say is — and I think we need to keep this in mind — that not everything here is bleak. I used to — one of my responsibilities was to put together the DNI's annual threat assessment every year. Obviously, if you read that from beginning to end, you can get very depressed, because it's a long list, and it gets longer. But the U.S. — we didn't have another major attack. You could say we've had some lucky breaks in that. I think the U.S. is safer. I think, as we were talking at lunch with Lord Reed, that the U.S. did learn, and there was a capacity there for learning from our mistakes and catching up. That's not to say that's necessarily where we should be in terms of changing government structures, but it could have been far worse. That's, I think, the other side of the coin when you're looking back on this reverse engineering. It could have been a far worse reaction on our part, and we could have dug a deeper hole for ourselves on a lot of these issues. In terms of the U.S. brand, you can look at the latest Pew poll in which, actually, we scored quite high on individual rights in terms of how the rest of the world looks on the U.S. So I don't think our brand has been irrevocably damaged. I do think we could have done a lot better,

but I would say that we really need to begin those — continue to take those lessons in. This bigger issue, really, about the change in the world and the inflection point is something that I think all of us need to actually take in more but also work on government structures to make sure that we can deal with these kinds of different threats — the kinds of threats we really haven't known and the ones that technology in many ways changing — technology is changing so rapidly that that kind of threat is changing.

**Moderator:** Thanks, Mathew. Well, Will has been generous since we've been running sort of beyond schedule all day. We've got some extra time. We have, I think, till 4:30. So let me get the ball rolling with — as moderator's privilege — asking a few questions of the panelists. I'll be very brief. Sir David, I wanted to pose to you the question of whether and to what extent we should be cautious about generalizing from the Northern Ireland experience. I've heard this discussion before and seen some people resist it on the ground that at least outside of context like Afghanistan, where we're truly intermixed with the population that is supporting the arm through, maybe it's not the most apt comparison. I'm not sure I buy that argument, but I'd like to hear what you have to say in response. Then for Mathew, since you've been in the business of forecasting and looking at these long-term trends, I'd love to hear your thoughts on the extent to which the ongoing evolution of communications technology interacting with the — as you put it — the ideological coalitions and the shifting networks that are issued here — how much are we bound to be finding ourselves in constant debates of the kind we're having this summer with respect to the NSA and further debates about the use of technology to try to get the information that, whatever we may ultimately do with it — the human rights law model and the law of war model or otherwise — we're going to need the information to know who it is that's out there and what their intentions are. So maybe Sir David, you could go first.

**David:** Let me add just a few thoughts, although it's important not to generalize, because the Northern Ireland experience holds many lessons, some of which you can apply in current circumstances but others you can't. First, treating terrorists as criminals is, I think, a very important principle to hold fast to. It is, however, important not to see the law enforcement approach as passive, because it's only going to work if you have the most active and aggressive intelligence effort to actually give you the information so that you can use the rapier, not the bludgeon of state power. Otherwise, the very tactics that you're forced to use will alienate the public. Where do you get high-grade intelligence from? Most of it you get volunteered from the community that wants to give up the bad guys to have a quiet life. If you alienate the community in question, you won't get that intelligence. So that's one thing. A formative experience for me was in the early '70s going out on patrol in Belfast with a battalion of the parachute regiment, and watching some fairly aggressive tactics, and the young officer I was with saying, "Just let us take the gloves off, sir, and we'll sort them." You know that what would have happened would have been a short-term gain — they would undoubtedly have flushed out some trouble-makers — but at the cost of a long-term strategic loss of confidence on the part of the community. What worried me especially and why in particular we were so keen on this concept of normality as the end state for the counterterrorist strategy is the thought that you can make problems a great deal worse by the choice of short-term measures. I think it's Tolkien that says in *The Hobbit*, "Shortcuts make for long delays." These shortcuts usually backfire in the long term. That's what we've seen, I'm afraid, with the spread of the AQ ideology. Final point — I think much of the effort has to be in public information and trying to explain to the public the rationale for the strategy that is actually being followed. It's the job of government to dampen down any sense of crisis. It can be extremely hard to do, but



it's best not to encourage it. So picking up Matt's point there, yes, there was — in London too after 9/11 — there was the cry, "What do we do?" People rushing around. But it's a question of the authorities, especially the emergency services, being a calming, reassuring presence steadying all of that, and then trying to build on words like "fortitude" and "tranquility," and stressing that normality is what we are trying to achieve. In that way you hope, as I said in my talk, to deny the enemy what the enemy is most seeking to achieve if they're a revolutionary terrorist movement.

