MR. JOSH LEVY: Welcome to Ann Arbor and to the University of Michigan Law School. My name is Josh Levy. I am the Editor-in-Chief of the Michigan Journal of International Law, Volume 20.

Thank you for coming to Ann Arbor, from as far away as Belfast and London to join us to celebrate the 20th Anniversary of the Michigan Journal of International Law.

For two decades the scholarship within Michigan's International Law Journal has contributed to the evolution of the international legal system. We hope that this weekend's symposium, "Post-Cold War International Security Threats: Terrorism, Drugs and Organized Crime," will contribute to the discussion of law's intersection with national security and international security concerns.

These issues arose in a discourse far away from here and a far time before this weekend, in places like Washington, D.C., London, Berlin, Moscow, Jerusalem and Chicago. We hope that the conversation continues in Ann Arbor.

This symposium could not have happened without the commitment of our 40 accomplished legal scholars and prominent government officials, past and present. Thank you, thank you all for joining us today.

In particular, we are indebted to an alumna of this law school, who's brilliance, wealth of experience, insight, depth, sense of humor, dedication, personal charm, and persistence have heightened this symposium to a level it would have otherwise not reached. Elizabeth Rindskopf, thank you for believing in us.
We are also in appreciation of the ABA Standing Committee on Law and National Security, the Chemical Manufacturers Association, Eastman Chemical Corporation, Lexis-Nexis, the University of Michigan Center for International and Comparative Law, and the University of Michigan Office of the Provost and Vice President for Multicultural and Academic Affairs. And in this vein, we are most appreciative of the University of Michigan Law School.

So, without further ado, I would like to introduce the Law School's Dean, Jeffrey Lehman. Thank you.

(APPLAUSE.)

OPENING REMARKS

DEAN JEFFREY LEHMAN: Welcome. There are many things about this Law School that make me proud, but nothing makes me as proud to be associated with the University of Michigan Law School as our students. And the work of the students on Michigan Journal of International Law that made today and tomorrow's conference possible was absolutely in the very best tradition of this school and its students, past, present and future. There is no better way, I think, to celebrate a special occasion, such as a 20th Anniversary of the existence of a journal, there's no better way to do that than to do it with something intellectual.

This conference engages a set of issues that are of profound importance to our world and the students recognized that and recognized that they had the ability to bring together a set of discussions that will illuminate those issues and will help us to make progress. They realized that they had the ability to achieve something that requires a great deal of imagination and effort and work and they were willing to put the imagination and the effort and the work into making it happen.

I join Josh in thanking the co-sponsors of this event, because without their support this could not have taken place and I look forward to seeing what will unfold here. The issues are vitally important to our world. The array of talent that has been assembled here in Ann Arbor for these two days is without parallel. I believe we have the opportunity to accomplish something very special here. And I look forward to seeing it unfold over the next two days.

Our first real speaker, our welcomer, is the person that Josh mentioned before and that's Elizabeth Rindskopf. Her biography is in the volume and I won't rehearse it for you. I would just like to say that over the course of my time here, as Dean, I have had the opportunity to get to know many distinguished graduates of this institution and it has been a
special pleasure for me to get to know Elizabeth. Her dedication to this school has continued, even as she has held extraordinarily prominent positions in government and in the private sector. And I want to agree with Josh that part of why this event came together the way it did was her willingness to step forward early on and to say “I want to help. This is an important topic and I want to do what I can to make sure that the students have the support that they need, to back them up, given the amount of effort that they’re going to put into this.”

She did that. She was there every step of the way and it’s been totally consistent with the person that I have had the privilege of coming to know over the past few years. She is going to present the real, substantive welcome because this is a field that she knows as well as anyone in the world.

And it is on that note that I will hand the podium over to Elizabeth Rindskopf.

(Applause.)

MS. ELIZABETH RINDSKOPF: Well, thank you Jeff and thank you Josh. Now I’m going to prove both wrong by giving you remarks that will not be brilliant, but they will, I hope, be heartfelt.

And on that note, let me begin by saying that we’re with a theme here of thanks and I really do think that we must spend a moment and thank the Dean, thank Professor Alvarez, thank Josh and Eric; the Dean for giving us the opportunity to explore these important issues; Professor Alvarez, frankly, for standing back and trusting his students. That’s a very difficult thing to do. He did it, and that’s the kind of support that students need. He let them explore some areas that are non-traditional and I say, “Here, here.”

And to Josh, obviously, and Eric Feiler and all of the others whom I’ve yet to meet, this is really, for me, a gift, a very important gift. And I’m going to start with a story and tell you why I think this is such an important event, an event that I hope, in future years, people may look back and say, “The Michigan Conference, if you weren’t there, you may have missed something very important.”

Some years ago, having spent, at that time, probably about nine years in the intelligence community as a lawyer and having been increasingly impressed at how little people knew about law and national security and I should say, a person who had started her legal career here at Michigan doing civil liberties and civil rights and being very surprised when I had the opportunity to get on the inside and learn about national security law, intelligence law.
I was struck by how little discussion there was, and so I went around and did, whenever the opportunity arose, the kind of talking that I hoped would open these issues up for discussion. And I came to the point where I thought we really need to do more about this in an academic setting.

I had a colleague in that period, David Bickford, whom you'll hear from, and David was at a point where, with a very similar background, albeit from the British system, he was about to retire. And it seemed to me that he would be an ideal candidate to teach such a course in a law school. And without wanting to point fingers, I went to some of Michigan's competitors—obviously I should have come to Michigan, but I didn't—and I remember one conversation in particular. I described what you'll hear me describe in a minute, as to why I thought that we were at a critical moment in our history when, as David Frompkin has said in his recent book, dramatic changes were in order and in particular with regard to the way we organize and govern ourselves and how we deal with the issues of war and peace and survival.

It seemed to me lawyers needed to be there. So I proposed that perhaps a seminar with David at the helm would be a useful thing because David had spent his career both in the British foreign service and then organizing an office for the MI-5 and MI-6, comparable to the CIA's General Counsel Office, which I then headed. The response from the law school I got was, "Well, Elizabeth, this is all very interesting, but there's no law there."

I was really struck down. I think I persuaded them that if there wasn't law there there should be. But clearly it was not a successful overture.

Well, imagine my delight when it was not I calling, but rather Josh calling me, I think just about a year ago, saying this was his plan and what did I think. I was thrilled, because somehow someone had figured it out.

I must tell you there is a little lineage. David did, subsequently, teach. He did have an opportunity to influence another law professor and through Hiram Chodosh, at Case Western Reserve Law School, I think Josh may have gotten a glimmer of what we were talking about, but I think he brought his own ideas to it as well. And it's a good thing, too, because the problems you're going to be talking about in the next two days are really ones that Josh and Eric and the Journal of International Law and their generation are going to have to solve.

But they are problems, more than anything, that I think need lawyers' attention, lawyers' skills, and lawyers' participation. And I must tell you, there has been too little of that in my experience.
Now, let me then—and I want to be mindful of the time, because we do have a great deal of material to go through—let me give you, again from a very personal and heartfelt perspective, how I came to some of the thoughts that I have that make me think that this is a uniquely important topic; national security, international security, and the post-Cold War situation.

I mentioned that when I came to the National Security Agency in 1984 I was surprised. I was surprised for two reasons. With a background of doing, as I said, civil rights, civil liberties and draft resistance, I came to the Agency armed with a bit of arrogance. The arrogance had to do with my view of military lawyers in particular, the military in general, and certainly, who would do the best job in protecting the rights of U.S. citizens in an agency engaged in intelligence collection.

Well, it turned out I was wrong on both of those assumptions. I found that my colleagues in the JAG Corp, lawyers who were involved in the Agency’s General Counsel’s Office were among the finest that I had met. They were terrific. They were sensitive, they were alert to the kinds of issues I was concerned about, with regard to individual rights and liberties and how an agency designed to collect intelligence should be mindful of the rights of American citizens. And I must tell you, too, that they did a better job—they and their civilian colleagues—than I would have in the same situation.

I held that thought in mind and for some time, didn’t share it with anyone. I think it may have affected my behavior, perhaps I was a little more humble. But years later I was struck that a colleague who succeeded me said the same thing. I think that has fueled me in recognizing that we really have created—and I’ll blame my generation here—something of a divide. A divide that we didn’t experience for many years of our history. It is then, that divide that I want to speak, for just a moment, about.

We are confronting a new world, I believe, a new world order, perhaps a new world disorder. You might liken it to the way the world was at the end of the Second World War, but there are notable differences. I think it’s useful to step back for a minute, to think about that history, think about where we were 50 years ago and where we are today as we begin to struggle with some of the issues that I think confront us.

There are five points I guess I would make. When we left the Second World War several things were true. I think we had a consensus on national security at that time. It came about because many people, indeed perhaps a majority, had participated in the military, understood what national security was all about, shared common definitions and
common understandings. We had identifiable enemies. We knew whom we had to watch and we learned how to watch the Soviet Union well.

We knew what the threats were and we could measure them. Nuclear weapons might be horrific and might have terrified us—I’m of a generation where we had regular alerts and learned how to hide under our desks—but nonetheless it was a measurable, quantifiable kind of threat. And we had legal systems which, in their definitions and their structures largely, I believe, worked for the kinds of concerns that we were looking at.

And we knew as well what our areas of vulnerability were. We had definitions that worked for us, in terms of domestic and in terms of international. We knew where the border was, if you will. Principles of sovereignty were still in play.

Those truths, those five points I’ve just made, I would suggest are no longer working for us. We confront, today, a very different world. And let me spend just a moment talking about, as I see it, how we got from 1945 to 1999. I look at this, somewhat, from an intelligence perspective and I—an intelligence law perspective—hope you’ll indulge me, and I hope you’ll allow yourself to think a little bit more broadly because I think that what I’m about to say does have broader application. But from the standpoint of the development of the laws that govern our intelligence agencies, one might say that there were three periods until the end of the Cold War. And the periods were really the first, where organizations were being formed, where legal structures were being put in place, and there was, as I’ve mentioned, the consensus about national security and so on. That took us probably until the Vietnam Period.

And then during the Vietnam period some important things occurred. We made some assumptions. We didn’t, I think, discuss them enough. There was not enough understanding. Situations began to change. National consensus on international and national security issues fractured a bit and we found—and indeed, speaking in Ann Arbor it’s appropriate to mention this—that some of the systems, structures, activities, authorities that were designed for foreign national security use were allowed to move onto the domestic front.

You’ll all remember the Keith case, you’ll remember the bombing in Ann Arbor. And really if we were to distill that to a simple lesson, I think it would be this, that we ought not to think that we can use authorities designed for international security purposes for national security purposes in domestic settings where law enforcement authorities are the appropriate set of systems authorities responsibilities. But we learned that lesson and we learned it from the standpoint, certainly, of those in the intelligence community, very painfully.
There were a series of hearings and investigations. New laws were enacted and it was a very powerful lesson; a lesson learned inside a certain part of the government—of course the intelligence community I'm speaking of—and less observed, less understood, I think, outside those communities.

When I arrived one might have said that there was a real fear of ever violating that important divide between authorities used for national security purposes, looking outward and authorities that would be appropriate for internal use, law enforcement structures and so on.

And yet, in the mid-'80s we suddenly found that there was an explosion of activities, fact patterns that needed a response and the question was, how to respond to them. Now, here I refer to what has sometimes been called the transnational threats; things such as drugs, certainly terrorism as an example, trafficking in weapons of mass destruction and increasingly money laundering and international crime, activities which have a mixed character. Are they national security threats or are they, rather, law enforcement threats?

Certainly those who are responsible for these kinds of activities freely move across borders. So what authorities do we really use to respond to those types of activities? The first way in which I think we experienced this was in the mid-'80s as I've mentioned, when we found that there were terrorist activities affecting American interests abroad. So now we had the reverse of a concern that I've mentioned that had occurred earlier, and we had our law enforcement authorities designed really to operate domestically in a situation where they needed to respond to new laws being legislated that took our criminal legal authorities and gave them extra-territorial application—extra-territorial application which I would say—certainly when I went to law school and took criminal law in this building—would never have been imaginable.

Well, that created an interesting set of problems and they burbled up from time to time in ways that were of concern to the public generally. Because there was an observation that the law enforcement authorities operating overseas seemed not to be terribly well coordinated with those authorities—largely intelligence collection agencies, such as the CIA—that were in their natural state overseas. How to coordinate? How to work these things through? How to harmonize the legal authorities? Whether to harmonize legal authorities?

Indeed, some in Congress seemed to think, as these transnational threats increased, that perhaps the response would be simply to collapse, to combine, to have one mechanism that would address these new security threats. Those, and I would certainly be one of them, who believed that we had divided power into smaller bits and pieces in order
to protect ourselves against the abuse of that power would say that that kind of a unitary approach is, most assuredly, not a good idea and not something that should be considered. And hence, coordination, working together became the issue.

And that's really where things, I think, were until, suddenly—some would say without notice, others would debate—the Cold War began to end. We'll date that from about 1989 when the Wall came down and certainly, I think, in 1991, with the final break up of the Soviet Union we could say that the Cold War period had ended.

That created yet another dramatic change in the world, a dramatic change in fact patterns that I think is now creating real challenges to legal structures and systems as we know them, because suddenly, with the end of the Soviet Union, we find that the ability to contain much of the negative forces within that broad empire has gone away. There are no legal systems yet in place to control the orderly flow of goods and people—whether evil or not—and governments that are struggling to regroup under dramatically different structures and systems. We, in the remainder of the world, find ourselves suddenly in a position where all manner of potential threatening actors, threatening activities, threats are out there, and we're not exactly certain where and when we may have to confront some of those new problems.

So, now back to my five points. We find ourselves, now, in the post-Cold War world, with no longer a Soviet Union that contains much of the world, if you will, for good or ill. At the time the Soviet Union existed, at least we could say this about it, we knew where it was, we knew what it did. We could rely on the fact that it controlled its fissile material and that it controlled those people within its borders. We're no longer in that situation.

We're also, now, in a situation where, in part because of the nature of national security and intelligence and the debates that I've been talking about, we really are not well informed as a nation. We've not been able to follow well the development of legal structures that have guided intelligence and law enforcement, sometimes because of the secrecy that, necessarily, has shrouded some of their activities and in other cases because there's been less interest and probably also because there has been—and now to the national consensus point—I think a serious fracturing of participation in these issues, unlike the situation we were in at the end of the Second World War.

We have a major divide. I find it difficult these days to go into communities, academic communities and other communities, and engage the kind of debate that you're going to have over the next couple of days. There's a real polarization. There are people, on the one hand, who
consider themselves civil libertarians, on the other hand, people who are determined that they are the source of security, in the national security sense and there's much too little conversation. So the national consensus has broken, has gone away.

The identifiable enemies, I think you've already gotten the point, they're simply not there. They may now be, and indeed I believe are, sub-state actors. And the kinds of capabilities that they can draw upon, what they can do to threaten, their access to the fissile materials that remain in the Soviet Union, to biological and chemical weapons we really can't predict, but I can tell you that most who know the Soviet Union as it was and as it now is, as Russia and the former states, will tell you that these materials are available. And they will certainly be things that we have to watch and be concerned about.

Our legal systems to do this are going to be challenged. They are being challenged. Why? Because borders are porous, because the types of actors that we may have to protect ourselves against are no longer simply states. And this, indeed, is the source of the word, "interstitial actor."

By interstitial actor, what we mean are those actors that fall between the cracks of legal authorities, that simply are not properly addressed and understood within legal systems as they exist.

And let me say, then, a final word on where we are vulnerable. Because here too, I think there have been changes. In the past our system of defense was based on the notion of deterrence. We didn't worry greatly about threats in the United States. We understood that those would be handled by law enforcement. But I must tell you that in today's world, with access to the kinds of weapons we're talking about and the porosity of borders there is great concern, within the government and elsewhere, that the kinds of threats that, heretofore, we thought we were deterring and keeping offshore, these days might even wander onshore.

And as if that were not enough, there is a further complication that I think we need to be mindful of and think a bit about and that's simply this, that we, if we talk about vulnerabilities—and we talk about vulnerabilities domestically as well as overseas—one point comes quickly to mind and that is that these days our security, our well being, if you will, is as much guaranteed by non-government as well as governmental actors.

So how do those two entities work together, the government and the private sector? We find that they share information in only limited ways. That there, again, is a lack of trust, a lack of understanding.

Well, perhaps that's, as we used to say, a fair opener, but I hope what it suggests to you is that this is an area that is rich with material for
lawyers to engage, to discuss, to understand. We are talking now, in Washington surely, about new legal authorities, changes in traditional ways in which we organize our world, both with regard to national security, domestic security—in short, the way in which we ensure our well being.

Lawyers need to be present at that discussion, present for the questions they ask, for the thoughts they should raise, for the systems they should have part in designing and thinking through.

This conference, as I said, is a gift, because these are topics—and there are many more, I’m sure, that you will uncover—that I have been greatly concerned about. And not to have the best, if you will, and the brightest—if that can still have the resonance that I intend for it—participate; not to have law schools, such as Michigan and others, not to have the kinds of professors and students that we have here today available, to be thinking through in a candid, open-minded and well-intentioned fashion, in which conversation and discussion is thoughtful and inclusive—as opposed to exclusive and rancorous—not to have that opportunity, I think, is to leave a legacy that we will all regret.

So, Josh, I’m delighted that this is a conference that has its genius in your generation. Because I will say that it is your generation, ultimately, that will have to solve these problems. But we’re delighted to help in any way we can and I’m particularly pleased that you’ve given me an opportunity to express a thought or two.

I’ll conclude by saying that I’m really hear to listen. So I suggested to Josh that I’d rather take that role. I’d like to be enlightened by the kinds of thoughts, the kinds of questions, the kinds of—not so much answers, but responses that we begin to develop today. There’s a great deal of material there. There’s a great deal of work to be done and I think that there are far too few people who are interested and informed and available to do it.

So, without further ado, I’ll turn it back to you, with again, heartfelt thanks.

(Applause.)

MR. JOSH LEVY: The next panel discussion will be focusing on the challenge from interstitial actors and their crimes.

While they’re coming up here, because we are short on time, I’d like to say a few brief remarks on the moderator of this panel.

Professor Hiram Chodosh was a former teacher—is a current teacher of mine and probably will be forever and a very good friend of mine. He earned his BA at Wesleyan University and his JD at Yale Law School. He then went to practice law at Cleary Gottlieb in its New York City and
in Paris offices. After his time there he went to Case Western Reserve University where he is Professor of Law and the Director of the Cox Center for International Studies.

Professor Chodosh is also the in-house legal scholar for the Institute for the Study and Development of Legal Systems located in San Francisco. This institute is responsible for ongoing law reform in the criminal and civil procedural systems in over 30 countries.

Professor Chodosh’s scholarship and his field work have contributed significantly to these very important law reforms. We’re delighted to bring him here to moderate this panel.

(Applause.)

(A BRIEF RECESS.)

CHALLENGES FROM INTERSTITIAL ACTORS AND THEIR CRIMES

PROFESSOR HIRAM CHODOSH: Thank you very much. I want to congratulate the school, Dean Lehman, Professor Alvarez, Josh Levy, it’s been a great honor and privilege to call him my student.

I want to keep my comments brief. My job is to pitch the ball and let the heavy hitters on the panel hit it out of the park.

It seems to me that the great promise of this conference is the pulling together of so many experts from so many diverse fields, including the national security community, the criminal justice community, the civil liberties community, the trade community. The panel is called “Challenges from Interstitial Actors and Their Crimes.” It seems to me that, at its lowest common denominator, the panel will focus on the effectiveness or ineffectiveness of the strategies employed to meet the challenges that Elizabeth spoke of.