Mathew: Just to expand on that point, in the U.S. case, you could look at Boston and the reaction there, which actually was — you know, showed that fortitude but not panic. I think part of that was a learning experience that the U.S. had gone through in the last ten years

David: Good point.

Mathew: Maybe in the case of the UK, you know, you had bomb threats and bombs going off in London in the '70s and into the '80s from the IRA in there that was, that sense [of], I think, some learning from that about how you needed to be strong, resistant, obviously, but not also panic. On the information, I think this is going to be a bigger — the cyber is a much bigger issue than just as it relates to the intelligence community or specifically to terrorism. At this point, people have — a lot of people who didn't focus on this are suddenly seeing the extent to which the government — but also it can be companies — actually have this wealth of data that they can marshal. Hopefully, it will be for good and not for ill. But it is that discussion and debate are way overdue on this issue. It is so far up until this known — a point, I think, characterized by looking at cyber or the cyber threat from China. But it is not looking necessarily at what, obviously, government capabilities are, but also how companies can use the information if there aren't also restrictions on it. I think this is only going to get — you could say — better or worse, depending on your point of view, as we get these sensors hooked up to everything, and you have everything basically being run through the Internet. You have, (a) huge security issues that are going to crop up, because you're basically trading here between efficiencies and some increased vulnerabilities when everything — your electric grid, your water supply — everything is really controlled through and managed through the Internet. So how do you build in those real protections?

Mathew: Then the other thing is: How do you use it for good? There's a huge project — MIT professor, Sandy Pentland, has been working on where they have used all the call data from the Ivory Coast to map out for the government places where they could increase their infrastructure efficiency, help them deal with some of the ethnic issues. So it's a great resource, but our problem has been that before this known, we really didn't have that public discussion on it. The final thing I'll say is the intelligence community is not equipped to be the one that leads the discussion. From their point of view, they've been given a task to make the U.S. safer. They have these tools. There are certain things in the law that they have to abide by, but they're — as anybody will tell you — I mean, they're trying to do their job and use as many tools as they're given for it. So where the discussion needs to be is really the administration needs to begin that discussion. We need to begin to think about what are the trade-offs. I think now we've gotten to the point where you actually need some confidence-building, and that's where when they're talking about redesigning the FISA Court and things like this, that really is, I would say, the tip of the iceberg. It's going to be also on how your information is stored by companies is also used.



Moderator: Terrific. We'll open it up to the floor. In the back?

Michael: Michael Rainsborough, King's College London — I just want to pose a question, I think particularly to Sir David, but also I'd be interested to know all the members of the panel think. What would be the legal and moral position, ethical position, and, indeed, do you have any knowledge of whether there were any examples of this of a situation where countries which may be against torture, may be against illegal renditions were actually in receipt of security sensitive information derived from illegally rendited source or even sources which were — or information which was derived as a result of torture which might actually be sufficiently important that it might actually have to be actionable by countries which are actually against or rhetorically against torture and illegal rendition?

David: Well, it's a very real problem. It was a very real issue, because we, indeed, received extremely valuable intelligence, including from Khalid Sheikh Mohammed's interrogation. All attempts by us to find out the conditions, the location, and the modalities, by which this information had been obtained, failed. So we simply got the information, and we were very glad to have it. The position taken by the British courts is very interesting on this general point, which was that under no circumstances can information where there is a reasonable presumption it was obtained by torture be admissible in a court. On the other hand, the duty of the authorities is to protect the public, and, therefore, if information bearing on the safety of the public comes into our hands from whatever source, we have a duty to look at it, evaluate it, and if necessary, take action to protect the public. It seems to me that is really the only sensible position one can take. We also took the precaution of ensuring that everyone involved knew that we should not be encouraging other countries to use such methods to obtain information for us and, thus, achieve, as it were, by the back door what we were not prepared to do for ourselves. But if information came unasked, we would use it.