To evaluate these strategies we have the benefit of some of the world’s top experts. If the problems are of a mixed character, it seems to me we have to bring that mixed expertise together.

To examine the intersection of overt and covert actions we have with us Fred Hitz. Fred Hitz is currently a professor at Woodrow Wilson School in Princeton, he’s a former Inspector General of the CIA and has private practice experience as well, as the managing partner of Schwabe, Williamson, and Wyatt.

To evaluate trade sanctions we have Professor Raj Bhala, Professor at GWU, currently visiting here who’s a prolific scholar in the trade
area, has extensive public sector experience for international and domestic financial institutions, including the Federal Reserve and as a consultant to the IMF and World Bank.

And to talk to us about strategies employed to convert intelligence to evidence, we have David Bickford, who, as you know, was the Under-secretary of State, Chief Legal Counsel for MI-5 and MI-6 in the U.K. and now has his own consulting firm and works with foreign governments on areas of organized crime and money laundering.

Elizabeth Rindskopf will also, I think, be around for questions for this panel. I hope that you’ll take some questions, Elizabeth, as we go forward, and I think we’ll have up to 15 minutes per speaker, and then we’ll open it up for questions.

So, Professor Hitz, I’d love for you to start and then we’ll follow with Professor Bhala and then David Bickford.

PROFESSOR FREDERICK HITZ: Thanks very much. I’m going to submit you to—and I apologize—the reading of a paper that I wrote at the height of the debate in the Congress last fall over the—what I’ve called the “Saddam Hussein Removal Act of 1998,”—actually, the Iraq Liberation Act.

I saw, as my paper will suggest, the reappearance of that old specter, the overt covert action. And I thought we had slain that dragon in the fight over the Boland amendments in the ‘80s, but, no, it came back.

Let me just read it. It isn’t long. It’s entitled “Say No to an Overt Covert Action to Topple Saddam in Iraq.”

“In a corruption of the old legal maxim that hard cases make bad law, frustrating international problems make for bad legislative fixes. Such a situation confronts the President in determining whether or not to pick up the $97 million that Congress has left on the table to unseat Saddam Hussein in Iraq. Just last week in deliberations at the White House, the President’s National Security Advisor was discussing how to fund Iraqi opposition groups.

“I make no plea for Saddam, having been on the periphery of several unsuccessful covert action attempts to develop opposition forces in Iraq earlier in this decade. I am convinced that his country, his region, and the world would be better off if he departed the scene.

“Nonetheless, the spectacle of the Executive branch and the Congress renewing the destructive effort of seeking to dislodge the Iraqi dictator by mounting an overt covert action against him seems to me a mindless repetition of the mistakes made during the Reagan administration in funding the Contra movement in Nicaragua in the face of strong Congressional opposition manifested in the Boland amendments of 1983 and 1984. The difference this time is that the shoe is on the other foot.
With the 'Saddam Hussein Removal Act of 1998', the Congress is dictating to the Clinton administration a course of action the administration is extremely reluctant to take.

"My concern is simply for the preservation of the legal and regulatory authorities that govern the conduct of covert action by the United States and the violence which I believe would be done to their philosophical underpinnings if a publicly announced 'covert action' were mounted in this instance. Since passage of the Hughes-Ryan Amendment in 1975 as modified by the Intelligence Oversight Act of 1980, the duties of the President in giving the Intelligence Oversight Committees prior notification of proposed covert actions has been statutorily clear. Prior notification to Congress occurs in all cases except where the President deems the covert action so time-sensitive or delicate that he elects to inform a so-called 'gang of eight', the Majority and Minority leaders of the Senate, the Speaker of the House and the Minority Leader and the Chairman and ranking Minority members of the House and Senate Intelligence Committees initially, and the other members of the Intelligence Committees at an appropriate time. In exchange for this requirement of prior notification, the Executive branch can maintain the secrecy of the presidential finding on which the covert action is based. Discussion of the finding and the underlying covert action is confined to the classified spaces of the Intelligence Committees; and funding for the covert action is obtained through a classified appropriation or from existing secret contingency funds. In other words, the free and open debate which envelops any other projected commitment of U.S. force abroad is short-circuited by this special procedure governing covert actions because they are specifically denominated as political actions affecting the conduct of other nations where the hand of the U.S. is intended not to show.

"For that reason covert actions are not to be entered into lightly, but only when deemed by the President as 'important to U.S. national security'. The Aspin-Brown Commission which studied the Intelligence Community in 1996 felt that the standard for employment of covert action should be even higher - only when 'essential' to U.S. interests. Normal political debate about the advisability of the action is curtailed both within the Executive branch and the Congress on the theory that the role of the United States must not be revealed and that if it is, if the possibility of 'plausible deniability' is removed, then in all likelihood the proposed covert action should not go forward. It is therefore a complete abrogation of the understandings governing the need for covert action to make it public, to discuss it overtly as the President and his top security advisors did with the aid to the Contra movement in the mid-80's and Congress threatens to do at this time with regard to Iraq.
"What concerns me is that by using a secret process for an overt act, in time the discipline to maintain secrecy which governs genuinely covert actions—for example, a lightning strike against terrorists or narco traffickers in a remote and hostile location—will break down. Even now in a period of divided government, the comity between the Executive and Legislative branches, which has prevented leaks about sensitive but controversial covert actions in the past, is under great strain. It only takes the indiscretion of a single disgruntled Congressman, staffer or Executive branch official to bring a carefully conceived covert action to a halt. How much easier this fatal revelation will be in a climate where legitimate covert actions, protected by a statutory process to preserve their secrecy are freely mixed with so-called 'overt' actions where no effort is made to ensure secrecy. The Administration and the Congress won’t be able to keep the different actions straight and the discipline of secrecy will evaporate. Better to abandon any pretense that the U.S. can mount genuinely covert actions than fool ourselves that the statutory process governing covert actions can work where the project becomes intentionally overt.

"I am all for seeking to end the regime of Saddam Hussein in Iraq, but not through the scrambled eggs procedure of an overt covert action. If the U.S. is intent upon toppling Saddam, let’s do it by openly supporting political forces opposed to him."

I’m happy to say that the thinking and really the spark for this effort came out of my classroom this fall. I taught, what the Woodrow Wilson School calls, a policy task force on the question, “Is covert action an appropriate instrument of U.S. foreign policy?”

I had eleven juniors, undergraduates and I put that as a question to the seminar and I told them I really didn’t care how they came down on it as a group, but they would have to make their arguments accordingly. And it was interesting that as we got fairly far along in the autumn term and this debate over Iraq burst forth in the Congress it was largely their responses that caused me to think that this is just a cockeyed procedure.

So, why don’t I stop there, Hiram, and we’ll go on.

PROFESSOR HIRAM CHODOSH: Raj?

PROFESSOR RAJ BHALA: Thank you. What I’d like to do is talk a little bit from the perspective of a student of international trade law. Making its way around the room is a brief outline of what I would like to say.

I came at the problem of national security from the perspective, as I say, as a student of trade law and observed that the progress on a multilateral agreement on investment is stalled, the progress on an information technology agreement, part two, is stalled, the progress on a
new transatlantic marketplace is stalled. Why? Bananas, beef hormone, but also Iran, Libya, Helms-Burton and a number of other sanctions; legislations that have caused a great deal of trade friction between the United States and its allies.

Now sanctions, as you know, are one way in which the United States interacts or doesn’t interact with the rest of the world. And Ronald Steel in his excellent book, “Temptations of a Superpower,” tells us that the central unresolved problem in our post-Cold War foreign policy is how to translate our unparalleled military power into political influence. We’ve been embarrassingly unable to dissuade Pakistan from testing nuclear devices in response to India’s test, for example.

And sanctions we’ve used as more or less of a skinnerian tool; the target or potential target being a rat in a cage. If we sanction them, that is we sanction them for bad behavior, and if they get the food pellet, that is no sanction, that’s good behavior.

That sort of psychological analogy tells you a little bit about the inter and intra disciplinary nature of the sanctions debate. We see lawyers, diplomats, economists, political scientists, human rights activists, philosophers, historians, all sorts of folks contributing healthfully to the debate. With that motley collection, though, I think you can see a focus on two issues.

The first is a normative issue. What is the normative purpose for invoking the sanction and is that legitimate by some criterion of fairness or justice? For example, is it proper to pry open an overseas market to an American business? Is it proper to use sanctions to combat human rights abuses or religious persecution? Confronting a stubborn dictator, preventing nuclear proliferation, stopping abortion, all sorts of normative questions.

The second interesting theme that you see among these motley voices is the efficacy of the sanctions. Do they work? Do they really modify the behavior of the target and if so, do they work only after imposing an unacceptably large cost on American businesses in winning procurement contracts and providing goods and services to other countries and engaging in foreign direct investment, etcetera?

And that issue, of course, has a corollary, the danger of overuse. And I needn’t tell you that the current administration’s been widely criticized for overusing sanctions and not being able to really differentiate the reasonable from the ridiculous, when it comes to what’s an appropriate purpose for sanctions.

If you now take a look, broadly, at our sanctions regimes two-thirds of the world’s population is under an American sanction in one way or the other. And of the 115 sanctions regimes that have been enacted since
World War One, over half have been implemented since 1994. Hence the criticism that we in the States have a sanctions-based foreign policy.

What, then, is very tempting is to dive into this fray and add to the heap of criticism. But I want to resist that temptation. I want to step back and say something that may be not quite so normative, not quite so empirical and ask how can we take a look at any sanctions regime in this post-Cold War era and analyze it critically and dispassionately before getting into the normative and empirical questions. And how can we, perhaps, make some modest predictive statements about the controversies sanctions or proposed sanctions are likely to cause? So that may give us some sense as to trade friction or political friction that might occur.

So my project is not designed to jump into the normative debate or the empirical debate. The project is summarized for you in the handout with the hopefully attractive or at least memorable acronym, “MRS. WATU,” a name that is common in many parts of Asia.

And really that seven variable model gives you seven variables to look at when you're thinking about sanctions legislation and seeing whether or not they're going to cause controversy or what kind of controversy they're going to cause.

The first, the method of the sanction. There are basically three types of sanctions that we use. We use ostracism sanctions, which means we're trying to say—we're trying to keep the target out of important organizations, like the WTO or the IMF or the World Bank or we're trying to pass general assembly resolutions saying that they're bad guys. There are foreign aid sanctions, where we cut off foreign aid, usually all but humanitarian assistance. And there are trade sanctions. Trade sanctions can take the form, of course, of import embargoes or foreign direct investment embargoes.

You would suspect, a priori, that the greater the number of methods used the more controversial the sanctions legislation is likely to be. So, for example, Helms-Burton contains an ostracism element in trying to keep out people who traffic in confiscated American property and their dependents from the United States, it contains a foreign assistant element and it contains a trade element. Iran-Libya, on the other hand, contains just really a trade element, that too, just in the petroleum industry. So that’s sort of the first cut at the picture, is ask yourself what method of sanction is being used.

The second cut is to take a look at whether or not there’s a private right of action. That is likely to be very controversial. You tend not to see private rights of action when it comes to foreign assistance or ostracism sanctions, but you do see them more often when it comes to trade
sanctions. And you’d expect that. After all, I think it was USA Engage that has said sanctions have caused American businesses $15 to $19 billion in lost opportunities and about a quarter of a million U.S. jobs.

Well Helms-Burton, of course, creates a private right of action. That helps, I think, explain one reason why it’s particularly controversial.

The secondary boycott, the “S” in the “MRS.” is going to be, also, something to watch for. We’ve kind of moved, it seems, in this post-Cold War era, to greater use of secondary boycotts; you see them both in Helms-Burton and Iran-Libya. And needless to say, our allies don’t appreciate the bullying.

Waiver authority, the “W” in the last name, “WATU,” is something to look at because, first, there may not be any waiver authority. That problem happened, of course, with the India-Pakistan sanctions, that some were non-waivable. And Congress finally had to get around to passing an India-Pakistan Relief Act that would allow the President to waive some but not all of the sanctions, like the voting in the World Bank and IMF.

The waiver authority, if it does exist, can be particularly controversial, depending on how it’s worded. If it is broad, in terms of national interests or important national interests, that leaves lots of room for debate. On the other hand, if it’s very narrow and is sort of objectively verifiable, like whenever Colonel Kaddafi gets around to turning over the Pan Am 103 suspects, maybe not quite so controversial.

The aim of the sanction is really asking the question, “Is the sanction aimed at a commodity?” In other words, a bad thing? Or is it aimed at a bad actor, a regime? Bad guy versus bad commodity.

Arguably—and this, again, is just sort of a thought as to how you might make a few predictive judgments—the commodity based sanctions may well be more controversial because of substitution effects. It’s easier for consumers of the sanctioned good to find substitute sources. In contrast, the regime that’s sanctioned needs to find new friends and that might be a little harder to do.

The termination provisions of the sanction regime are also something to look carefully at. And again, there may not be any, as with the waiver criteria. That was a problem with the Nuclear Proliferation Act. The Glenn Amendment had no such termination provision. On the other end of the spectrum, there may be a sunset provision, like Iran-Libya; it’s a five year rule.

It’s a little hard, sometimes, to give you an a priori judgment on what kind of controversy termination authority is likely to cause. Certainly if there is none, that’s going to cause some problem. You need some mechanism for the President to call off the dogs. On the other
hand, a sunset rule, which is fairly objective, five years, can be quite problematic because it may be thought, "Well, why should we terminate the sanctions in advance of the sunset rule if they’re working?” Or, I’ll take the flip position, “If they’re working, keep them on, keep on the pressure.”

Finally, the last variable in the model is the idea of whether the sanctions are unilateral or not. Here you sort of want to be a little careful and ask are they unilateral in fact as well as in law. It may well be that the regime, in a de jure sense, is unilateral, but in practice lots of countries are, indeed, participating. Or of course, the reverse could happen, we could have a multilateral regime where only one or two countries are actually employing the sanctions. I would submit that the case where the sanctions in law and in fact are unilateral is, again a priori, likely to be the most controversial case.

So there you have this “MRS. WATU” framework just to take a look at sanctions legislation, proposed or existing, and make some judgments as to how controversial they’re likely to be.

Thank you.

PROFESSOR HIRAM CHODOSH: David?

MR. DAVID BICKFORD: Thanks very much, Hiram. I’d like to say, obviously, how much of an honor it is to be here, the Michigan Journal is so highly respect in the United Kingdom. And thanks very much to Josh, particularly, for inviting me along. In fact it’s a double honor, because with Hiram as moderator, one really has to behave oneself. So I shall try not to.

Ten days ago, in two separate judgments on the same day, the British courts first released a major suspected terrorist on the grounds that his deportation to Britain was disguised extradition and then released half a dozen suspected narcotics traffickers on the grounds that the seizing of 4.5 tons of narcotics in international waters was contrary to Maltese, British, Dutch and international law. They had a field day about that.

Now, both operations were very carefully planned. So who was at fault, the law enforcement agencies or the courts? Well, the answer is neither, both acted in good faith, but good faith is no provider of convictions against organized criminals, including terrorists, whose operations cross boundaries, physically, financially, and communicatively.

These operations were caught up in Napoleonic Code law, Roman-Dutch law, Islamic law and Common law, each of which has different standards for conviction, different procedures, and different civil rights provisions.
In each of these operations, prior to arrest, the law enforcement officers had to predict, accurately, what were the legal basis, evidentiary requirements, standard of proof needs, civil rights balances under all these laws, and, more difficult, what they were going to be in the actual trial jurisdiction.

The British courts, where jurisdiction finally rested, decided that the law enforcement agencies had got it wrong.

Now in France, such a situation would almost certainly not have arisen. The French investigating judge would have controlled the law enforcement and intelligence operations and determined the legal, evidential, and procedural requirements as the operations were in progress.

International organized crime is carried out in great secrecy; secrecy that's enforced by bribery, physical assault and murder. Intelligence operations are planned, covert, highly secret infiltrations into organizations which pose a threat to the state. The objective is to learn about the organization and the methods of the target. The operations use long-term informants, telephone intercepts, eavesdropping, devices and complex surveillance. They may take months or even years to penetrate a target and create a picture of the operations. The effect of this penetration on the legal organization is extremely damaging, whether by results in court proceedings, disruption, exposure or discovery.

The British intelligence agencies carry out international operations to secure intelligence as evidence for law enforcement agencies to enable the prosecution of organized criminals, including terrorists. Their international operations encounter nothing but the legal, evidential, and procedural chaos caused by states' insistence on clinging to outdated national, legal, and procedural traditions.

What is clear to the intelligence agencies, however, is that the flexible French system of judicial control greatly reduces or eliminates this chaos. Now the number of operations that we've carried out using the French control has shown us this quite clearly.

For many years the intelligence agencies have called on the British government to introduce changes to British law, to introduce the French system of judicial control to assist their evidence-gathering operations, but the common law is seen as sacrosanct and any such change, however sensible, is a diminution of British sovereignty, which of course protects the law. So judgments, such as those of ten days ago, continue to be handed down.

This state of affairs exists in a world where the new information age is about internationalization. Individuals with access to an online computer can freely exchange information across the globe. Commerce is now conducted freely amongst the whole international community,
limited only by state regulation and legislation. And that legislational regulation is often unable to be effective because of the international nature of the transactions conducted.

The OACD predicts that commercial transactions on the Internet will increase by 200 times by the year 2000 to reach $40 billion per annum. Fed wire, CHPS, and Swift currently move 700,000 cross-border financial transactions every day. There are no effective international regulations on such commerce, nor is there any effective capability to assess and collect taxes on the revenue of such commerce.

The new threats to society imposed by organized criminals, including terrorists, take full advantage of the inadequacies of state legislation, regulation, procedure and control in the new era of internationalization. Organized criminals transcend boundaries and ignore borders.

These new disparate threats amount to a common danger to the economic base of states. They are admitted by states to be out of control. The old sovereign methods of limited group defense and limited international information exchange, which were effective against the Soviet Union, another limited group defense, fail to deal with the absolute international dimension of these threats.

Sovereignty can no longer cope with the explosion of internationalization. Sovereignty merely obstructs international solutions to an international threat.

States should be abandoning the national approach to tackling international organized crime. States should be urgently considering the successful French system of judicial control of international undercover operations. States should also be urgently considering the identification of international organized crime syndicates as being a threat to the international community and identifying them, in international law, as international criminal organizations.

Many transnational criminal organizations have a formal governing structure and are, in fact, economically stronger than most U.N. states. There is every reason, therefore, to treat organized criminals as organizations and not as individuals. They conduct their criminal business in the international community with a view to stealing the community’s assets and corrupting its businesses and governments.

There is every reason, therefore, to treat them as objects of international law and to identify them as international criminal organizations to be made the subject of a defined legal and procedural regime. This mirrors the way in which the international community treats rogue states, creating a legal regime to isolate them and to restrict their ability to cause harm.
Rogue states are subject to administrative legal sanctions rather than criminal law measures. These measures strike at the heart of the state's ability to conduct international relations or government at a financial level; assets seized, trade embargoes, suspicious movements limited.

Given the similarity of the threat of harm presented by international crime organizations [ICOs] states should treat them in similar fashion. Once identified as ICOs, sanctions could be enforced against the organizations and their emanations under international law. ICO assets would be subject to seizure and forfeiture, property and personnel subject to interdiction.

Such a regime would obviously require strict oversight and a forum for determining the existence of an ICO and complaints and claims from effected individuals and third parties. The legal basis for such a regime could be the same as that of supporting sanctions against rogue states; that is a finding of fact by the international community on the administrative law basis of the balance of probabilities, supported by an arbitral tribunal to settle disputes.

It may be argued, however, that such findings impose the rigor of sanctions on individuals without a finding based on a criminal standard of proof. However, the regime is not aimed at creating criminal law, it is an international law regime aimed at addressing threats posed by organizations and their members that can destroy the fabric of society, just as rogue states can destroy the fabric of society. However, if a criminal legal basis were deemed to be preferable to support such a regime, the international community need look no further than the jurisdiction of the international court. That jurisdiction could be extended to creating a sanctions regime against ICOs.

The findings of the existence of an ICO could well be accomplished, for instance, by adopting the U.S. criminal RICO statutes. The evidential procedures supporting either an administrative sanctions regime or the ICC sanctions regime and the finding of the existence of an ICO could be accomplished by the French code, Napoleon, providing for the control of the intelligence and law enforcement evidential operations by an investigating judge.

Intelligence is merely information. The difficulties only lie in converting that information into evidence. Evidence is no longer the property of individual states to be dealt with according to the whims of their legal traditions. It can no longer remain such property if organized crime, including terrorism and the import and export of fissile material and bacteriological material is to be defeated.

The law is also, likewise, no longer the property of states or individual states. Sovereignty, the old mantra of state property, is being pushed
aside by internationalization, the new mantra of the 21st Century. And the sooner states realize this, and internationalize their legal and evidential response to organized crime, the better.

Thank you.

PROFESSOR HIRAM CHODOSH: Thank you very much. I think I’d like to open it up to the floor for questions. Elizabeth?

MS. ELIZABETH RINDSKOPF: Well, I’ve got to ask my first question—though I have many—of Fred.

Fred, you talked about regulating covert action and you mentioned, at the end of your comments, about using covert action where it may actually be needed to take on drug gangs and so on and so forth. And that raises this question for me, we tend to think of covert action as something that the CIA has done, historically, for political and military purposes, and yet, increasingly, the security threats today are more of a law enforcement character.

So the question becomes, if action taken in those law enforcement settings, which looks like a covert action for the CIA to do, is done by non-intelligence, non-national security actors, for example the FBI, what regulatory framework is there or do you think there should be for that type of activity and does it concern you if there isn’t any regulatory framework on that?

PROFESSOR FRED HITZ: Thanks. And, Elizabeth, I meant to tip my hat to the number of problems like this you and I had the pleasure of working on when you were still in government.

I think that’s a real issue because one of the problems is that—and I think one of the hardest jobs for the intelligence community, and specifically CIA, is to begin to gather the expertise that David was speaking to and that you know so well, to be able to operate in a law enforcement mode as opposed to the collection of foreign intelligence, as has been defined under statute and regulation since the creation of the Agency in ’47.

So it’s highly likely, if you want to be effective, that you either get the FBI in on it or other entities—the Drug Enforcement Administration if it’s narco trafficking—to work in this area and as you suggest, the language of Hughes-Ryan and the language of the Intelligence Oversight Act of 1980 is pitched to the intelligence community. Now the FBI obviously has a stake in that and DEA, too, but it’s not as direct an application and we—all of us have in our clear recollection, the difficulties that can ensue if the President of the United States—because the President of the United States is going to the big actor here—determines that his normal help-mates, in going into this area, aren’t good enough and he turns to the National Security Counsel to do it—as happened in
Iran Contra—and you’re really in the soup, where there’s no regulatory matrix.

I would think that what you would have to do is consider the applicability of this statutory framework to these new actors and you would also have to broaden—or if you wanted to do this, this would be an act of political will—have to broaden the ambit of the intelligence agencies in what it is that they would be able to collect. Because as you know, that’s a controversial element too. It still is governed by the requirement that the information gathered has to be for foreign intelligence purposes. It’s not capable of being done for a law enforcement purpose exclusively.

**PROFESSOR HIRAM CHODOSH:** Henry King?

**PROFESSOR HENRY KING:** Yeah. I have a question for Mr. Bhala. Something violently bad happens in the world and you want to avoid military action, in other words, you don’t want to do military stuff, and Congress would say, “Well, we’ve got to do something. There’s a plane shot down and there are hostages taken.”

The problem I think is the impetus for sanctions as a way of avoiding military action or something worse, even though it’s detrimental to interests in the United States, such as exports—we’re getting out of markets.

Do you have any comment on how you avoid or can anticipate situations such as that and avoid something that’s hard to terminate? For as you say, termination is one thing that’s very difficult.

Is there anything that can be done in that situation or is it just something that you have to live with?

**PROFESSOR RAJ BHALA:** If I understand your question correctly, you’re saying sanctions are sort of sometimes a safety valve to avoid—or an escape valve to avoid something far worse and what would my comments be on the use of that safety valve.

I guess what I would say—a couple of things—one is, the long term interest has to be kept in mind here, and this does get into both the normative and the empirical aspects of the debate—is this the kind of behavior or commodity that we really want to sanction and is the sanction likely to work?

And we, as you quite rightly said, all too often rush to judgment and often it’s a result of lobbying power of particular interest groups that are able to get their cause heard. And one comment I would have it to keep those long term perspectives in mind.
The second would be to work much more closely with our trading partners who are going to be essential to the effectiveness of any sanctions regime, assuming the normative purpose is seen as legitimate. We have not done a good job, in most instances recently, of doing that. There hasn’t been sufficient consultation beforehand. So that would be the second piece of advice that I would suggest.

AUDIENCE MEMBER: I have a question. As always, your ideas are provocative in the best sense and I’d like to follow along. Are you saying that we ought to have—we ought to recognize that these international organizations are international in scope?

Carry that to the next step for us. I can think of three ways one might do that. One might have some sort of understanding, saying, “All right, given these facts we all agree we’re going to treat these fellows this way.”

One might say that we need a new law for certain kinds of acts, put people beyond the realm of state enforcement legal sanctions, that other very difficult quasi legal area that we do not call up, war, for one example, or that these things are like NGOs, they’re kind of somewhere between the transnational context and since there are really wars, traditional warring actors—but create something in the middle, quasi-sovereign.

Where would you—if you had to push this idea—you know, the U.N. said, “All right, Bickford, now is your chance. What do you want us to do?” Which of those three works?

MR. DAVID BICKFORD: It would probably result in some of the chaos that I’ve been talking about. What you’re really saying is that there are possibly three ways about treating this, treaty, law of war or NGOs for instance.

I would subscribe to your latter proposal and that is that you look at these organizations—by using intelligence you can identify the organization, you can normally identify who the leaders are and you can identify how they operate to a large extent. Intelligence can do that for you.

By using that intelligence, you can then decide that this in an organization that is rather like a non-governmental organization, but rather than being a legal non-governmental organization it’s an illegal government organization. And you start to treat that, in international law, in the same way you would treat a rogue state, you would apply the same regime.

Now, when one talks about the international community doing this we’ve got all sorts of problems, but I do believe that the recipients, if you like, of most of the depredations of organized crime—and I’m
talking about drugs, money laundering, the movement of illegal fissile material, bacteriological material and terrorism are the G-7, G-8 states. That’s basically where the main brunt comes.

Of course it comes from within places like India or Sri Lanka—or the United Kingdom for a couple of years—but the brunt is here. And the reason it’s here is because that’s where the maximum impact can be made, that’s where the maximum money can be made, which is what it’s all about.

So in essence, I think the G-7, G-8 states could get together to create this regime within their own national territories, as a start, and then your intelligence operations move the evidence to support the regime that I’ve been talking about, within either an ICC or within an arbitral situation within the G-7, G-8 states.

AUDIENCE MEMBER: Mr. Hitz, I liked your ideas very much about cooperation between the intelligence and law enforcement agencies, but in my observation, I think that anybody who worked with both of them would say, the cultures are absolutely different. And anybody who’s spoken with people on the law enforcement side who works overseas, FBI, DEA agents, in private will tell you of case after case after case, where the intelligence people have gotten involved and what they’ve done is they’ve tainted the evidence and you can’t present a case in court.

Then we get to Mr. Bickford’s ideas. I mean it seems to me that, number one, for something like this to work, you have to have some sort of a mechanism to try to create a common culture and then you run into the problems that were presented in the introduction, about are we going to create an entity that is going to be too powerful or is presenting a threat to our freedoms.

And then we also get into the problems that Mr. Bickford pointed out so clearly and succinctly, the need for some sort of a supra-national arrangement in this area in order to be able to be effective against these people. Because unlike in the case of rogue states—I mean at the end of the line, what we want to do is to put these people in jail, someplace or other where they can no longer go out and prey on the world public.

I mean I agree with you both, that the changes definitely have to be made, but I think it’s going to require really radical changes. It’s going to require us, here in the United States, to amend many of our traditional ideas about law and how law should be practiced, how police should operate, how evidence should be gathered, things like that.

For intelligence agencies it’s going to require a radical change in their culture, where the big push is to know. With law enforcement people the big push is to put people in jail. For the intelligence people, just
to know what’s going on. They’ll do almost anything to find out what’s going on, but to a law enforcement person it doesn’t help to know what’s going on, you end up putting the guy in jail at the end of the day.

I wonder if you can just comment on that a little bit.

PROFESSOR FRED HITZ: Well, I think you’re on to something. Elizabeth knows a lot about it, too, having worked in that vineyard.

I think the problem is that we’ve been patching it up and doing it by improvisation. The Counter-Terrorist Center is a place where these two cultures have been meeting, now for almost ten years, but our people for the most part—that is CIA operatives, case officers—don’t have a legal background, don’t have the training in this area, do have training in the notion of information collection for foreign intelligence purposes where, traditionally, the timeline is a little bit longer.

And these are technical points. I think there have been massive efforts in the last few years, certainly since Ames, to sort of breakdown the cultural barriers, but you can’t break them down if you’ve got one set of actors who have had a different and a highly technical training and others whose preparation for it is often times learned on the job.

Which then gets you to leapfrog that particular practical problem on the ground level and determine whether you’re going to change the underlying authorities and as I said earlier, that’s going to take vote of the political dimension, it is going to change political will—and I can see Kate down there getting ready to ask a question.

There are going to be a lot of grave concerns expressed, and rightly so, as to whether you’re turning in this foreign intelligence group of collecting entities into a worldwide police force. It may be that that’s what we have to move towards if we’re going to bring the rogue actors before the bar of justice, but there’ll be an awful lot of spade work that will have to be done in our country, I believe, before that comes about.

PROFESSOR HIRAM CHODOSH: We’ll take two more questions. Kate first.

PROFESSOR KATE MARTIN: Well, I wanted to ask a question about how you see, in a world of increasing international cooperation and increasing international problems, you’re going to have a legal regime that adequately protects individual rights, especially in the context of law enforcement actions.

I think the problem is raised, already, by the arrest of Ocalan, for example, which was reportedly accomplished, in part, through assistance given—intelligence information given by U.S. agencies to the Turks. And presumably that information was given without any assurance that the Turks are going to conduct a trial that will meet any kind of international standards of due process or fairness or even any assurance that he
won't be tortured in a Turkish prison, as the State Department has documented, many Kurds have been.

And in talking about what is basically a law enforcement international regime, you have this basic problem of ensuring individual rights and who's standards are going to be used.

MR. DAVID BICKFORD: Thank you very much, Kate. Another tough question from Kate.

But it goes to the very heart of it. I couldn't agree with you more, there has to be a civil rights regime that's certainly stronger than any civil rights regime that's actually applied at the moment. In the United Kingdom we're lucky because we have the European Court or Human Rights and the European Convention on Human Rights, which studies these issues quite continuously. It's extraordinary, if you look, how many judgments and commission decisions have been handed down by the European Court of Human Rights on the balance of rights between states and individuals in these particular national security issues.

So if you move, as I would like to see, to an international regime dealing with international illegal organizations then there has to be a concomitant oversight of the law enforcement and intelligence activities that actually underpin, if you like, the ability to deal with these international organizations. I agree with you, it has to go hand in hand.

PROFESSOR FRED HITZ: And there's going to be a spotlight on that trial, you're quite right, in Turkey and I think it's going to be very interesting to see how much information will be permitted in terms of how Ocalan is treated and whether they follow Turkish law. The signals are already up.

MR. DAVID BICKFORD: I think Ocalan, himself, will actually go to the European Court, ultimately. If there's a trial and he's convicted and he uses up all his right to appeal, I'm sure he'll go—and the European Court will ultimately determine his fate.

PROFESSOR HIRAM CHODOSH: Elizabeth?

MS. ELIZABETH RINDSKOPF: If I could just make one comment and take it back a step. Kate's contributions are always wonderful and I'm glad she's given us something to think about.

Perhaps my favorite expression learned at NSA was a military one, "OBE," overtaken by events. I'm afraid, Fred, getting back to the question about relationships between law enforcement and intelligence that we are, as lawyers, a little bit overtaken by events. Because what I see having happened there is that we've gone beyond discussions of how do we work together and how do we harmonize the cultures, which of course, each have their purpose and they're very different, to a situation
where it’s the FBI now in the lead and it is moving with alacrity to gain substantial additional responsibilities.

Now, in an earlier day I would have said this is a very bad idea. Whether it’s a good idea or a bad idea concerns me less than that it is an idea that has not been discussed and has not been tested against traditional legal principals that we have come to see the value of in the historical period I described.

And in particular, one of the things I have harped on over the past couple of years, is the fact that the CIA’s charter legal document has now been amended in a way that, to me, is very significant, to allow it to gather law enforcement information overseas when no U.S. person is involved.

Now, one could argue that that’s necessary or a good idea or a bad idea, but it’s not a document that’s been talked about and thought about, and yet what happened was a statute was amended and no one, even among those who watch these kinds of things, seemed to be aware of it. One saw virtually nothing about it in writing.

PROFESSOR FRED HITZ: So when in the non-U.S. person context in which you are sighting it, there doesn’t have to be this foreign intelligence nexus.

MS. ELIZABETH RINDSKOPF: That’s right. So they then become the junior partner to the Bureau. Now it may be inevitable that the Bureau take on this kind of an international presence, I suspect that it probably is, but there are too many areas that the Bureau has, one, not had experience in and two, has not had a viable regulatory, I believe, structure to guide its decision process.

And I worry that they may march along the path and make the same kinds of mistakes that you and I, Fred, know that the CIA did in its history.

PROFESSOR FRED HITZ: Yes.

MS. ELIZABETH RINDSKOPF: So that’s one reason why I think this whole area deserves thoughtful and informed discussion, to kind of balance these issues; on the one hand, the importance of civil liberties, on the other hand, the real threats that we’re becoming convinced can be documented and are seen out there and must be addressed.

PROFESSOR FRED HITZ: And I think you would probably agree that what’s going to bring this to the fore is trauma. There’s going to be one incident that is just a horror and people are going to get—they’re going to have to confront a lot of these questions that haven’t been answered, and they’re not going to be doing it under circumstances where reflection and deliberation will be possible.
MR. DAVID BICKFORD: I mean the U.K. actually faced this in the Irish situation, and in 1989-1990 we decided to use the intelligence that the agencies had—that was both 5 and 6—as evidence to support prosecutions, which had never been done before. And that forced a link between the law enforcement agencies and the intelligence agencies with the law enforcement agencies in the lead, with very, very close cooperation.

And, unfortunately, the word “committees,” creeps in, but actually there were committees that oversaw operations, so that these really difficult issues of evidence, retaining secrecy, insuring that defendants had all the relevant information, civil rights balances, were actually thrashed out during the operations.

That system is now extremely successful, except as you see when you go transnational, you get into the problems I was discussing earlier.

PROFESSOR HIRAM CHODOSH: I’m afraid we’re out of time. We all have many more questions and I hope we’ll continue to talk about these issues during the break.

I want to thank each of our panelists for some very informative and provocative talks. Please join me in giving them a hand.

(Applause.)

(A BRIEF RECESS.)

HOW CAN TERRORISM BE DEFINED?

PROFESSOR BRIAN SIMPSON: Let’s begin. I’m Brian Simpson and I’m just here to moderate this session.

First of all, the bad news, Yonah Alexander is unwell and unable to come today. So that’s the bad news, but the good news is we’ve got two of our panelists and it gives them a little bit more time to talk than would otherwise be the situation.

The other bit of good news is that the topic for this discussion of this panel is “How Can Terrorism Be Defined?” and that’s going to be widened just a little bit to include an opportunity for Kate Martin to talk about the civil liberties implications of terrorism and attempts to control terrorism, which is obviously a big and important issue.

As far as procedures, we’re suggesting that our panelists talk for about a quarter of an hour or so and give plenty of time for questions. And while they’re talking you must be working out the issues that you want to be raised and discussed by the panel. And we hope you have lots
of nice, lively, interesting questions. Indeed a few aggressive questions are always good on these occasions.

Now Kate Martin is going to start. She is the Director of the Center for National Security Studies in Washington. That sounds like a securities organization, but actually it's a civil liberties organization, so it's important to get that clear. She also is a co-director of the Helsinki Foundation in Warsaw and—

PROFESSOR KATE MARTIN: No, I am not.

PROFESSOR BRIAN SIMPSON: That is not any longer?

PROFESSOR KATE MARTIN: No. I haven't—I have a project with the Helsinki Foundation.

PROFESSOR BRIAN SIMPSON: You have a project within the foundation. I'm afraid this is slightly wrong.

She teaches at Georgetown and she is also General Counsel for the National Security Archive, which is an archive that makes available to people declassified U.S. documents on security. And she has, in a previous existence, been in private practice. So she is also a person with experience as a practicing lawyer.

So I'll ask her to open the discussion, Kate Martin.

PROFESSOR KATE MARTIN: Thank you for the opportunity to come. This conference is on a subject very close to my heart and I appreciate the opportunity.

I was struck by Elizabeth's story, where she was told by some law professors at some other school that there was no law on the subject. There is, of course, enough national security law to fill an entire textbook called—and in fact, two textbooks—called "National Security Law," and the striking thing about that textbook is that it's entirely about issues of national security and civil liberties; government surveillance, First Amendment, civil liberties and constitutional decision making questions, such as war powers, covert actions, and the public's access to information about government activities.

There is no doubt that the subject of terrorism and its relationship to all those subjects covered in that national security law textbook could occupy many hours. I have only a few minutes and I propose to be provocative and to outline some problems which I think merit much closer analysis.

Since the end of the Cold War policy makers have increasingly identified terrorism as the most important foreign policy and national security issue in the United States. At the same time terrorism is seen as a problem to be addressed primarily through national security and law enforcement means, rather than political ones. Military force, covert
action and the targeting of individuals and organizations are the preferred methods of dealing with such threats.

However, it is my thesis that when the problem of terrorism is viewed primarily through the lens of national security and law enforcement, policy options are likely to be foreclosed and potential political responses not adequately considered. It is clear, I believe, that the immediate ramifications of this national security approach include largely unexamined and quite serious consequences for human rights, civil liberties and the development of the rule of law worldwide.

I believe that we need to ask the question whether or not promoting democracy, justice and the rule of law will, in the long run in fact, prove to be one of the best weapons against terrorism.

Even if this approach were to be proved only somewhat useful, the current policy process assigns no weight to respecting civil liberties as helpful in the fight against terrorism. In doing so, policy makers consistently argue for the weakening of protections as necessary to saving lives. And I believe they consistently overlook or undervalue alternative policy responses. Thus, calling attention to the potential threats to civil liberties and human rights concerns is necessary, both to protect those liberties and I believe, will open up broader policy options for the government to consider.

I want to suggest that one way of looking at what's going on is that the current approaches to these post-Cold War security threats is basically to shoehorn them into existing Cold War legal framework, with the result that inadequate attention is being paid to the consequences for civil liberties.