Moderator: Take some more — yes, in the back.

Bruce: Yeah, Bruce Jentleson too — a comment and then a question — the comment, I think, just all these panelists together, I think that a lot of the discussion has been what happened and how we better understand it over the last ten or fifteen years, but what's really coming through is the question of what's next. Right? So how does it — if 9/11 was a surprise that either wasn't foreseeable or could have been foreseen or wasn't whatever — and we've gone through drones and cyber — just think of all the different things that we've been facing that we now consider to be significant threats in the last three to five years, the question is: Not only what do we do about the ones we know, but how do we try to apply what we've learned towards thinking about what's next? It's not — to pick up on what Matt said — it's not forecasting or point prediction, but it's very much scenario-based kinds of things. What are some of the drivers we want to look at to get at least a rough sense in which to put this? I guess in that context, my question is for David. As you've mentioned earlier in your remarks about trying to sort of flesh out what you all thought the Al-Qaeda strategy was, can you talk a little bit about that process? How did you do it? Did you do it internally? Did you kind of entertain competing analyses? What was that process like trying to figure out what their strategy was?

David: Well, the process was very simple. We borrowed an experienced diplomat from the foreign office who gathered a team together including folk from the intelligence community and defense. They went away, and they worked on the issue, wrote it up, and

came back, and gave us a report on what they thought the threat amounted to. As I say, we were all pretty callow in those days, because we didn't really have the intelligence base, and we hadn't read or absorbed all the writings that were out there from bin Laden, and Zawahiri, and those who inspired them such as Qutb in Egypt and those inspired them such as Ibn Taymiya. That took a little more time. I think in your first part of your remark, you touch on something very important. This morning in answering a question I said that I worked with a model of intelligence which consists of four components: situational awareness (answering who, what, where and when?), explanation (answering why and what for?), estimation and prediction (answering what next, where next?) and I add a fourth category, which is strategic notice (whatever next?). Strategic notice is the queuing mechanism by which you alert the research and development community and the intelligence community, not to things you predict will happen, but to developments which you think are sufficiently important as to merit starting to think about them and research them. If that kind of strategic notice had really been around the community before 9/11, then may be some of the dots might have been joined up. I say "may" because this is counterfactual history. But that idea that systematically you should look at changes in the international environment, changes in technology, changes in social attitudes, and try and spot where you really want to direct future effort — that seems to me a very important component of what I regard as an effective model of the intelligence process.

Theo: Actually, I'll — just to — on this, "What next?" I'd just put a shout-out for Philip Tetlock's book on predictions, political predictions. I don't know if you're familiar with the book, but his basic findings — so he surveys almost 300 political scientists and asks them to predict the future. Ten years later he goes and looks at their predictions, and he finds their predictions are no better than tossing a coin. So really, actually, what you want to do, it seems to me, is engage in scenario-building for the purpose of scoping out possible moves that you might make — strategy, right — and the required capabilities. But don't think you can predict, because you probably can't.

Mathew: I was about to say scenarios and drivers [unintelligible 1:36:03].

Theo: Yeah.

John R: What I think you can see —

Moderator: This is John Reed.