If I might take just a moment to sketch out, what we could talk about for many hours, the three key features of the Cold War national security law framework in the United States, which have been consistently recognized and criticized as problematic, both from the standpoint of civil liberties and from the standpoint of constitutional decision making.

The first feature of that framework was an excessive reliance on national security secrecy and decision making, with the effect that the public and many times the Congress has been shut out of that kind of decision making.

The second feature has been the whole question of the constitutional allocation of responsibility between the President and the Congress in making decisions regarding foreign policy; the debates over the uses of force by the United States, the problems of the War Powers Clause, and the problem of covert action, who's going to decide, and what is the Congressional participation going to be or rather, how much is Congress
going to be excluded from the process of deciding about U.S. covert action.

And the third set of legal rules that were enacted and adopted during the Cold War were a set of rules designed to protect privacy, free speech, and the right of association, balancing national security and individual rights and basically according fewer protections to individual rights than would be recognized in other situations. The most obvious and kind of paradigm example of this is the wire tap laws. As you know, there are two sets of wire tap laws in the United States, one governs wire tapping criminal investigations and the other governs wire taps done for "foreign intelligence purposes," that's the Foreign Intelligence Surveillance Act.

The Foreign Intelligence Surveillance Act was a compromise reached between many different parties—the civil liberties community, the intelligence community, etcetera—designed to both serve the foreign intelligence needs of the government while, at the same time, providing for some protections for individual rights of privacy. But the key point here is that the protections for privacy rights, under the Foreign Intelligence Surveillance Act, are fewer than the protections under Title Three, which governs domestic criminal wiretapping.

Those kinds of distinctions and lesser protections were justified on two bases, I think, during the Cold War. One was that we faced a grave threat to our national security, in that the nation's very existence was deemed to be threatened by an evil empire, the Soviet Union, aimed at world domination and armed with the threat of nuclear annihilation.

The second basis for the more limited protection of individual rights was that when the government was acting to gather foreign intelligence it was less threatening to individuals—and this is a somewhat of an oversimplification, as I'm sure all of my colleagues will point out—but that basically foreign intelligence gathering wasn't aimed at individuals, it was aimed at finding out the intentions and capabilities of the Soviet Union and other nation states. And when it did that while wiretapping individuals, the purpose of the wiretaps was not to gather evidence to be used in a criminal trial against that individual.

I think that in looking at the problem of how the law is going to treat terrorism—that this is now the fundamental issue that we face, which has been alluded by the speakers on the previous panel. Again, this is somewhat of an oversimplification—but that Cold War national security threats were deemed to come from foreign states and that, in general, the arena of action that's dealt with in that context has to do with diplomacy, war, covert action; all areas which are, in some sense, extra-legal. That's not to say that there is an international law and a law of war and all that,
but it’s not governed by law in the way that we understand the activities of the FBI to be governed when it’s taking actions against American citizens.

In contrast, of course, the threats that are now being discussed, the World Trade Center bombing, the Oklahoma City bombing were responded to not by diplomacy, war or covert action, but by the FBI engaging in traditional and, I might add, very successful law enforcement activity. It identified the individuals responsible for those bombings, apprehended them, and the government made the case that they were guilty, and they are now in jail.

I think that one of the key factors of trying to figure out the problem of how to deal with terrorism is to recognize that we have now shifted from a government focus on state action to a government focus on individuals, and that one of the main aims here is to imprison and apprehend individuals, rather than to deal with other nation states or even sub-states, such as the PLO.

This raises very difficult and complex problems about how the law is going to deal with it, which I don’t think have been adequately addressed. Although the government has spent a lot of energy saying that law enforcement and foreign intelligence now have to cooperate, that seems to me to be only the beginning of the inquiry and not the end of it.

Just as an example of the way that this works out: for many years when I was at the ACLU—and we spent a lot of time working out what we thought were real civil liberties problems and what weren’t—we never took a position on the question of the CIA’s burglarizing or eavesdropping on a suspected Soviet agent in Italy. In our view the Fourth Amendment in no way protected that person, and the CIA’s activities against such a person in Italy didn’t implicate Constitutional protections. It did, of course, implicate Italian law or international law, but not the Bill of Rights.

That is no longer true when the CIA does that in Italy with a view to helping the FBI bring a prosecution against such a person in American courts. And I think that’s kind of an example of how this problem comes up.

I want to mention a couple of distinctions that I think are very important for us to keep in mind in looking at this problem today and then just outline a couple of areas where I think civil liberties problems have already arisen.

I think that it’s important not to lump terrorism together, all different kinds of terrorism. I think that when talking about effective responses and legal and constitutional problems in dealing with terrorism there are important differences between the PLO and the ANC—the ANC of
course was designated a terrorist organization and Nelson Mandela is now the President of South Africa—there are important differences between those organizations and an organization like Osama Bin Laden’s organization. And there are more important differences between that and Timothy McVeigh blowing up the Oklahoma City building.

When FBI Director Louis Freeh testified a couple of weeks ago, in front of Congress, to ask for more money for his counter-terrorism efforts he linked together and lumped together, in my view, all of those and then added that part of the counter-terrorism efforts included apprehending the people responsible for killing doctors who perform abortions at abortion clinics. While those are all violence and in some way, perhaps, political violence, I think it serves no purpose and in fact, confuses the inquiry to treat them as somehow fundamentally similar.

It’s important, I think, to take into account the effects of the information revolution, of the increasing globalization of the world and the of the enormous number of people who are migrants in this world today; the enormous number of immigrants, not only in our country but in western Europe and all over; the enormous number of people who are homeless and stateless; and what that’s going to mean about what countries’ populations look like in the 21st Century.

All of those problems, I think, have to be factored into what kind of legal response are we going to have to the problem of terrorism.

Now, what I would like to do is simply outline a few of the most pressing current civil liberties problems that I see. The first one is this problem that has been alluded to, which is what are the authorities that should govern FBI, CIA terrorism investigations of Americans? Now, under current law, if the FBI suspects a foreign nexus for a terrorism it can conduct a wire tap without ever having to tell the American, who was the target of the wire tap, that he or she was wire tapped. If, in fact, you are notified that you were wire tapped, and that happens only if the FBI wants to use the intercepts against you, you will never be given the opportunity to see the underlying affidavits that were used to obtain judicial approval for the wire tap. The government will assert national security, and no one has ever been allowed to see those underlying affidavits. In my view what that means is that there is no truly adversarial judicial review of that kind of wire tapping because the target of the wire tap has never seen the relevant information.

It is also true, at the moment, that since 1994 when the government obtained an amendment to the Foreign Intelligence Surveillance Act—which the government needed because of the Aldridge Aimes case, but in fact they justified it by reference to the World Trade Center bombing—that the FBI is now free to break into your house, photograph your
papers, copy everything on your computer, and never inform you that it has done so, if it can do that for national security reasons based on some kind of foreign nexus. The number of such national security wire taps has been steadily increasing, and there is no doubt that the reason is that they are more and more used in, quote, “terrorism investigations.”

The other problem having to do with the authorities governing domestic terrorism investigations has to do with the questions of what protections do we need for free speech and political rights to make sure that government investigations of terrorism don’t focus on political speech or affiliation, that they aren’t prompted by ethnic background or religious affiliation. At the moment almost none exist in the law today.

There are some guidelines issued by the Attorney General. They are not enforceable in court or elsewhere, some of them are secret, and there is almost no actual statute on the book.

It’s not a theoretical problem of course. When Timothy McVeigh blew up the Oklahoma City building the FBI had an Arab-American arrested in London when he got off a plane that had left Oklahoma City shortly after the bombing.

The second question I would ask is whether or not the government is going to be permitted to use secret evidence to deport people who have come to this country legally, who have made their lives here, who have married Americans, have American citizens’ children, who are charged with no crime but who will be forced out of the country on the basis of secret accusations by unnamed informants that they are terrorists?

There are 22 such cases pending right now. The legality of that has not been approved by the federal courts, but the Justice Department has an entire task force working on making sure that it’s established as constitutional.

The third question I would ask is what are going to be the rules that will govern the explosive extension of the reach of United States law enforcement worldwide? Will constitutional protections follow FBI agents seeking to bring foreigners back here to spend their lives in American jails? We know the answer to that, in part, already and the answer is no. The government successfully argued to the Supreme Court that the 4th Amendment does not protect foreigners overseas when the United States government is seeking evidence from them to use in an American court to put them into an American jail.

The disappointing thing, I think, since that decision, is that the Democratic administration, the Justice Department, has not made it a matter of policy to say “We will seek some kind of Fourth Amendment protection when we go execute these extra-territorial searches.”
To my mind the Bill of Rights is one of the best and wisest instruments written regulating government powers. Why the United States doesn’t seek to extend those ideas and that reach overseas at the same time that it seeks to extend its law enforcement powers is a question that I—well, I’m afraid I know the answer to, but it makes no sense to me.

I think that both as a matter of human rights law, civil liberties law that those constitutional protections ought to follow U.S. law enforcement agents overseas, and that it will have beneficial consequences for the development of the rule of law worldwide.

As a corollary question, it has also been true as Elizabeth mentioned, that since 1996 the administration sought and received authority for the CIA to assist the FBI overseas in ways that would be illegal for the CIA to operate here in conducting law enforcement investigations overseas.

And then I think we have to ask about other United States actions targeted overseas against individuals, not states, which don’t aim to bring those individuals back here, where at least they will be accorded due process in court when they arrive. We have several examples of those. In the last few months the CIA, in an operation in Albania, helped round up Islamic fundamentalists who were then delivered to Egypt for trial. This without, I suppose, any discussion of the State Department’s Human Rights reports detailing the abuses that the Egyptians regularly practice against such people when they’re arrested and tried in Egypt.

The United States missiles were aimed at killing Bin Laden, of course without any trial or guilty verdict and significantly, I think, without any Congressional debate or participation in whether or not that was a wise use of U.S. military force. And then we have the problem of U.S. intelligence and law enforcement assistance to other countries, like Turkey in the Ocalan case.

And I think all of this raises the question of what about constitutional processes here? Will these issues be subject to public debate? Will relevant information be withheld on national security grounds? Will there be Congressional debate and participation in the issues about using U.S. military force overseas in combating terrorism?

I just want to close by saying that I think it would be useful to examine the lessons of Northern Ireland, South Africa and Israel in connection with asking the question about the ultimate necessity of a political solution to the problem of terrorism, rather than simply a military or a law enforcement solution.

I would suggest that we begin with the assumption that our Bill of Rights and our Constitutional checks and balances, which provide accountability and some democratic decision making, are not impediments
to the effort to combat terrorism worldwide, but in fact, could be used as a powerful tool in support of that effort.

PROFESSOR BRIAN SIMPSON: Thank you, Kate. Now we’re going to move on. Our next speaker is Steve Emerson.

Steve Emerson is an author and filmmaker based in Washington, with a specialist’s interest in terrorism, particularly Middle East terrorism having Western counter-terrorist problems.

He’s served as Associate Producer of the HBO film, “Path to Paradise,” about the World Trade Center and has been involved in various other related authorial and production work of this character. So I will ask him to continue the panel.

MR. STEVE EMERSON: Thank you. I think I’m one of the few non-lawyers here in this building, so if you’ll excuse my minority status. I also had other comments that were in my Northwest baggage that was misappropriated by Northwest and I think that’s Northwest’s anti-terrorism policy.

(Laughter.)

MR. STEVE EMERSON: Ad hoc lose a bag, and the terrorists can never be sure. This is a plea to anyone watching this video, if you see my bag, please return it.

Let me say that the title of the talk is “Terrorism, the Legal Definition,” and we could probably spend days deciding it. There have been various definitions that have been instituted in Congress or in the State Department. There was an excellent definition, I thought, in Title Eighteen, in the 1986 law and I’ll just read part of it.

“The term international terrorism”—now we’re talking about international terrorism—“means activities that involve violent acts or acts dangerous to human life that are a violation of the criminal law of the U.S. or of any state or that would be a violation if committed within the jurisdiction of the U.S. and that appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or to effect the conduct of a government by assassination or kidnap.”

My bottom line is that terrorism is the systematic use of any type of violent act against a civilian population for the purposes of political motivation. I don’t have a sliding standard. Anytime a civilian is killed in a political act designed to bring about a political purpose that is an act of terrorism no matter how sympathetic I might feel personally toward that act.

In the last few years the paradigm of terrorism has changed. Within the United States the paradigm has changed a bit, not as much as it has
changed internationally. Internationally the old paradigm of state sponsorship has given way to a new paradigm of decentralized, more amorphous types of terrorist groups and organizations that are not state-sponsored but subcontractors, or they are independent actors: they’re mostly religiously motivated, and they are not subject to the same type of intelligence gathering and or control as other organizations were, let’s say in the 1970s, as the PLO was or as other groups were in Europe.

These organizations, like Bin Laden’s organization, the Gama Islamiya, and the Blind Sheiks organization are fanatically religiously motivated. They do receive some type of state assistance, but they—because of the ability to operate worldwide, the ability to move funds in and out of countries at will, to gain credentials to access to other countries—they have been able to build up an international network that defies the traditional Western response to contain them geographically.

That was seen, obviously, in the World Trade Center bombing in 1993 when a conglomerate number of militants got together and decided to blow up a building that, had it been successful, or had it been successful according to the designs of Ramzi Yousef as he has testified, it would have killed upwards of 100,000 people or maybe even more. Ramzi Yousef stated to an FBI agent that he wanted to kill 250,000 people.

I suggest that had any more than the six people that were killed and the thousand that were wounded, had there been numbers of ten thousand the 1996 counter-terrorism bill would have been passed within weeks if not months after the ‘93 act and there would not have been the same type of debate about certain provisions—a debate that was premised on civil liberty concerns—about giving the government too many powers, in terms of wiretap and other areas. A debate which, by the way, saw a unique confluence between ultra-right and ultra-left members of Congress.

The bottom line, as a British politician once stated, is that democracies respond when there’s blood in the streets. And there is a moving consensus that changes in accordance with the perception of the threat. In the 1970s, there were a whole rash of anti-terrorist conventions that were passed as a result of the threat that was manifest in the bombings, assassinations, and kidnappings carried out by European-based terrorist groups. And those conventions included the Hague convention on aircraft hijacking, the Montreal convention on aircraft sabotage, the European convention on suppression of terrorism, the Dublin Agreement and the United Nations Agreement. All of these were responses to the appearance and the emergence of violent acts on European soil.

In the 1990s the terrorist paradigm shifted. Now, no longer do we have state sponsors but we have independent actors. And as a result of
their ability to mingle within Western populations, law enforcement agencies and intelligence gathering agencies suddenly had new challenges that could not be met with the same type of powers that had accrued to them in the 1970s.

The question is, how do we stop terrorism? If we assume that terrorism is a threat—and I give that as a basic assumption, that terrorism is a major threat in society, that increasingly with weapons of mass destruction, particularly biological agents being made accessible to terrorist actors and their willingness to employ such agents, Western societies will be increasingly vulnerable to these types of mass casualties.

Interestingly, it doesn’t take a lot of mass casualties to instill the type of fear that terrorists hope to instill by killing a lot. In 1996 when Israel was subjected to a series of four suicide bombings that killed 59 people the entire Israeli population was literally frozen into a paralysis where many hundreds of thousands of Israelis would not leave their homes and they felt captive in their own country, where they wouldn’t board busses, they wouldn’t walk the streets.

Similarly, in the United States, during the Gulf War, people did not travel and even feared going into major cities in the United States because of a fear that terrorists would strike. In fact, during the Gulf War there were attempted attacks by Saddam Hussein, they were interdicted successfully by either the CIA or by allied law enforcement and intelligence gathering agencies.

In light of the threat and the increasing threat of terrorist violence to the West, and in particular to the United States, what is the appropriate response? Well, for one, the primary response, traditionally, has been a legal one, the FBI’s mandate in the United States and now, increasingly outside the United States, with the 1986 law, the first of a series of laws giving it extra-territorial jurisdiction, has been to basically fight terrorists by bringing them to justice.

The FBI is constituted as a law enforcement organization not as an intelligence gathering organization. And, yes, unfortunately because of the abuses committed by the FBI in the past, from the 1950s and the 1960s and the 1970s, some of which were disclosed by the Church Commission, some of which were disclosed by the Rockefeller Commission, there have been a series of regulatory changes imposed upon the FBI, codified most clearly in the Attorney General guidelines that specify what range of freedom the FBI is allowed to engage in as it conducts investigations into terrorist groups or political violent groups in the United States.

Now, those Attorney General guidelines restrict the FBI severely in monitoring political groups that are perceived to advocate a violent
philosophy, but, in fact, have not carried out any violence themselves. They also restrict the FBI in going after groups that anoint themselves a religious status, so that the FBI’s threshold for doing surveillance against a group that may advocate violence but defines itself as a religious group is very high. I’ll give you one good example and it occurred here in this city—not in Ann Arbor, but in Detroit.

In December of 1993 as I was working on the documentary film, “Jihad in America,” I attended a radical Islamic conference in Detroit, Michigan. It was held at the Renaissance Center. Before I attended the conference, I went to see some people in the FBI in Washington, and I asked them, in the Counter-Terrorism Bureau, if they would be attending this conference because of the fact that it was advertised in certain militant newspapers that known international terrorists would be attending this conference from outside the United States, people from Hamas, people from Islamic Jihad, two notorious Palestinian fundamentalists organizations that are deemed to be terrorist by the State Department. And the response from the FBI people that I spoke to was silence. And I said, “Aren’t you going to be going to this? After the World Trade Center happened around seven months ago or ten months ago, this would be an ideal place to be collect intelligence, especially if there are known terrorists coming in.”

And a senior FBI official held up his hands like this (indicating) his hands are tied. And they explained that they could not legally attend this convention to collect intelligence because there was no criminal predicate, there was no evidence of a conspiracy ahead of time that a violent act was going to take place.

And I understood that. I still felt that this would be an ideal and justified place to collect material if they knew that certain conspirators from the World Trade Center bombing had attended the previous years conference, held in another city, and they knew that—and according to open sources, that known terrorists were coming into the United States. They didn’t attend.

The last day of the conference I was there, and I collected a lot of incendiary material, I collected several bomb-making manuals in fact, and there were terrorists, known international representatives of terrorist organizations delivering speeches; incendiary speeches urging violence. Not necessarily violating U.S. law, but from a journalist’s perspective, certainly an interesting event to monitor.

I wasn’t going to proffer an opinion about whether, in fact, they were violating U.S. law. The bomb-making manuals that were distributed would certainly have been of interest to the FBI, if it knew who was distributing them.
Nevertheless, on the last day of the convention there was an outside speaker. And who was it? It was the representative of the local Detroit office of the FBI, and he was there to talk about good community relations.

The irony here is that he did speak and he had no idea, no clue as to the group that he was speaking before. Because at one point he was asked, tongue-in-cheek, and there was a lot of mumuring in the crowd and laughing at him when he was asked, "How can we ship weapons to our friends overseas?"

And his response was, "Well, I don't know the exact law, but I hope you follow the ATF guidelines."

Now I ended up speaking to someone at FBI headquarters after this speech and said, "Did you know that so-and-so,"—the name will be remaining anonymous to protect the guilty—"spoke before this radical Islamic convention, whose bylaws openly urge the destruction of the United States, and they're headquartered in the U.S., but they have offices overseas?"

And he said, "That's impossible. We would never send someone to that." He checked back and called me back, rather sheepishly, a little bit later and said, "We did send someone because we had no idea what this group was about. We didn't keep a file on this group. We weren't allowed to."

So I think that there has been a recognition of civil liberties in the fight against terrorism, sometimes to the point of being ludicrous. I'm not one who advocates shutting down free speech or simply monitoring someone because of the fact that their language is offensive or even violent.

It's legal for me to get up here and say "Let's kill all the Jews. Let's kill all the Christians. Let's kill all the Muslims." It's not illegal. It's protected speech. At the same time it's not—you know, in the classical argument, it's not legal to yell "Fire!" in a crowded theatre.

Should it be legal, as a State Department official once said to me, to get up in a religious center, like a mosque, yell and call for Jihad and then not expect to take the consequences if somebody in the gathering decides to kill for the sake of fulfilling this religious obligation?

I like the question—and here's a question for some of the lawyers—if there's a baseball game and there's a ring leader yelling "Kill the umpire," and by the ninth inning the umpire is killed, is the person who yelled "Kill the umpire," legally responsible or can he be connected to the conspiracy to kill the umpire? I don't know the answer to that.

I do know this, that we do have major issues to solve regarding associational activities regarding the use of secret evidence against illegal
aliens. I note that Kate mentioned that there are 22 cases today. Most of those cases—I think I’m pretty correct about this—are deportation cases against people who are deemed to be here illegally not legally. And I think that it’s a good debate as to whether illegal aliens should be entitled to the same protection.

My feeling is that if somebody is here illegally, that person ought not be entitled to the same protections under the law as people who are here legally. And, in fact, that’s the basic thrust of the INS, Immigration and Naturalization Service, cases against these individuals, because they are here illegally and the Supreme Court has ruled, in previous years, that hearsay is allowed against aliens who are here illegally in deportation cases. I believe the 1996 Alien Deportation Act has not been enforced yet and I think there will probably will be a case pretty soon in which a defendant will appeal the application of that and we’ll see where the Supreme Court stands today.

But by and large, I think that terrorism is a political crime that needs to be punished by a series of multi-faceted responses, including legal, political, economic and military. And to the extent that there is no economic or military response and it’s left only to a political or to a legal response, terrorists may not be deterred. And deterrence is the key component of a successful counter-terrorist policy.

To the extent that the terrorists feel the ability of Western states—it doesn’t have to be Western states, any state—to impede their ability to maneuver and operate freely, they are constrained in their activities.

To the extent that the Sudan now fears that another strike will be launched against one of its institutions because of its hospitality that it afforded to Osama Bin Laden, the Sudan will not sponsor Osama Bin Laden. Already the Taleban are saying “We don’t have Osama Bin Laden in our country.” I don’t know whether this is dis-information or not, but clearly they are worried about the strikes that the United States inflicted last summer and about a potential repeat.

So I believe that Western countries, led by the United States, need to institute a series of responses that involve all types of categories that I’ve cited before; to bring terrorists to justice, to use measures to penalize the state sponsors, to issue a policy of no deals, no concessions, to issue a policy of no surrender to terrorists, to be willing to use military force and to make a determination never to allow terrorists to make the political justification that somehow their political demands require us to concede on political grounds, therefore justifying the terrorist outrage.

Thank you very much.

PROFESSOR BRIAN SIMPSON: Well thank you. We’ve had two, not totally, but somewhat opposed, sort of perspectives on the sub-
ject for discussion. It’s now time for question, and let’s have some ques-
tions.

AUDIENCE MEMBER: Ms. Martin, I’d like to agree with Mr. Emerson and disagree with your definition of who’s a terrorist and who’s not a terrorist.

I, frankly, can’t see any difference between Arafat, Mandela, and for that matter Shamir, Begin, many of our own founding fathers, and Bin Laden, the Blind Sheiks, and the guy who blew up the Oklahoma Federal Building. The only difference is the first people that I mentioned, whom you didn’t want to define as terrorists, all succeeded in establishing what they wanted to establish. The people whom you want to define as terrorists have not succeeded, at least not yet.

In Bin Laden’s case it’s pretty clear. I mean, he wants to overthrow the government of Saudi Arabia, a government that was established by the ruling family, by overthrowing the Hashemites back in the beginning of this century. I can see no difference at all between him and Shamir and the Stern Gang assassinating Vokie Bernadot in Lebanon or Begin blowing up the King David Hotel full of women and children in—

PROFESSOR BRIAN SIMPSON: Okay. Could you respond to the general thesis?

AUDIENCE MEMBER: Yes. So I think that all of these people are terrorists, and when we’re talking about dealing with terrorists we have to have a common policy.

I mean we just can’t sort of draw a line and say “Well, those that have succeeded, now I’ll say that they’re okay and those that have not yet succeeded we’ll say that they’re not okay, but once they succeed then we’ll say that they are okay.”

PROFESSOR KATE MARTIN: My point is that from the standpoint of the law, you can’t treat those people the same in any way. It may have been legal to target Osama Bin Laden with U.S. missiles and maybe it wasn’t, but there’s at least an argument that it was. It’s not legal to target Timothy McVeigh with a missile. I mean from the standpoint of the law there’s no comparison between those two people, and how the U.S. government can treat them. And that’s my point.

You know, I think an interesting question of about who’s a terrorist, and how the law and the policy is going to treat them is Pinochet. The Assistant United States Attorney who prosecuted the Chilean Secret Police for having murdered Orlando Lettellier and Ronnie Moffit on the streets of Washington in the 1970s wrote recently, in the “Washington Post,” that he was convinced that that murder, on the streets of Washington, was ordered by General Pinochet. That is an act of terrorism
according to everybody's definition. The United States Justice Department is considering what to do about that.

**AUDIENCE MEMBER:** I mean killing Vokie Bernadot was certainly an act of terrorism, yet Shamir slept in the White House when he came and visited the United States. I mean many of the things the ANC did during their campaign against South Africa or what Arafat's people did in the Middle East were clearly acts of terrorism, and yet now they're both respected—

**PROFESSOR BRIAN SIMPSON:** I think the point has been made. Do you want to respond to this, Steve?

**MR. STEVE EMERSON:** I don't necessarily believe once a terrorist, always a terrorist. Sometimes terrorists do change. I mean Nelson Mandela was head of the ANC. Mandela, in my opinion, is a true leader who has renounced violence now. The ANC had carried out some outrages, and they've even acknowledged it.

So to a certain extent, I think that if there is a genuine change in the policy of an organization to renounce the terrorism that they committed, then I think political decisions are made.

I don't believe that, necessarily, terrorist organizations can't be changed. Sometimes they can be, and sometimes they can't be. I think today, with regards to the PLO for example, I'm not so sure it has changed, but to a certain extent there was a political decision to recognize them and to legitimize them, and they were given an opportunity to demonstrate their genuineness.

**PROFESSOR BRIAN SIMPSON:** The gentleman sitting by Professor Hathaway is next.

**PROFESSOR COLIN HARVEY:** Just picking up on something that Kate said. You talked about a terrorist policy. What about a conflict resolution policy?

**PROFESSOR BRIAN SIMPSON:** A conflict resolution policy. Would you like to comment on that?

**PROFESSOR KATE MARTIN:** I'm not sure I completely understand the thrust of your question. I mean what I was suggesting is that—you know, when we went after Bin Laden, one of the things the government was very frank about was that it wasn't going to work. That it wasn't going to mean that there were no more attacks. And I think one question it behooves policy makers to ask is how do we address whatever the political and social conditions are in the world that mean that some number of 18-year old or 20-year old guys are willing to commit suicide in the course of blowing up a lot of other people. I think that there are always going to be some such people in the world and they're always mentally ill such people, but it's also true that political and social
and economic conditions around the world encourage such people and the groups that support such people, and that that's a question that would be useful to look at, which is kind of a conflict resolution question. How do you discourage a whole community feeling that they should send their young people to be killed for some ultimate better goal?

PROFESSOR BRIAN SIMPSON: The gentleman over here.

AUDIENCE MEMBER: I have a question for Kate Martin. How would you deal with a situation of a foreign terrorist organization that comes to the United States, it may have a religious function, a social service function, perhaps as a cover to raise money in the United States; it raises money both for its terrorist purposes and its social service and religious purposes? How do you propose to deal with that situation?

PROFESSOR KATE MARTIN: I think that is, in fact, the case and a difficult situation. I think we have to start with the Supreme Court decision.

One of the things we forget is that was the view of the Communist party. You know, that the Communist party was a front, it was aimed at world domination, etcetera. The Supreme Court said, basically, that you could be a member of the Communist party, that the government had the burden of showing a specific intent to further the illegal aims of the Communist party and Americans who wanted to be supportive of Communist party activities.

And I think that's where we have to begin. We have to be—you know, if you're talking about an organization that, in fact, is not a cover, is not a fraud, is conducting legitimate humanitarian activities overseas, is the only organization running hospitals in a certain refugee camp, is the only organization providing schools for children in a certain refugee camp—that then it's a hard problem to say, how are we going to stop the flow of money to the terrorist activities of those organizations and at the same time permit, what I think is permitted by the First Amendment, which are associational activities in support of those legal humanitarian activities overseas?

MR. STEVE EMERSON: Can I add something?

PROFESSOR BRIAN SIMPSON: Yes, please do.

MR. STEVE EMERSON: I would disagree with Kate here. I would say that I can't conceive of compartmentalization of a terrorist group into one legitimate, charitable, non-political activities versus its military arm.

One of the aims of these groups is to clearly confuse the West into believing that somehow they are engaged in non-political, charitable, social welfare work and with a compartmentalized, totally independent arm that carries that military work.
It is clear, beyond any shadow of a doubt—for example with Hamas or the Islamic Jihad or the Gama Islamiya—that these are organizations whose violence is infused in every aspect of their activities. And when one gives money to a Hamas hospital or to a Hamas children's school they are ultimately giving money to create a terrorist apparatus, because it is those schools or clinics or hospitals that are serving as recruitment grounds or covers for the actual terrorists themselves. And two, these centers, themselves, serve as ideological incubators for the violence that is carried out.

So I would say that I would not want to be—I would not compartmentalize and I think that the U.S. ought to be more aggressive in shutting down the nonprofit organizations in the United States that are sending tens of millions of dollars overseas every year to organizations that use this money to further terrorist outrages that are intrinsically identified by violent anti-American, anti-Western and terrorist ideology.

PROFESSOR BRIAN SIMPSON: There's a gentleman in the center now.

AUDIENCE MEMBER: Mr. Emerson, I would like to focus on those last few paragraphs of your initial address. You were talking about deterrents and I'm concerned about that as a concept here. I'm concerned about what are the outside boundaries. Is assassination a relevant tactic or a tactic which you would advocate?

Presuming—I'm even willing to give the assumption that we're assassinating the right guy—is that a tactic that the United States should adopt? I've got some problems with that.

Second, you referred to the bombing of the chemical plant in Sudan. If, indeed, that was a chemical weapons plant, that raises one set of question. If, indeed, it was not a chemical weapons plant it raises a whole range of other questions. I don't want to get into the factual issues, but I think if your point is cruise missiles into Khartoum serve a deterrence function, then I guess it doesn't matter if it was a chemical weapons plant, right? I mean it could have been an apartment building because that would be an effective deterrent, right?

Where do we draw the lines here? And a follow to that is, might we be generating a pervasist sense of lawlessness? A sense that the only tactic that makes sense in the world is the use of violence? And mightn't that deterrence, therefore, provoke precisely the opposite reaction than what we want?

MR. STEVE EMERSON: Okay. No, no, and yes. As far as assassination is concerned, I have to tell you that I don't—I don't have a clear-cut answer on this one. It is clear to me that the U.S. thought that Osama Bin Laden was going to be in the barracks when they launched
the cruise missile strikes against his barracks, which would have been an attempt to assassinate him, but it wasn’t defined as such officially. So I’m not so sure that I am against—I won’t—I’ll have to sit on the fence on this one. I mean I haven’t really come down to a full resolution in my own mind about whether assassination should be acceptable at this point. Okay?

As far as the issue of Khartoum and the strikes, when you mentioned the apartment building as a deterrent, I would say to you that the deliberate targeting of civilians would be an act of terrorism. However, the targeting of an institution that is an appendage to the government, that is critical to the survival of that regime, and that regime is found to have been engaged in acts of terrorism, then I think that institution is a legitimate target.

So to a certain extent I do agree with you, that once we started getting into the game of having to justify the particular institution associated with Hasan al-Turabbi and the regime of the Sudan and to justify that it was really a chemical weapons manufacturing plant, we went down the wrong path. I think that any institution, governmental institution that clearly is critical to the survival of the Sudanese regime was a legitimate target, any institution. Whether that had been a military industrial complex—but I’m not including civilian targets. And I think that would have been and should have been a deterrent.

The issue about lawlessness, unfortunately the lawlessness started way before the U.S. invoked military responses. In fact, if you look at the number of military responses to terrorism, you’re going to find less than the number of fingers on your hand. You have 1986, the Libya-LaBelle Disco retaliation; you have 1988 Sudan and Afghanistan; you have some efforts to interdict terrorists, like the 

Achille Lauro; you have some missions that were in Lebanon that weren’t successful; you have arrests of terrorist overseas, but I wouldn’t put that into the category of lawlessness or violence and neither would you.

So I think that if you look at the entire range of responses, the U.S. has been quite un-aggressive. That, in fact, terrorists are going to carry out attacks on us no matter what, they are going to hate us no matter what. They hate us because of who we are, because of our value system.

I don’t think there’s any political reconciliation possible with them. They’re the ones that have made it a war to the end, a duel to the end, and we can respond, or we don’t respond. We can be sitting ducks, or we can try to interrupt their range of maneuverability preemptively.

PROFESSOR BRIAN SIMPSON: Thank you. Kate, yes, you may respond and then after that I think we have time for just two quick questions, and then I think we must draw the proceedings to a close.
PROFESSOR KATE MARTIN: I just wanted to say that if assassination is going to be the United State’s policy, at a minimum we ought to have some public debate and Congressional authorization of that method, before it’s adopted unilaterally and in secret by the President.

PROFESSOR BRIAN SIMPSON: Now we have one question here.

MS. ELIZABETH RINDSKOPF: Well, it’s not going to be a question, for which I apologize.

First I’ll say, on assassination, I couldn’t agree with you more. I think it’s a policy where, when it’s a choice, the only sensible answer is no. It perhaps requires more than that comment, but I have been there, talked about it, thought through it, and I’m shocked to hear people cavalierly suggest that assassination is the answer. It does, indeed, play right into the lawlessness.

I think this discussion is, however, a rich example of why lawyers need to participate in these kinds of combined policy and legal issues. The choices are complicated.

What we are obviously all desirous of doing is taking a system of law which we’ve come to cherish and value and export it. And it’s not as easily exportable in terms of protecting human rights and liberties, consistent with our own security, as we might like. So the choices, as move along this continuum, become more and more problematic.

To you Steve, and where I originally raised my hand, was this, it is said, and I think not without reason, that in cutting off the ability of organizations—let’s use Hamas as an example and you’re more involved with this—in cutting off their ability to do socially useful things, raise money and do charitable kinds of activities, in blocking that fundraising activity that they have traditionally had access to the United States with, you then create us as another possible target.

Indeed, some would argue, in positions that we’d hope that we’d know, that one of the reasons the United States has been relatively free of the kind of terrorism, perhaps, that we saw in Europe, is that that kind of capability was allowed. Now that then raises the question, at what price do we buy our safety? If in fact the money is a fraud, as Kate said, then I would agree with you. On the other hand, it seems to me that we ought not just decide the issue without testing whether, in fact, allowing socially useful activities—assuming that the money does go to those kinds of purposes—may not yet be a sustainable and allowable activity, if for no other reason than it may enhance rather than degrade our own security as callous as that may sound.

I think, frankly, among the questions, Professor Harvey, a person we’d like to hear more from and I know we will, asked one question that
I've got, back to the original question, which is, at what point does one draw a moratorium down and say, "You were a terrorist, but no longer. Reconciliation is now appropriate"? What kinds of legal issues does that raise? What points do we have where we can actually move to a more conciliatory working together and what are the legal points along that path?

PROFESSOR BRIAN SIMPSON: Thank you. I think we'll leave that as a point being made and not to respond to it.

Okay. One final—but I think at that point, I think the appropriate moment is to draw the proceedings to a conclusion.

I cannot resist telling one short story, however. In 1939 Colonel Mason McFarland offered to shoot Hitler from his bathroom window—which he certainly would have succeeded in doing; he was a very good shot. The British Foreign Office turned it down as "not quite British."

(Laughter.)

PROFESSOR BRIAN SIMPSON: It is now my pleasure to thank our two speakers and thank all who participated for an interesting and thought-provoking panel.

(Applause.)

MR. ERIC FEILER: And if I could just have your attention for a moment. I would like to thank our panelists. And I would also like to thank several people without whose participation this symposium would not have been possible, specifically Dean Gordon and Professor Alvarez and the Center for International and Comparative Studies. They were kind enough to sponsor the breakfast that we enjoyed this morning and tomorrow morning as well as the lunch today and tomorrow.

(Applause.)

(Whereupon, at 12:00 p.m. the proceedings were adjourned to be reconvened at 1:15 p.m.)

AFTERNOON SESSION
(Time noted: 1:15 p.m.)

FINANCIAL ASPECTS OF TERRORISM

PROFESSOR MERRITT FOX: Why don't we start the next session, which is entitled "Financial Aspects of Terrorism."
I'm Merritt Fox, and I'm on the faculty here at the University of Michigan Law School. We are very honored to have three unusually informed guests to talk to us today on this topic.

Let me introduce people as they're seated to my left and the order in which they're going to speak, starting with Stephen Kroll, who is Chief Counsel of the Financial Crimes Enforcement Network of the U.S. Department of Treasury. He has had that job since 1990, when he decided to take on these sorts of tasks instead of teaching, which he had previously been doing at the Cardozo Law School.

To Steve Kroll's left is Robert Sims, who is Of Counsel in the litigation group with the law firm of McCutchen, Doyle, Brown and Enersen in San Francisco and from the period of 1994 to 1997 was the Senior Advisor for the Bureau of International Narcotics and Law Enforcement of the Department of State.

And finally, to my far left, Phillip Nichols, who is a Professor of Legal Studies at the Wharton School who specializes in International Business Transactions and has a particular interest in bribery and regulation of bribery.

So, with that, let me start with you, Steve.

MR. STEPHEN KROLL: Good afternoon. It's obviously a pleasure to be here, to speak to this audience, to see some old friends. I am the first person, I think, today who has to note that his views are only his own and do not necessarily reflect the views of the United States government or the Department of the Treasury. Bob and Fred and some others used to have to do that, but they got tired of it.

And in this very conflict of interest-sensitive age I want to say and I want to assert very firmly at the outset, that our family Border Collie is named Elizabeth.

(Laughter.)

MR. STEPHEN KROLL: I want to talk about the financing of terrorism and what I call financial intelligence, in both senses of that term. When I started to work on this talk I thought I wouldn't have much to say. Now I find that I've probably go too much to say, because this subject, as you come to think about it, is as diffuse and as full of the quicksilver of alternating comfort of threat in a room of smoke and mirrors filled with quicksand as just about any you can imagine.

Lest some of what I say be misunderstood, I want to state my ultimate views at the outset. Terrorism, to me, is not the sort of thing about which it is good to be culturally relative, if you will, in the defense of wholly abstract propositions. There's nothing abstract about the slaughter of innocents or the slaughter of non-combatants.
What Shaw's great character, Undershaft, calls in *Major Barber*, "the faith of the armorer," in which he says, "to give all arms to all men who offer an honest price for them without respect of persons or principals, to aristocrat and republican, nihilist and czar, burglar and policeman, to all sorts and conditions, all nationalities, all faiths, all follies, all causes and all crimes," is not one to which I subscribe.