John R: Sorry, sorry — John Reed — is that almost every problem that we've identified as hitting us after 9/11 will be present on the cyber issue in spades. So if you think it's difficult to discover where the networks were with Al-Qaeda, then it's going to be even more difficult to discover where they are in terms of cyber attack. The attribution of a cyber attack is extremely difficult as well. I mean, I remember — it was a couple of years ago now, but there was an American general who I won't name who was asked, "Well, what would you do in the event of a cyber attack?" He said — I think I quote him — "Well, we'll just stick a nuke down their smokestack," which seemed to me to indicate that he wasn't completely in control of the finer details of a cyber attack. The attribution is going to be even more difficult, and thirdly, the complications of international law that we discussed this morning as regards after 9/11 are going to be there with a cyber attack, because it is actually illegal to go into someone else's network. Even if you did go into it, you may find just the way the terrorists would hide an artillery piece inside a hospital that you have actually attacked

back on an old folk's home in Romania, because they've used that as a [unintelligible 1:37:56] net to attack you. You may find that behind that is a state — China or somebody else. So the one thing you can say — boy, I agree entirely — “Expect the unexpected,” Donald's unknown unknowns. You can toss a coin, but it's going to be — some of the problems that we've been identifying as challenging as immediately after 9/11 are going to be there with the cyber. The only good thing about it is that at least we know the general dimensions of it, and we're doing what we can to prepare for it.

David: Just to give a practical example of strategic notice, well over a decade ago I remember sitting as a member of the Joint Intelligence Committee when we wrote an intelligence paper with no intelligence in it. It was actually a strategic appreciation of the fast moving field of synthetic biology and the risk that developments in that technology would within a few years give any good post-graduate chemist really serious capabilities to create biohazards — and that the intelligence community had better start looking around to see if they can spot the first signs of this threat developing. It wasn't a prediction, but it was putting people on strategic notice. I think we need more of that kind of thinking.

Moderator: Okay. We have a couple of two-finger interventions. Josh Rovner?

Josh: Very quickly, yeah, Josh Rovner. On this point about cyber — I agree entirely that this is going to become a more important issue, but again, I don't think this is necessarily bad for us. I think that the attribution problem with cyber is really, really hard when it's small-scale attacks, but whenever you're trying to put together anything large and significant that could actually hurt the United States, that requires a lot of investment, a considerable amount of organization. Those are the things that we can't find. So from what we know in the open sources, the U.S. is actually getting better and better at tracking down countries that are doing this stuff and, actually, the buildings where this stuff is happening. So I think that, again, while I agree that cyber is a challenge, it's an asymmetric challenge, and we're on the right side of asymmetry. We're the country with the scientists and the capabilities that can actually sort this together. I would rather be on our side of this problem than on the small side that sought to use cyber as a way of hitting us.

David: I would just add a warning since, clearly, the U.S. is the leading player in offensive cyber. Keep those offensive cyber weapons for when you really, really need them, because every time you use a cyber weapon, the code gets reverse engineered. Very quickly, you will find them being fired back at you.

Josh: As with any weapon — I would agree with that.

Moderator: Yes.

Ted: Ted Bromund — I wonder if some of the panelists haven't a little overdrawn the dissimilarities between the U.S. approach and the virtual approach. If you think about the effort to prevent terrorism abroad the approach that the United States comes to after 2006 and counterinsurgency strategy based on the idea of promoting and preserving normalcy, of trying to get the situation in Afghanistan and in Iraq where people can live normal lives and, therefore, do give up information. So I think in that regard, the U.S. has a very good track record, admittedly, after a couple-year failure, whereas, by comparison, the UK has shown itself quite willing — no criticism — to use the military approach in Afghanistan and Iraq alongside us and proved in spite of its experience in Northern Ireland to perform

rather badly in Basrah. So one wonders sort of in the foreign part of the scenario if differences are not quite as extreme as sort of [unintelligible 1:41:53] extreme as you suggest. Even on the domestic side, Doug talked this morning about the importance the administration attached to preserving normalcy in the United States. There have been a lot of arrests and trials of terrorists and attempted terrorists in the United States. There is a law-based there. The UK, as Sir David alluded to, seeks to have a period of pre-trial detention, which I think would probably not be acceptable in the United States. The fear was on the IRA-level of domestic surveillance, which we may be experiencing here in the United States, but it strikes me as more serious in the UK. A very distinguished gentleman — I forget precisely who it was — described the Home Office at one point as not fit for purpose.