Terrorism is, however, the paradigmatic national security threat of the post-Cold War era. To call it paradigmatic is not to do a weighing versus the Soviet Union or Nazi Germany, it is just to say that it is paradigmatic of this era. It's mix of the civil and criminal, of the legitimately political, the creatively entrepreneurial and the terrifyingly psychotic shatters the categories of analysis on which enforcement and intelligence efforts have come to rely and around which our law is based. It may even reflect or represent a significant break in the wall of the Westphalian system.

And it's the very difficulty of the problem that requires, to me, a certain neutrality in analysis and a willingness to consider how things are like, and how things are unlike one another as a basis for drawing necessary distinctions.

Now that armed opposition to authority requires money as well as will is nothing new. George Dangerfield's book on Anglo-Irish conflict in the Easter Rising—which I commend to everyone who hasn't read it—contains the following delightfully old fashioned and straightforward passage: "Lack of arms in Southern Ireland, due more to want of funds than to the government's embargo, was a serious embarrassment to those who felt that as a response to Unionist landing of weapons at Larne, it was now the Irish volunteers duty to get out of hand."

On 8, May, 1914 there was a meeting at the house of Alice Stopforn Green in Grosvenor Road, Westminster to discuss this problem. Mrs. Green, widow of J.R. Green, the historian, and daughter of a Protestant Arch Deacon of Meath, had published, in 1908, her history of modern Ireland and its undoing. She had charm and wit, a scholarly cast of mind and a gregarious nature. On this May 8th she met with Sir Roger Casement. They were discussing the possibility of running guns for the Irish volunteers. Well that was two World Wars and one Cold War ago and as many of you—at least of my generation—know, Roger Casement was executed for treason in what is still one of the most controversial terrorist trials, I suspect, of this century.

Terrorism, at least organized terrorism, requires an infrastructure and that means money. The extent of the need depends upon the situation. There's weapons, there's travel, there's the operating requirements of secret operations; false passports, forged entry, ID documents and so on.
Funds are also needed for training camps, to pay soldiers, logistical personnel pensions, and death benefits.

Terrorist groups, most of the time, coexist, by design in some cases, by physical and social reality in others, with loosely organized non-governmental social aid and welfare groups among the population from which terrorist volunteers must be drawn and in whose name the terrorists at least claim to act. This is as true of Tamil insurgence as it is of the various Islamic groups Steve Emerson has mentioned. These ultimately symbiotic links reflect a sort of ecology of grievance that we are just beginning to understand.

Now everyone has his or her own indexing system, but I’d say that there are six categories of terrorist financing. The first is pure criminal activity. That’s nothing new. Stalin’s June 1907 daylight seizure of Czarist currency shipments is legendary in Bolshevik annals. The Stern Gang—one of the things you have to do here, of course, is to insult or at least implicate every possible ethnic group you can think of, and I have tried very hard to do that. I thought about mentioning John Brown, but that got to close to home—the Stern Gang robbed banks. And more recently, terrorist gangs throughout the world, including the Red Brigades, have specialized in kidnapping, extortion, robberies of various kinds.

Second, alliance or what today I guess we would call strategic partnership with organized criminal groups, especially narcotics traffickers. These relationships don’t all arise in the same way. In some cases organized criminal groups have the expertise the terrorist needs. They know how to secure weapons, move money across frontiers, where to buy the best false documents. In other situations the anarchy created by each group certainly benefits the other. I suspect—and I hesitate to say this with Ambassador Quainton here—I suspect that that’s true of the narcotics traffickers in Peru and Sen Dara Luminesca.

In still other cases, the paramilitary groups may see the traffickers as a source of funds or tribute. I have heard experts speculate whether, for example, the left or the right wing paramilitary groups are more closely tied to elements of that troubled nation’s narcotics industry.

Chechnya, of course, is a story unto itself, not for a speech but for a day or two-day long seminar about the interaction between organized crime and national security.

Third is state sponsorship. To the extent that terrorists are state or sub-state actors, they derive funds either directly or indirectly from their political sponsors. Much attention has been given, some of it overstated, but some of it quite accurate, I think, to the likelihood that Syrian control over the Biqaa Valley provides a convenient way for the government to fund terrorist groups simply by looking the other way. It’s much cleaner
than actually paying someone money, you just conveniently look the other way as the narcotics move out of Lebanon.

Fourth is external fundraising or support intended and understood by donors to further political and violent ends. Roger Casement's motives were not very ambiguous, neither are those who contribute to the procurement of arms for the real IRA, for various Islamic groups or for the Israeli group Kach.

Fifth is general external fundraising. Now problems of attribution become a lot more serious. Funds may be raised for one purpose and used for another or as Steve said, you can simply rely on the fungibility of money to defray expenses from one side of the balance sheet and use other money for other purposes.

Finally, there is investment. All terrorist organizations don't have the wherewithal or wit to create the sophisticated commercial venturing that characterized and still characterizes the Palestine National Fund, but it is likely that some of the money used to finance terrorist activity comes from otherwise legitimate investment. Steve Emerson, again, suggested in the journal last August, that Bin Laden is the beneficial owner of investment accounts in London and New York. Now, whether or not that's accurate, it certainly wouldn't and shouldn't be surprising.

But why is this different from the support that civil insurrections always required? I think the answer, which people have given this morning, is that combination of technology, freedom of personal movement, and mass communication that have expanded terrorist activity as never before. It is now possible for terrorist groups to operate without state support as NGOs who can mobilize and project force or the threat of force around the world.

A corollary is the tracing of financial trails. It's likely to be of use in solving particular crimes, illuminating both motive and opportunity, and expanding the focus out from the person who happens to rent the truck or drive the van. This is no different than what is done in organized crime cases.

Second, the financial trail is likely to be of use in working to prevent or curtail the opportunities terrorists exploit. Again, it's uses are likely to be the uses of all good intelligence, to provide focus, leads for on the ground collection and analysis and confirmation, but there are several caveats and pre-conditions for their effective use and I'd like to discuss that. I'd like to point out that although I am a lawyer, I'm trying very hard to talk about a non-legal subject.

The caveats are easier to state, I think, and are more obvious. Financial data, no matter how good, is never a smoking gun. The data are too provisional, they are based wholly on those abstract representations of
abstract ideas that we call numbers and they are likely to be generated without much human involvement on either end. They can generate reasonable suspicion, even very reasonable grounds to believe, maybe probably cause, but almost never proof beyond a reasonable doubt.

Second, the amounts of money terrorism requires, even when carried out through organized, purposeful organizations is never large enough to reveal itself. The tens of billions of dollars spent on narcotics each year in this country might create bulges in cash flow that you could see if you knew where to look.

If every dinar of Bin Laden's money was used for terrorism, it wouldn't create a blip, even in a regional financial center, probably even if it moved in one day, at one time. And of course the loan terrorist who needs pennies to buy a truck, some nitrate fertilizer and gasoline is never going to be found by anyone using financial analysis.

This shouldn't deter us. Even the naval code breakers at Bletchley Park could only track U-boats, on good days, to ocean sectors many hundreds of square miles in area. I try never to speak where David is attending unless I have some good English reference in there as tribute.

To succeed, I think, requires capacity, cooperation, balance, reasonable expectations, and knowledge—and I'm probably going to go a minute-and-a-half over.

Capacity means paying attention and using the tools of prudent fiscal regulation. This is important. The relevance of efforts against money laundering, organized crime, and corruption are immediately relevant. Ultimately, transparency is indivisible.

The second crucial element is cooperation. If organized crime is an international activity, how much more is that likely to be true of terrorism. No one has more than a piece of the puzzle. Sharing collation and analysis of information among cooperating governments and within the U.S. government are essential. That's why the pending U.N. convention on the financing of terrorism, which has been reported in the press, is likely to be significant. There's not much in it that's going to be very breathtaking, but the fact that it represents a commitment to share information is.

That leads to three more difficult issues. The first is balance. The new opportunities for terrorist financing are, in some large measure, the product of the very breakdown of barriers to free movement of goods, funds and persons, to which U.S. policy has been largely, steadfastly, and admirably devoted throughout this century.

To a very real extent that is the challenge of the post-Cold War national security environment. This is not a hunt for new devils or new tasks. It is an attempt to shape the basic functions of civilized govern-
ment to a world environment in which war is not the continuation of politics by other means, but in which there's only one set of means to be used for good or ill.

Next, reasonable expectation. We ought not to apply "the how many people did you arrest today?" standards of law enforcement to the long-term, difficult task of creating a secure environment.

I'm on borrowed time, so I'm trying to hurry through. I've just got one more page.

Finally, knowledge, we simply—and none of us wants to admit this, not in the Agency, not at the Treasury, not at the Department of Justice—we simply understand too little about the financial system. I've scanned the books on my own shelves about terrorism, intelligence, and policing and found precious little attention paid to finance or economics.

Sherman Kent devotes eight pages to the subject in his classic 1984 book. Woodrow doesn't mention it. And those who really want to learn the risks of three-way asset swaps should start with Lawrence and Fox and not with Iran Contra.

Part of HUMINT if you will, is not what the other guy knows, it's what you know or are supposed to know. How many OR agents or officers understand that few pieces of paper in modern banks are ever touched by human hands, and that blocking orders intended for implementation on the same set of electric binary instructions as those that send your favorite magazine to Lansing rather than Ann Arbor because two names and addresses were switched when a merge-mail function failed.

The knowledge that is second nature to even young investment bankers and tax lawyers about financial transactions is mysterious to our personnel as whatever it is we know would be mysterious to them. It may be less important to understand what a renegade Saudi millionaire does than what a relatively law abiding Saudi millionaire does with his money. You can't track aberrations without a baseline.

So financial intelligence means both financial information and the capacity to understand what it means. And with that, I'll turn it over to Bob.

PROFESSOR MERRITT FOX: Thank you very much, Stephen. Let's move on now to Bob Sims.

MR. ROBERT SIMS: Thank you. It's a pleasure for me to be here. I would like to focus, if I could for a few minutes, on a broader picture of money laundering activity, primarily organized crime and drug trafficking because we'll see some of the overlapping concepts that Steve talked about.
It's probably appropriate, having traveled to Detroit by way of San Francisco to Denver to Washington D.C. to Detroit that I'm sort of talking about the convoluted pattern of money laundering activity. Because that's really what laundering is, the ability to conduct a series of financial transactions that disassociate the funds from their illicit source.

In terms of current trends, I think it's still important to recognize that while it's very difficult to measure the amount of money laundering activity on a global basis and various international organizations and the U.S. government constantly try to do that. The fact of the matter is, you get estimates of $300 billion, $500 billion, $750 billion. It's all a lot of money to me, but it's very, very difficult to measure.

What does appear to be clear, however, is that drug trafficking continues to be the primary source, the single primary source of laundered funds, but significantly, financial crimes, bank fraud, credit card fraud, advance fee schemes, and the like make up an increasing percentage of global money laundering activity. In some countries that exceeds drug trafficking. In countries like the United States and elsewhere it may equal trafficking proceeds.

So you're talking about organized crime activity and drug trafficking in particular as primary sources.

One of the things, having looked at this problem as a prosecutor and at the State Department and I also have seen the private practice side of things, one of the areas that's interesting about laundering activity is how much, sort of, doesn't necessarily change.

In fact, the three stages of money laundering activity that I heard about when I initially became a prosecutor—the placement stage of funds, where criminal proceeds are initially introduced to the financial system, the layering of transactions, whether by wire transfers or offshore companies and the like to increasingly complicate the picture and disassociate the source and then finally the integration stage, where you have successfully laundered funds that can be invested in the legitimate economy or reinvested in further criminal activity—still basically tells the picture of money laundering, even as these emerging technologies have come into play, even as the diversification of sources and the like, those still are basic concepts that are true today.

One of the principal things—I would view this as a national security risk associated with laundering—is that it truly does provide a mechanism for criminal organizations to penetrate the legitimate economy, to, in some countries, assume control of institutions, undermine the integrity of financial institutions and the financial system, but really play a substantial role in the legitimate business activity of particular countries.
I still am struck by the notion, before I left the State Department, that President Clinton used his authority under the International Emergency Economic Powers Act in '96 to target the Cali Cartel leadership and its associates and front companies.

One of the institutions that was on the Treasury list and sanctioned was the largest drugstore chain, for example, in Colombia; that was cartel owned. That laundering activity allows criminal organizations to consolidate financial power and reflect that power in various states is a substantial risk.

Let me quickly talk about a couple of current trends that international organizations, including the Financial Action Task Force, which is the principal international anti-money laundering organization—and I have included the Web site, for those of you interested in additional information. I've included that Web site in the outline that, hopefully, you've gotten—but they have an annual typologies exercise that provides a snapshot of current trends in money laundering reported by a wide variety of organizations around the world.

It's still the case that banks and increasingly non-bank financial institutions are the money laundering tools of choice. Clearly the methodology that we've seen for decades now, the use of offshore companies, you know, "smurfing" cash into financial institutions and the like is still a primary money laundering tool.

The large scale bulk shipments of cash—as companies have developed more effective mechanisms for money laundering, for example, in the United States as our laws and regulations became more actively enforced, as banks became more aware of laundering and adopted anti-money laundering techniques, the tendency has been for criminals to generate cash proceeds, but get those cash proceeds to countries, to jurisdictions that don't have the same level of scrutiny.

So the large scale bulk shipment of cash that you see in the U.S., you see in Europe is creating tremendous pressure on financial institutions in Latin America and the Caribbean. And that continues. There have been a number of cases reported.

When I was a prosecutor I had a case that involved the Cali Cartel buying a container ship that—and when we initially got the information we thought it was going to be used for the purposes of bringing drugs into the United States. In fact, its intent was to get cash out of the United States, because, obviously, it's a whole lot of $100 bills that you have to get out of the country.

So that continues, as you see in Europe, Canada and elsewhere.

Finally, I think the one disturbing trend that most FATF members and other countries continue to report is the increasing use of
professionals, accountants, lawyers, business folks involved in formation of companies. Their involvement directly in money laundering schemes is of growing importance and a very, very disturbing trend because that has provided a mechanism for bypassing, in many cases, the anti-money laundering techniques, regulations, and the like that have been developed in other countries.

I have, in the outline, as I said, Web site references, both the FATF and also the State Department’s International Narcotics Control Strategy Report, which is a good source for case studies and a discussion of current international and bilateral initiatives.

Let me close this, and hopefully we’ll get into some of this in discussion, by saying clearly while there has been tremendous progress in developing legislation and enforcement mechanisms in countries around the world, there is a great deal that still has to be done and far too many weak links and even rogue states in the chain that defeat the anti-money laundering legislation and enforcement activity in countries that are more active. Offshore countries with strict bank secrecy or countries that fail to cooperate in investigations and the like are still a primary problem in addressing what really is a global phenomenon.

I think in terms of our activity in the United States, while we have made tremendous progress, there has been a tendency to engage in what I believe are sort of poorly planned prosecutions and regulations that undermine support for the anti-money laundering activity in the U.S. And perhaps we can talk a little bit more about that.

Let me close there. Thank you.

PROFESSOR MERRITT FOX: Thank you very much, Bob. And for all three of the speakers, one of the reasons I’m being so merciless here is so that we’re sure that we do have time for discussion.

MR. STEPHEN KROLL: The note says, “You are on borrowed time.”

(Laughter.)

PROFESSOR PHILLIP NICHOLS: I’m going to try to avoid getting one of those notes. My name is Phil Nichols. I feel really out of place here. I think Steve Kroll might have helped me understand why.

The environment that I work in and do research—I study transactions that are good and that are right. The people that I work with have spent their entire lives learning how to understand finance when it works, and how one uses finance to make money, but also to accomplish things.

My own personal research interests are in how the world fits together, but I’ve studied how the world fits together from a very private
perspective. The people that I study are business people and the institutions that I study are business institutions.

I also feel out of place, because I'm quite probably the most boring and have the most boring life of anyone in this room. The people that I study don't carry guns, they don't blow things up. I go to villages sometimes and everyone, except for me, is armed to the teeth and I go talk to them about "How do you effectuate a contract?"

(Laughter.)

PROFESSOR PHILLIP NICHOLS: You guys have made me see that perhaps I should be looking a little bit more broadly when I look at these people.

The other thing that struck me and made me feel really curious was that there was a panel on Interstitial Players. The people that I study are interstitial players, because business, now, pays very little attention to borders.

The discussion that I heard that most strongly resonated with the people whom I study and the people whom I interact with was David Bickford's conversation about law enforcement. He was telling us that the law enforcement agents who are trying to accomplish something have to deal with British law, Dutch law, Islamic law, common law, adversarial law, a whole plethora of laws, and in the end, in the particular instance that he was telling us about, it ended up working against what the agents were trying to accomplish.

The businesses that I study, as I mentioned, care very little for national borders. My students, when they come into my classroom, very rarely talk to me about countries. They talk to me about deals, they talk to me about transactions. And these transactions cross a border, or they don't cross a border, and these transactions involve persons from one country or from two countries or from 15 countries or from places that aren't even countries. My people care very little about that.

What they do care about and what does occasionally—in fact, quite frequently—cause a transaction not to occur the way the people designed it to occur is those national laws or is the differences or is the differences between those national laws.

So the community that I'm interested in first of all is a community that essentially works and doesn't blow things up, and is a community that crosses state borders, that attempts to affect transactions without regard to a border.

Now, having told you what I study, let me tell you a very short story. I am here to talk about corruption, about bribery and I learned a term for what my talk is, it's OBE, it's been overtaken by events,
because I, very much—I am going to propose to you that countries should illegalize, they should criminalize, they should penalize the paying of bribes by their nationals to foreign officials. Once that was a controversial subject, now the OECD and the Organization of American States have agreed, and they’ve asked their members to do so, they’ve required their members to do so. I’m still going to argue that the entire world should do this, because I’m a scholar, and I can make arguments like that, but in the process perhaps I can begin to understand how my area of study overlaps with the area of study that involves international security. One of the most interesting days I had, in the last couple of years, was in Kazakhstan and I was spending a few weeks in Kazakhstan talking to businesses about how they were adapting to the new Kazakh foreign investment code. One day every single business that I spoke to, every single business person that I spoke to, of the businesses I spoke to mentioned, unsolicited, the serious problem that they had and one of the things that they found most disturbing with doing business in Kazakhstan was bribery. They found bribery to be both morally repugnant, and this was interesting; but they also found it to be inimicable to their attempts to do business in an open and forthright fashion. And interestingly, most of them—and I will never name names—but most of them also told me that they paid bribes. They paid them, they didn’t like it. They found it to be against their culture and against doing business. My translator, Elmera, who is a wonderful person—Elmera is now here in the United States, which leaves a gaping hole in my studies in Kazakhstan—Elmera, a wonderful person, 19 years old, great friends. I took her and some of her friends to lunch, and these 19-year old kids, among many other things, many enthusiastic things, complained bitterly about corruption in Kazakhstan. And many of them—these are some really smart kids—said, “We’re not going into government service because we don’t want to become like that.” And then I got a call from—again, I won’t name names, but a very high ranking official in the Kazak government, who—you’ve all been out there, and you know that when you’re the one Westerner in town, you often get called, as a courtesy call, “Come in and talk to us.” So I went, and I talked to this gentleman. I walked into his office, he had a gorgeous suit, he had shoes like they talked about in that football player trial, beautiful shoes. He had three laptops—and this in Alma-Ata quite some time ago—and he had a Rolex; I don’t know how he lifted his hand up. We had a very pleasant conversation and we talked about the changes to the Kazakh laws just a couple of weeks ago which very much
narrowed where approval for foreign investment could come from, it could come from him. And he said “The best thing about this law is that now your companies know who to bribe.”

And he may have seen the look on my face and he said, “Oh, yeah, I know, you don’t talk about bribery in your country, but in my country bribery is just the way we do business.”

Of course I said nothing to him, for many reasons, but I could not help but contrast the business people I talked to and the teens that I talked to, the people who are actually effectuating transactions and who are going to be, one day, the future of the country, with the government official. Their claim was that “Bribery is not part of our culture, it’s been imposed on us. We don’t like it, and we want to get rid of it.” His claim was “It’s part of our culture, and you bribe me.”

There’s an anthropological term called disengagement, which refers to when a government is not providing services that the people need, the people provide those services themselves. One service that is not provided to my community, to the community that is effectuating transactions without regard for borders, is an infrastructure that supports those transactions. Now many people here have spoken about the lack of accordance among securities laws. There is an equal lack of accordance among business laws, of laws that allow my people to do what they need to do across the border.

One particular area in which there is a lack of infrastructure is in the control of corruption and the control of bribery. Not a single country in the world will allow you to bribe their own officials, but there are very few provisions and very little regulation of bribery outside of a jurisdiction.

Now, to the extent that laws are still made by sovereigns and to the extent that laws are still enforced by states, in order to support my community there has to be a cobbling together of state and other sovereign-type laws. But these laws have to be built with an idea towards the fact that they are supporting communities that just don’t exist inside of their states.

A very important law that could be passed would be a law against, a law prohibiting, a law penalizing transnational bribery, the bribery of officials outside of the boundaries of a particular sovereign. That law would give voice, would give effect to a community of persons who exist—what I’ve learned to call, today—an interstitial community, but an interstitial community that is not intent on destruction.

The other thing that I could point out is that in the study of transactions that work we do learn that there are transactions that don’t work. And I submit that it is by working to support good transnational
transactions that we will be more likely to find, expose and be able to control and deal with the non-viable of the inamicable transnational transactions.

Thank you.

PROFESSOR MERRITT FOX: Thank you. Let me thank all of the panelists.

Let's open things up for questions and comments. And maybe I can take the privilege of the chair and ask the first question, which is perhaps more aimed at Bob Sims and Steve Kroll and, in particular, Bob.

You mentioned that not every country is part of the solution at this point. What kinds of policies by the U.S. government do you think would be—or legal reforms—would be helpful in making more countries part of the system?

MR. ROBERT SIMS: I think that there are a couple of different approaches and probably no easy answer here precisely because most—and I think it's a very good point where you're talking about money laundering activity and regulation. In fact, what you're doing is imposing certain restrictions on legitimate business people, legitimate banking customers, the legitimate economy for the purpose of controlling—no matter where you are and no matter how much drug money there is, it's going to be a small percentage of overall economic activity.

So when you're doing that, by it's very nature you've got to be careful in how it's done. I think that there are several international organizations and initiatives that are doing very good work in this area, the Financial Action Task Force is one, in this hemisphere the Organization of American States, the OAS, has several different initiatives to try and work with regulators, law enforcement officials in the region to develop legislation.

Where we have the most significant difficulty is what to do about what I would view as the rogue states; states that not only are lax in terms of enforcement, but affirmatively cooperating. There, I think, we have been very hesitant to use economic sanctions in this area and the like. I think that we have to rethink that. But again, because we're dealing in an area where you're imposing on the legitimate economy the preferable approach is always going to be to do things by cooperation and through financial and economic technical assistance.

PROFESSOR MERRITT FOX: Do the other panelists have comments?

(No response.)

PROFESSOR MERRITT FOX: All right, let me open it to questions from the audience.
MR. DAVID BICKFORD: This is a question for Steve Kroll. The information from the reporting requirements by financial institutions seem to impose a huge burden on the group that is seeking this information for purposes of a money laundering sense or whatever. Some people argue that that information can be put into an intelligence base and used. But from your perspective, what is the real effectiveness of the information that is drawn from the institutions for the purpose of preventing money laundering?

PROFESSOR MERRITT FOX: Okay. The question in summary is, in terms of the official reporting requirements, which can pose burdens on the recipient of the information as well as the provider, what is the effectiveness of these regulations?

MR. STEPHEN KROLL: David, that’s a crucially difficult question. I think that our Bank Secrecy Act, which is an anti-bank secrecy act, reporting requirements probably have three impacts, and I’d list them like this: with respect to the reporting of large currency movements, both cross-border and into and out of financial institutions—which was in my text until the notes started coming—I think that preservation of financial trail, provision of real intelligence for investigators, and to the extent that we have success with mining that data for indications of activity, combined with the deterrent effect certainly makes laundering harder. Whether the costs and benefits balance depends on lots of assumptions about public goods that I won’t go into, that I’m not qualified to go into.

The suspicious activity reporting requirements, which we’re just beginning to learn to work with, are actually producing some quite extraordinary results. It turns out that banks are pretty good at knowing what’s going on in their institutions, which we’ve always supposed they were, and I have to say that I am encouraged, very encouraged by what I see coming out of what the analysts do, and what they’ve been able to identify, including, in some cases, with respect to the activity that I’ve talked about specifically today.

But there is always, I think, a legitimate question—and this is part of the challenge. I mean here you’re basically using a civil approach to limiting—it’s a little bit like export controls I suppose—what is actually ultimately either a law enforcement or security problem, depending on what part of it you want to look at.

In a world in which the free movement of funds is the assumption and how you calibrate and recalibrate that balance is not going to be a question we’re ever going to be able to answer one time for all.

I’m not trying to dodge the question. I think it’s a legitimate question that I get asked to answer once a year, usually by people that control
my funding. So if something has happened that I need to know about, David, if you’ve switched your citizenship and gone and got elected somewhere, I need to know that.

I hope that answers the questions.

PROFESSOR MERRITT FOX: Questions? Yes?

AUDIENCE MEMBER: I have a question for Professor Nichols. I, too, was in Kazakhstan a number of years ago with part of a delegation to talk to them about non-proliferation. And we had folks from Customs and Commerce and the intelligence community and all kinds of folks. And we were talking about how you put in place effective export control laws, and what the role of customs is, and how you do export licensing. And the audience was very responsive, very committed. We had a dinner the night before with lots of toasts, and the commitment was clear.

And midway through, sort of late afternoon after this day of sharing ideas somebody stood up and said, “You know, it comes down to individuals, and our customs folks make next to nothing. And if someone comes along, he doesn’t have to offer them very much money.” And they were talking about the corruption and the bribery that can undermine all of those kinds of efforts.

And I have watched the OECD work on foreign corruption and bribery and the efforts that they’ve made with their member countries. And I wonder, is it going to get at that kind of bribery, because that brings that very close to the kinds of national security issues that we’re talking about?

PROFESSOR MERRITT FOX: Okay. The question for Phillip Nichols relates to bribery, in connection, among other things, with customs control and non-proliferation efforts.

PROFESSOR PHILLIP NICHOLS: You’re question hits home. I don’t travel with delegations, I travel on my own, and I’ve been robbed at the border at gunpoint by customs inspectors who took all my warm clothes.

Will an OECD convention prevent them from ticky-tack violations? No, it won’t. But a question that we might be asking instead is—and a question that all of us, no matter what our interests are, because we’re all very international—is does the law lead change, or does change lead the law? And the answer probably is both.

Some field work I’ve done in Kazakhstan indicates the foreign investment code does change the way that Kazakh businessmen do business with each other, not just foreign businessmen. To the extent that the OECD countries eventually become less prone to bribery, it’s quite possible and probable, I would think, that government officials in non-OECD countries will be less likely to demand bribes. And to the
extent that people at the top are less likely to demand bribes, it's possible that there will be less of the culture that allows a border guard to feel that he can ticky-tacky violate with impunity.

In the short run, no, certainly not, but if we do buy into the possibility that law can lead change, then the OECD changes eventually will have a broader effect in non-OECD and in countries that are not quite wealthy right now—at least that’s my opinion.

PROFESSOR MERRITT FOX: Yes?

PROFESSOR FRED HITZ: Steve and Bob, how well, in your view, do we protect our own data? If you assume that information warfare—not understood particularly well by me, but I’m told that there are a good many who do believe that there are some extraordinary weapons out there—how does the United States, as one of the principal originators of this data go about protecting its secrets?

PROFESSOR MERRITT FOX: The question is for Steve Kroll and it relates to how the United States goes about protecting its own financial data that it wants to keep secret.

MR. STEPHEN KROLL: This is a test, right? If I say anything I have to kill myself.

(Laughter.)

MR. STEPHEN KROLL: You can always tell a former Inspector General, they’re always out to see if you’ll slip.

Look, I think that everyone is keenly aware that electronic impulses flow both ways. It is, he said, looking at Mr. Bowman carefully, I believe no secret that the Bureau has expressed—it’s not going to be secret in a minute—a great interest in having banks be more forthcoming about computer break-ins. That is very important. The best thing I can refer you to, Fred, at least here, is a wonderful article that appeared in the “New York Times” magazine two years ago about the big CHPS computer in New York, which has redundant systems designed to make the redundant computer systems redundant because, frankly, if that ever crashes there will be no way to reconstruct the balances of the world’s banks. No one adds that stuff up. It either foots out at the end of the day or it doesn’t, and no one really knows exactly how.

But there are people in our government who are terribly worried about this. It is something that we think—it’s part of the Critical Infrastructure Protection project that Mr. Clark is heading, although it doesn’t get as much publicity as other things and is the ultimate level at which—I mean the whole theory of this conference, I think, is that now everything merges together into everything else and we can’t say, “You guys wear the uniforms. If we have a war, we’ll call you. And you people
over there, do your legitimate transactions and remember, no weapons please."

That's the ultimate place where everything merges together. It's a terribly serious long-term problem; corruption of data. That's all I could say and probably just about all I know.

MR. ROBERT SIMS: The only thing I would add to that is that it's such a difficult problem to deal with. Having now seen this from the perspective of, sort of, representing the private parties involved, that our whole system—one of the difficulties of being more forthcoming—for example the law enforcement about these problems—is that by its very nature this becomes a matter for public discussion, and it becomes just excruciatingly difficult for businesses trying to resolve these issues to be concerned that that information is going to—or the fact that there is some problem is going to make its way to public discourse. And boy, you know if you've got products, and you're out there advertising your security, and the next thing you know a couple of guys, as a little home-room project, break into it, that's not something that you want to go spreading around. And systematically, that's the nature of much of our system.

MR. STEPHEN KROLL: Somebody broke 56-bit DES last year, didn't they? They just broke a sentence, but with the computer power exponentially multiplying every 18 months it won't be long before 56-bit DES is—you know, my daughter will be able to break that some day.

PROFESSOR MERRITT FOX: Yes?

AUDIENCE MEMBER: About the cryptography, do you see cryptography aiding the money laundering, that people can encrypt things and that it disappears into the network?

MR. ROBERT SIMS: It is certainly a substantial law enforcement concern, the increased resources that organizations have, especially sophisticated organizations have. And the flip side of that, part of this difficulty, one of the responses, at least in terms of money laundering activity is enhanced transnational cooperation, which generally would mean sharing more information across borders and not less. And having this concern about security in that direction as well, makes the enforcement or regulatory problems more difficult.

MR. STEPHEN KROLL: I break it down, and I can never remember these two categories, there's encryption for authenticity and encryption for data protection. Encryption for data protection is no problem for me, though it is for the FBI. That is to say, when you do a Title Three you're against data protection because if you can't listen to what they're saying, it doesn't do you much good to have a tap on the line.
My problem is different in a work in which there’s financial inter-
mediation. In other words, as long as the encrypted message gets
unscrambled somewhere before it can be used, I’m fine with that.

That’s where the kind of work that I do is generically different.
Where the encrypted message cannot be unscrambled, either because it’s
sent to a jurisdiction to which my writ does not run, or because people
are willing to take the unscrambled message to represent the value un-
derlying it, then I’ve got a real problem and, we don’t know where that
comes out yet.

**PROFESSOR MERRITT FOX:** One last question. Anybody?
(No response.)

**PROFESSOR MERRITT FOX:** Well, let me thank the panelists
for a really stimulating session. Thank you.

**MR. STEPHEN KROLL:** Before we end I’d like to say that I
speak at a lot of these things, and I have never met a group as welcoming
or as interested in making their tired, grumpy travelers feel at home than
the students here, and it’s a really great advertisement for the school. I’d
never been here before, and they’ve just been swell. I think we all feel
that way.

(Applause.)

(A brief recess.)

**DEFINING DRUG TRAFFICKING AS A
NATIONAL SECURITY THREAT**

**PROFESSOR KENNETH GRUNDY:** My name is Ken Grundy,
and I’m from Case Western Reserve University.

The Bush Administration declared war on international drug traf-
fickers. Did that act, ipso facto, transform the international drug trade
into a national security threat? One might ask, how can a crime become
transformed by dictate into a national security threat? How does this
declaration of war transform the policy alternatives that are available to
the government? Does it widen them or does it narrow them? And if
some think the international drug trade is now a national security threat,
how does that affect privacy concerns to a greater extent than an issue of
law enforcement affects privacy?

So the United States now uses foreign policy and commercial policy
to deal with a heretofore law enforcement issue. Or to widen our scope
even further, what happens when governments or agencies thereof par-
ticipate, facilitate for a price the international drug trade?
We know that international criminal organizations can use governments and particularly the protection accorded to them by sovereign states, and that governments can use international crime organizations for their ends, especially in ideological and religious contexts. We know that international crime organizations establish links with political organizations and vice versa. That certainly came out in the financial session that proceeded us. And we know that the use of proxy actors in foreign policy is extremely common, even in the post-Cold War context.

With us this afternoon are two specialists, Cynthia Ryan who is the Chief Counsel for the United States Drug Enforcement Administration and Ambassador Anthony Quainton, who currently is the President and Chief Executive Officer of the National Policy Association.

Cynthia will kick off the discussion with some general remarks, and the Ambassador will try to look, in more specific terms at how an embassy deals with those questions. Cynthia.

MS. CYNTHIA RYAN: Thank you. Good afternoon. I want to thank the law school for putting on this symposium. I think it's a really important subject, and one which I would never have dreamed to have explored when I was in law school 20 years ago, and I've gone through a law enforcement career, primarily, as you will sort of understand from my remarks where my focus is.

I've been a prosecutor on the local level, a prosecutor on the federal level, and I went with DEA about 11 years ago, and I'm now Chief Counsel, where primarily the Chief Counsel's Office advises the Agency on how to conduct its business. We don't do the actual prosecutions, but we're basically like in-house counsel. We have over 50 attorneys, basically helping DEA run its operations within the bounds of the law.

We've talked a lot about a lot of different angles today, but I thought I would just start with a general overview, things that aren't in the law books, sort of how the government runs, with a specific focus on how we attack the drug problem. And I'm just going to do a very general overview, and what we thought we do then is I'll hand it over to the Ambassador, and he'll talk about some of the application of some of these thoughts in the U.S. embassy where he's had DEA people and had to deal with the drug issue. We'll leave plenty of time for questions so you can basically lead the discussion in whatever areas you'd like to explore.

First I'd like to talk, as I said, an overview and sort of set the stage and talk about what are the U.S. government players in the—and I really hate to use the term—but in the war against drugs.

First of all let's talk about the controlled substances law. There are several treaties that are multilateral treaties, 1961, 1972 and the latest in
1978. And basically what they did—especially 1961—is they scheduled controlled substances, so we have this understanding, worldwide, on what controlled substances are, and how they are scheduled, and what substances basically need to be controlled. Obviously we’re going to be talking about, primarily—our focus for the U.S. government is cocaine and heroine, which are produced outside the United States. We also have marijuana issues, which is produced domestically and abroad.

But there is this worldwide recognition of basically what drugs need to be controlled, which includes certain pharmaceuticals as well, and then some of these other drugs that are used primarily just for abuse.

Now under the treaty obviously we have domestic legislation, and that legislation is the Controlled Substances Act and that’s found in Title 21 of the U.S. Code. The enforcement of that law is given to the Attorney General, which is delegated down to the Administrator of the Drug Enforcement Administration. The FBI—and we have an FBI colleague here today—also has concurrent jurisdiction delegated down from the Attorney General for the Controlled Substance Act. And the U.S. Customs Service has a role, basically at the U.S. borders, for the importation.

Now the federal law enforcement community—these are the three agencies, by the way, that operate internationally, the primary actors, the primary mission. And we’ve been talking a little bit about tension between the law enforcement community and the intelligence community. I’m going to get to the four communities here in a minute, but the law enforcement community, it’s primary mission is obvious, but I’ll state it anyway, is the fact that we like to get evidence, and we take the evidence to arrest people, and we like to prosecute them, and we like to put them in jail, and preferably we like to prosecute them and put them in a U.S. jail, and that becomes an issue, as you’ve heard, I think, in which jurisdiction we’re going to prosecute and put them in jail. Because we really rely—we feel strongly about the fact that the U.S. justice system is the strongest one, the most corrupt free and it’s the one that we’re going to make sure that they’re going to stay in jail. So that’s sort of the objective of the U.S. law enforcement systems. We also have some other objectives, and we do some other things, but that is our primary mission.

So keeping that in mind, when I said we’re going to primarily discuss cocaine and heroine, you should understand that while we’re talking about international, it’s because cocaine and heroine, coca and opium are not manufactured or cultivated in the United States. They’re cultivated in what we call the source countries, and obviously we know what those are. Colombia is the source country for cocaine as well as
heroine, a growing heroine, opium market, as well as, of course, Burma and Thailand are source countries for heroine.

Now, that raw material is shipped through other countries, and there's a vast amount of transitory countries there which we just call the transit countries, and obviously the U.S. government is concerned with them as well. There are cocaine routes, and there are opium routes or heroine routes, and there are routes all throughout the world, such as the rest of South America. I mean Peru and Colombia are source countries, but obviously the transit countries are many of the other South American countries, the Central American countries and certainly Mexico. For heroine, of course, we have the PRC, a growing transit company and we have some Southeast Asian countries, as well as Eastern Europe becoming a tremendous transit area; Spain as well as all the way over through the East European countries and the Mediterranean area. So we're also, obviously, concerned with them.

And then, of course, we're concerned about the final destination countries; obviously the U.S. is our primary concern, but Western Europe is a growing destination for the Colombian cocaine as well. It's a growing market.

So you can see that there's probably not too many countries in this world that aren't affected by the drug trade, and that we're not interested in.

So that brings me to where DEA fits in, and I'll just talk briefly about that so you can understand, since we are the lead law enforcement agency when it comes to drug enforcement. It was established in 1973, and frankly the reason it was established was because the U.S. government was frustrated with the multi-agency effort towards the drug problem, and there was a big problem then, of course, as it is now. And one of its duty is as the primary liaison with foreign law enforcement agencies. Right now we have approximately 80 offices in 57 different countries. We have over 400 agents abroad. But frankly, this is not a new phenomena. DEA and its predecessor agencies have really had offices and agents acting abroad since the 1920s. We are the largest U.S. law enforcement presence abroad, although the FBI, I think, is catching up with us because they've really been expanding their efforts abroad as well.

Now the authority that we have, obviously our job is to enforce the Controlled Substances Act, which is a U.S. law, but the Controlled Substances Act also applies outside of the United States. It applies specifically and explicitly in international waters and the territorial seas of other countries. So basically DEA's enforcement authority, implicit
authority, although it is not explicit in the Controlled Substances Act, is worldwide.

Now, that is not to say that we fully exercise our authority in all the other countries. Obviously we have an issue of international law here on enforcing our domestic law while we are located in a foreign country. I think the best way we explain how we do that is we exercise our authority in a foreign country to the extent the foreign country permits us to, and that’s basically under international law, and if you want to look at the restatement of international law, that’s Section 432. We abide by that and that varies from country to country.