David: No, that was said of the Immigration Department at the Home Office, not the counterterrorism department.

[Multiple Speakers]

Ted: This is true, oh, but questions of emigration and immigration and border control are rather relevant to this discussion. So I'm a little — I wonder a little bit. I'm sure there are differences, but I wonder if the panelists could comment just a little bit about whether there aren't some more commonalities between our experiences than you might have suggested.

Theo: Well, I'll offer one perspective. I think you're right that from about 2007, 2008 onwards that in the overseas campaigns you get more commonality, and I would agree with what Lord Reed said over lunch, which is the British go into Iraq quite cocky about their experience of COIN. I distinctly remember going to a workshop at RUZI [phonetic 1:43:23] where you had the command staff of 82nd Airborne turn up and get a briefing from the general staff on how we did it well in Malaya. Of course, the British just screwed up in Iraq, and the Americans get very good at COIN — very, very good, because you're rotating your battle staffs through the theater [unintelligible 1:43:41] tempo, and the British catch up. So you get a commonality in the tactic to the combat, to the campaign, and you get quite a degree of commonality in the operational level in [unintelligible 1:43:53] HQ. But just to emphasize on the application of law, this remains a very significant difference. If British soldiers, when they're overseas conducting COIN in an area that is not actually — where it's considered that they're not at war, so they're engaged in counterinsurgency, they're subject to the criminal law of England and Wales. If they use deadly force illegally, they could be prosecuted in English courts for that. You don't have that in the United States as far as I'm aware, and on the application of European law, European human rights law applies to British military facilities in Iraq and Afghanistan, because the European court determines that extraterritoriality applies. So the application of law is quite extraordinary in terms of the constraints of British soldiers apply. In that sense, Lord Reed is absolutely right in saying that there's a bit of an unreality here with regards to how human rights lawyers are thinking about the application of law when it comes to the conduct of military operations overseas.

David: I hope I stressed sufficiently — and if I didn't, then I'll stress it now — the effectiveness of U.S.-UK intelligence cooperation, which has been really outstanding and developed very substantially after 9/11. One might have thought that it couldn't have been developed any further, but as it happened, ways were discovered that ensured it could. There were some

rubbing points as I mentioned earlier to do with the early period of renditions, and coercive interrogations, and so on — and the practical difficulties that then led to over the handing over of information about terrorist suspects, for example with a requirement for a legally-worded statement that no covert, overt, or executive action may be taken on the information. It is also worth pointing to the difference between risk elimination and risk reduction. With terrorism, you can't give a guarantee that it's not going to happen again. What you can do is to work your socks off to reduce the probability that it will happen again, but you can't give the public an absolute guarantee that this will never be allowed to happen again. If you do say that as a politician, then you're asking for trouble. But you can reduce the risk to the point at which people are perfectly confident to get on with their normal lives, and that is where we are now. Of the dozen or so serious jihadist plots since the attacks in London — partly due to the incompetence of the terrorists, partly due to good intelligence — none of them has actually resulted in a major attack. So that's the kind of record. But could one slip under radar screen tomorrow? "Yes," has to be the honest answer. The public has to be aware that you have to live with risk: getting up in the morning, getting out of the bed, driving on the freeway — these are all risky things to do. We have to learn to live better with risk.

John B: Since we're just about out of time, I want to use that as a jumping-off point to actually respond to Theo on something. One, in response to the question, I think there certainly has been a convergence — some convergence between the U.S. approach and the European approach to dealing with terrorists as a matter of law over time, and part of it was, in fact, this dialogue that we were having in the second term resulted in a better understanding of what each other was doing. Part of it was that, in fact, the United States significantly changed its laws and policies, either on its own, because we realized that what we had done was not working very well or in response to court decisions. In some other cases, Europeans started coming in our direction. For example, when I started the dialogue, it was, in fact, Theo, not accepted that a state could be in a state of armed conflict with a non-state actor. This was very clearly the European point of view. Armed conflicts — wars — are between states. The way for a state to deal with a non-state actor — no matter how massive the attack — was to deal with it as a criminal law enforcement matter.

It has become accepted over 12 years that, in fact, a state can be in a state of armed conflict with a non-state actor. Now, where I disagree with you is that I think there continues to be pretty significant divergence 12 years later amongst lawyers as to whether there is an armed conflict going on around the world. The "yes" — I think it may be now accepted that the United States could have used military force and apply a military model in Afghanistan in 2001, 2002. But is it appropriate — and this gets to sort of the bigger question even going forward. I don't know whether these circumstances could happen again. But if the United States or any country is forced to confront a threat from a non-state actor that is emanating from outside its territory where its criminal laws do not apply, but from countries that are not willing to stop the threat, then what body of law do you apply? You'll still get — I can still line up my 100 experts, and some will say, "You cannot be in an armed conflict with a group in multiple places around the world." That's why drones continue to be controversial. People don't accept that we're in an armed conflict that's going on in Somalia, or Pakistan, or various other places. Even with respect to — so half the lawyers will say you have to apply a law enforcement model even if your own laws don't apply outside your own country. The others will say, "All right. We accept that you can apply an international humanitarian law/law of war model," but then they



debate about specifically what rules ought to apply. Even if you say that the parts of the Geneva Conventions apply — and I agree with you; I have long argued inside our administration that Common Article 3 did apply, which was ultimately upheld by our Supreme Court — but that, even then, was not the end of the inquiry. That actually is the beginning of the inquiry.

I gave a speech shortly after the Hamdan decision at Oxford in 2006 in which I said, “Look, even if Common Article 3 applies, it doesn’t actually give you the answers to the questions that a state has to know the answer to as to who is actually a combatant.” We, to this day — you know, who is a combatant? These people don’t wear uniforms, and the moment you capture them, they tell you, “Oh, I was just minding my own business here.” Second, what process is necessary if you capture somebody to determine whether they’re a combatant or not? The Geneva Conventions do not give you answers to these questions. When is a conflict between a state and a non-state actor over? This is something we are grappling with right now in the United States with President Obama sort of wanting to declare the war over. But how do you decide when the war is over? Then finally, you have captured a lot of people from a group of non-state actors who come from 20 or 30 different countries. Then what do you do with them? That was essentially our problem with Guantanamo. In a traditional battle, you’re basically dealing with one country, and then they go back to the country they came from. But if you’ve got [members of] Al-Qaeda who come from 30 different countries and then you finally do decide that the war is over, do you deposit them where you found them? Do you send them back to their home countries who don’t want them? If their home countries are likely to mistreat them because they didn’t like them any more than you do, then do you send them to someone else’s country? You know? So it’s too easy to just say — you know, I heard this a thousand times from different European lawyers, “Oh, just follow the rules.” Well, the rules don’t give you answers to these difficult questions — which is really sort of the last point that I would like to reiterate. Yes, we’ve certainly learned some unhappy lessons. Yes, we’ve made some mistakes through bad processes, because we were doing it on the fly, because we had not learned the lessons of history. But that still doesn’t mean that 12 years later that there are clear and legal answers to these questions and that we can now still just go to the book on the shelf, follow the rules. That’s one reason why, when the Obama administration came into office to a moral certainty that the Bush administration had made these horrible errors and that they were going to change all the policies, they didn’t.

Moderator: Well, my friends, on that happy note, I think we will have to wrap it up. I congratulate the panelists for a very stimulating [inaudible 1:53:19]. Very brief housekeeping items — we’ve got a break for a little under a couple hours now, so enjoy the Texas sunshine if you’d like. Please, meet right outside this door in the lobby are right here at 6:30 sharp, prompt, on the nose. The shuttle bus will be waiting to take you to the dinner venue. That’s especially for all of our out-of-town guests. Those of us who are local, because of limited seating on the bus, please, drive over there yourself.

**[End File. Recorded Time = 1:53:59 = 114 minutes]**