In some countries we are extremely active and operational, Colombia is a good example where we actually are going out and helping with raids and search warrants and—they basically do have search warrants just like we do—and going out and doing all kinds of operational things. It also means that in Western Europe, for example, we are much more strictly a liaison function. We may accompany some officers doing something, but we’re primarily a liaison service. It also depends whether we can carry a gun or not in a certain countries. In certain countries it’s absolutely forbidden, we can’t carry our guns. In some countries we can. There’s either an explicit or an implicit understanding that we may.

What we do if we’re in countries is basically we support foreign law enforcement. We not only want to enforce, obviously, U.S. law—and as I said, events that happen in foreign countries can come under the jurisdiction of the Controlled Substances Act; conspiracy, importation, transiting things that are destined for the United States. There are a lot of activities that are going to occur on foreign soil that can be prosecuted in the United States.

But, we also have another role and that’s to support the foreign law enforcement programs and that’s in training, equipment; we do a tremendous amount of information sharing about people, activities or asset locations and of course we share evidence.

We also, of course, want to share information about the location or we pass along information about the location of U.S. fugitives, fugitives from U.S. criminal justice. And obviously DEA very much doesn’t like to have the fact that people that are indicted in U.S. courts are not coming to U.S. courts for prosecution. So we have this issue, obviously, of if we have U.S. fugitives located in a foreign country how are we going to get them back. There are options there, obviously, of extradition, detention and expulsion—or extradition and new formal rendition as you might want to break it down.

So basically that’s how we work, in a very brief way. Now, I was talking about the declaration of the War on Drugs as a national security
threat, and how does that change how we approach this problem. I would like to clarify and I think that sometimes this is really sort of lost in the rhetoric—when President Bush declared it a national security threat, he did it for reasons basically because drug trafficking was threatening some of the democracies, especially in South America, the money and things like that, but it really didn’t change the legal authorities. It didn’t change the legal authorities of the DEA. It didn’t change the legal authority of the CIA or any of the other agencies of the U.S. government, who put their resources to bear on this problem.

So I’m going to talk a little bit about those communities. I basically like to break down the government into four communities. I’ve just talked about the law enforcement community, we have the intelligence community, and we have the Department of Defense, the non-intelligence community side of it, and we have the State Department diplomatic community, which I will obviously be leaving to my colleague here.

But each community has its own set of authorities, and it has its own set of restrictions. And as Elizabeth was saying in her opening remarks today about how in the 1980s there was this growth of the threats of transnational crime, of threats against American interests abroad. And we generated all this U.S. activity to meet that. And back in the late ‘80s and early ‘90s there was a lot of activity and a lot of different players were coming into the Drug War scene, but it really wasn’t a very coordinated approach, and I will agree with Elizabeth. Elizabeth and I have worked since 1989-1990 in working with our respective—that’s when she was with CIA—agencies and trying to sit down and trying to figure out how we’re going to do this.

The objective really is how to maximize the authorities of each agency that’s involved and get around the restrictions; not violate the restrictions but get around them. How is it that we can do this job together, and we can use your authorities and your authorities, and then we don’t have to worry about your restrictions and my restrictions? And that’s really what the game has been, and I think we’ve gotten a lot more successful about it.

The intelligence community basically has its authorities—if you don’t know, we may be talking a little bit basic here—in Executive Order 12,333. It tells you who the intelligence community is and of course it’s the alphabet soup, CIA, NSA, DIA, and FBI has an intelligence part, and Treasury has an intelligence part, and the State Department does, and all the military services do as well. DEA is not an intelligence community agency. It is a law enforcement agency.
So primarily their authorities allow them to operate primarily outside the United States, and, of course, we know they collect intelligence. And they also have specific authority, in that Executive Order, to permit collection on activities of international drug trafficking—and I stress international drug trafficking.

And, of course, their primary mission there is to collect intelligence and provide it to appropriate policy and decision makers. It is not, obviously, their objective to expose their sources and methods. Their objective is to protect their sources and methods so they can continue to use them. They also have restrictions of no law enforcement powers and no collection on the domestic activities of U.S. persons.

Now you can imagine that we have this tension between law enforcement and the intelligence community. Law enforcement is overt. We collect information so that ultimately it is exposed in a U.S. public trial. The intelligence community collects information, which we like to share, but obviously their objective is completely opposite of ours, and they want to keep theirs closed. And if you want to, later, we can talk about some of the ways we have been able to share information and manage to not compromise those objectives.

The Department of Defense—and unfortunately Ann Marie Salazar cannot be here today so I promised her I would at least try to explain a little bit about what the DOD does. They had a greater role in the late ’80s and early ’90s. Congress basically gave them a lot of money for the War on Drugs; it’s a war, get DOD involved. And so they did, and they became the lead agency in the U.S. government of the detection and monitoring of air and maritime traffic of illicit drugs into the United States.

Now they’re basically a support role in the drug effort. They’re supposed to be supporting law enforcement.

It’s a little difficult for DOD, though, because they’re used to not being in a support role, they’re used to being in a commanding role. So again we have a little bit of a tension there in who’s going to be commanding and who has been assisted. But as you might know, the Posse Comitatus Act, which was passed like in 1878 or something like that is still in the books and it’s in Title 18 at 1385 and it says the military may not enforce the laws of the United States against our citizens.

So now they’ve been given money to assist in the war effort and the domestic front is particularly a problem, as well as outside our borders.

So basically what happened is the military said, “We really can’t do anything because we have this Posse Comitatus Act and we didn’t really know where the middle ground was.” So you’ll find at 10, U.S. Code, at Section 371 it tells you what they can do. They can provide information,
training, equipment, people to help with the training and equipment. They're not allowed, however, to do any arrests or search and seizures; no direct participation with the public, no direct confrontation with the public. So again we have this—we have another role here to play with the Department of Defense.

The Department of State has a role, as exercised through the U.S. Ambassador, the Chief of Mission, and, of course, they're responsible for coordinating all the U.S. government interests. And obviously they're competing interests. Drugs are not the only interest, even in Colombia or in Mexico, and we'll be hearing about that in a minute. Of course there's trade and human rights and other issues.

They're supposed to make sure that all those agencies, with all their different missions and programs stay in a nice, coordinated box in country and keep it controlled so we talk with one voice.

In closing I'd like to get back to the issue first mentioned by Elizabeth, and that was the authority to take action against drug trafficking, and it is really a very complex issue with many different authorities from all these different communities with a lot of different restrictions. But we see that, as lawyers, one, not only as a challenge—lawyers basically try to thread the needles here and try to get the job done and make sure that we use the government resources effectively and efficiently, but I think we all feel, too, that in a democratic society that it's necessary, and that not one agency has all the power to do one thing, and the fact that these different authorities and restrictions are very healthy for us and keep us in balance to move the government forward.

Thank you.

AMBASSADOR ANTHONY QUAINTON: Thank you very much. A lot of what's just been laid out I am going to go into in the specific case of Peru. I was trying to think what I might call these remarks and perhaps the best way would be, "Pro Consul Reflects" or "Hegemony at Work."

I came on the scene or fell off my perch into the trenches of the Drug War within weeks of its being declared in 1989, just before I went to Peru. I was given extensive briefings about what was intended, what we were to achieve, and extensive promises about the commitments and the resources that would be made available from the United States government in order to achieve the purposes set out in the Drug War.

What I'd like to suggest this afternoon is that as we implement our programs in the narcotics arena, we come up against a series of fundamental problems, problems which could be extended much more widely to other areas of our foreign affairs, and I don't want to since this is a
cameo appearance before five o’clock. I don’t want to duplicate some of the things that I’m going to say then.

But with regard to the Drug War, let me suggest three of four specific problems. The first, and in my view the foremost problem, is the problem of the rhetorical context itself. It is extremely unhelpful to think of this as a war. Because when you deal with our military colleagues and indeed, to some degree, with the intelligence and law enforcement colleagues, wars are to be done. Wars have finite endpoints. Wars are something in which you can have, to be sure, strategic objectives. But at the end of the day, somebody will have surrendered.

The practicalities of the War on Drugs are that as long as there are consumers, as long as there are people in our society and in other societies who wish to consume whatever prohibited substance you are dealing with—and the two most common are cocaine and heroine, with international dimensions at least. It is very unlikely that a War on Drugs in the Andes or in Southeast Asia or in Central Asia will, in fact, come to the kind of victory which you expect from the rhetoric. And I think we have got ourselves into considerable problems with the Congress and elsewhere by continuing to say that this is a war.

More important and more difficult, it seems to me, is the squaring of the circle between the national objectives of two different countries in two different contexts in two different regions of the world. I’ll speak, almost exclusively, about Peru, but I think much of what I will say would almost certainly apply to Bolivia and Colombia and, I suspect, to the countries of Southeast Asia as well.

If you think about what we hoped to achieve in the Drug War in the Andes, we hoped, in fact, to get them to stop the production of the raw material, and that is the growing of the coca plant and in those countries from which heroine comes, the growing of the poppy.

So our first objective was to go after the plants, those little green bushes, but if we couldn’t get them then, before the product was refined very far, we wanted to go after the laboratories. And if the product was refined in a laboratory, then we wished to stop it from being exported from the country of production. So interdiction became important.

In the case of the government of Peru, when they looked at this problem or their national priorities, as it touched on terrorism and touched on drugs, they said, “No, wait a minute. Our problems our economic. We are minor consumer, although we spent a lot of time trying to tell them that consumption would get them in the end, that they would go our way, down into the problems of the inner city in Lima and elsewhere. They never really believed that.
But they said, "No, no. The problem isn’t about destroying coca plants or laboratories or whatever, the problem is the people who are the producers, who are our citizens, need to be protected against the blandishments of the international cartels."

"So don’t tell us to cut down the coca plant unless you’re prepared to tell us what you will put in its place, because we cannot, as a political phenomenon and a political reality, ask our citizens to give up earning a living in a desperately poor country unless you are prepared to give them an alternate source of livelihood. And if you promise that then, indeed, we can join with you in doing the things that are on your agenda; eradication, laboratory destruction, and interdiction."

But when we actually went down that road, of getting the resources to substitute one crop for another, we immediately came up against the conflicting agendas of the United States Congress and of the administration of the day. I’m going to come back to that in a second because I think it’s very important, but only to say that what we wanted to do meant that we often talked past our interlocutors on the other side of the table in the governments with which we were dealing.

Now we did, in the end, engage in some limited eradication of seed beds, and we did destroy some laboratories using DEA agents under the Snowcap program, and we did get the Peruvian Airforce to shoot down some planes or shoot at some planes, and we did, in fact, over time in the early ’90s bring about an engagement of the government of Peru, not withstanding our failure to produce large resources in return. By the middle and late ’90s we began, indeed, to produce the resources, and the Peruvians have become much more active participants in the whole effort to reduce production of the coca plant and hence of the refined product, which has come through Colombia, Brazil, and other countries onto the American market.

But let me suggest that if you think about the U.S.-Peruvian relations and you’re not in the Drug Enforcement Administration but are somewhere else in the United States government, you’re going to be telling the American ambassador that drugs are well and good, but that’s not what’s important for the United States in this particular Latin American country of some size and importance—23 million people.

There was one large constituency that said, "What’s really important is that they should get their economic system right.” What I would call the IMF Structural Adjustment agenda. Our friends in Treasury were enormously enthusiastic that we should get the Peruvians to change almost every macroeconomic policy that they had. And fortuitously and fortunately, on to the scene steps Alberto Fujimori, who says,
"Absolutely. We’ve got to change this country from top to bottom, and we’ll start by changing it the way the IMF wants."

That, of course, made a lot of people in Washington very happy, but it took an enormous amount of political and bureaucratic energy, both in the embassy and outside, to get this to happen.

There was another larger or equally important school of foreign policy, but most notably represented in the Congress that said, "Well, it doesn’t matter whether they reform their economy, or whether they deal with the drug problem, what they’ve got to do is observe international human rights. Democracy is the central agenda item for America in Peru. You’ve got the army to stop beating up on the citizens, and you’ve got to get the police to stop beating up on its citizens, and you’ve got to get this fine man, who’s the President of the Republic to stop beating up on the political opposition, that what we want is democracy first, economic development second, and the Drug War some distance behind."

And then were those in the intelligence community who were being exhorted by their masters to get on with the business of combating terrorism. Terrorism, as you may remember, throughout the '80s and certainly on into the early '90s was a central theme of American foreign policy, and I’ll say a little bit about this later this afternoon, as to how it impacted. But they were using their resources to chase after the Sen Dara Luminesca and the MRTA, and they did not want much to be distracted from what Washington said they should be doing, to get their hands dirty in the Drug War, side-by-side with the law enforcement agencies who had an explicit mandate to get on with that particular job.

All of this, when you think about it, you would probably have agreed with everyone of those agenda items, that we really do want Peru to run its economy efficiently, so that there would be American trade and investment, that it would be a democracy observing human rights, that terrorism would be eliminated and indeed, that drugs would not come from Peru to our shores.

The problem, and I think this a problem everywhere where we are engaged, is that a small, inefficient government finds it very difficult to do all these things at once. And while we have enormous resources, I think it’s probably safe to say that if there are 400 DEA agents around the world, there are not anything like 400 Peruvian diplomats around the world.

We are so large and so top heavy, and an embassy like our embassy in Lima has about 200 Americans from 20 different agencies working there, plus a large number TDY folk coming from the DEA and elsewhere. We look awfully big. We are very overbearing, and each one of
those sections are busy trying to promote their agenda with the Peruvian government or whatever the government department is.

And I didn’t mention, indeed, one other large and important presence that had its own constituency in Washington, related to the human rights group and that is, of course, those who believe that the first and most important task in any society is sustainable economic development which meet basic human needs, the AID agenda. And AID had some independent resources from the resources promised under the Andean Initiative, and they were interested in getting on with spending their money on health and education, maternal child care, population and a whole series of things, which indeed did and, if played out over time, would make an enormous difference to the way Peruvian society operates.

So we had a lot of different people in an embassy, some of whom were supportive of the Drug War, some of whose job was the Drug War, all of whom had been told by their masters in Washington that while they should get on with their principal task, they should be helpful at least, where they were not emotionally or bureaucratically committed.

And that led to the single biggest challenge that our embassies abroad face and our ambassadors do, if you will, but it’s more than an ambassadorial problem: how do you pull all of this together? How do you make all of this happen? In the Drug War in Peru DEA had an office and airplanes and a regularly rotating team of street agents whose job it was to fight the Drug War, who carried weapons, who came out of helicopters and went after laboratories, who, in fact, were engaged in what was very nearly paramilitary operations. The enemy usually didn’t fight back, but there were occasions, indeed, when it did.

You had the intelligence community engaged in supporting that in various ways. You had the State Department, which also has its own airforce. One of the craziest things that was ever done in the Drug War was to give the State Department airplanes. I can speak with some confidence that we are not very good at running an airforce, but we have one. We have C-130s and other aircraft deployed to Peru and to the other drug countries in order to support DEA in its mission. But doing that efficiently and effectively was always a problem and there was always a question of whether we used the State Department’s airplanes or DEA’s airplanes or South Com’s airplanes or, in some cases, the CIA’s airplanes. Everybody had airplanes running around the world doing good work.

And who’s going to decide which missions are the right ones? Some are to collect information, some are to provide logistical support, some
are actually operational. I say airplanes, in the larger sense, there were a lot of helicopters as well, which pose all sorts of other problems.

But what you've got is a lot of people doing a lot of different things. And the question comes, in a war, one of the features of a war is that, of course, you've got to have targets. You've got to decide what you're going to hit that the enemy has that you don't want the enemy to have anymore.

My predecessor in Peru was a great enthusiast for the Drug War in this regard and he has an operations room with detailed maps of the Huallaga Valley where the stuff was and they would sit around every morning and plan the next assault. I never felt that this was something that I was going to be very good at, sitting around choosing targets, pretty elusive targets at that; little laboratories in the jungle. But that's one way of going about coordination is to get everybody around the table and help choose the targets and then decide how you were going to deploy your resources.

You also have to have some means for coordinating the information. At the base of the Drug War and indeed of so much else that we do is good information, good intelligence. And there a lot of people collecting it in an American embassy, some you would think about and some you wouldn't, but almost everybody who is in a country is in the collection business. That's what they do in order to understand their interlocutors and what their interlocutors are up to.

And some of that information, whether it comes from AID, from the AID development people, or whether it comes from the people promoting democracy or human rights is, in fact, relevant to an understanding of the Drug War or the drug problem and hence, may be useful in fighting the Drug War. And this coordination is absolutely critical.

Coordination used to be easier and is now harder in some respects, although the mandate to coordinate in Washington has become much stronger and hence, has become stronger in the field, but what you now have is dispersed communications. Every agency has its own channel to get back to its headquarters and get instructions and making sure that that all is pulled together is a real challenge.

All of that being said, my experience in this was that, notwithstanding the bureaucratic differences, not withstanding the different cultures involved—and I think it's important to realize that State Department diplomats and law enforcement officers off the street and military officers out of a unified command come from vastly different cultures. They think about each other differently, and there are enormous jealousies—jealousies about who has priority, how people are treated—and getting that right is, of course, something that we need to work on very, very
hard, it seems to me, in the United States government as a general proposition. Because most of the things that we do overseas require a synergy involving multiple agencies in ways that was never true before.

A couple of specific examples of how things can—unexpected issues can come up, a couple of them with legal ramifications. At one point we became—we were talking about this last night—quite enthusiastic for interdiction by the Peruvians, getting their airforce to shoot planes down, as a real deterrent to drug traffickers and indeed it is.

The only problem is that there were a lot of other planes flying around in Northern Peru and Southern Colombia, belonging to missionaries and others. And the question kept arising, what would happen if the Peruvians shot the wrong plane down at our instructions, using our intelligence, using our information? And for quite a long time all these efforts were held up while people in Washington thought through the legal ramifications of a policy they had long since approved.

Another occasion we got into a terrible mess because of internal coordination, where we had been authorized by the Peruvians to do a flight to take pictures. Unfortunately the Peruvian government wasn’t notified appropriately by the defense attaché whose job it was to do it, and so when the flight came over they intercepted it. Here’s the Peruvians intercepting us, not the drug traffickers. Our plane turned off its approved flight plan, thereby violating all the rules of the road by going where it was not allowed to go and was eventually forced to land, having been shot at by our allies in the Drug War.

Well there was a terrible fuss up in here in Washington as you can imagine; an American service man was wounded, the plane was seriously damaged, and the allies in the Drug War had turned and bitten the hand that was feeding them, so many people said. And it set back the cooperation for a period of months as Congress demanded explanations and compensation.

But the bottom line was that if you don’t have the right kind of coordination in the embassy, you can’t carry out the programs, however sensible they may be, which have been approved at higher authority back in Washington and which the ambassador is authorized to carry out. Vastly complicated. It seems simple when you hear the lines of authority, yet in practice it’s hard to pull together in a coherent way.

MR. KENNETH GRUNDY: Thank you very much, Mr. Ambassador and Cindy. A reminder that if you do have questions or interjections, we are using the microphone down in the front.

Yes, sir?

AUDIENCE MEMBER: For Ms. Ryan. I understand that the drug business is an enormous business and that it’s second only to armament
in profit in the world. Chief Justice Warren Burger made a statement when he was on the Supreme Court bench that the drug business in the United States could not exist without the cooperation of certain local law enforcement people, and that if the local law enforcement people that were cooperating with the drug business would stop the cooperation the day that he made his talk, that at midnight the drug business would be over in the United States.

And I’ve seen write ups, like about the Detroit Police Department, where it said if the officers that weren’t cooperating with the drug business tried to get the officers who were cooperating with it to stop that there would be a civil war in the police department. And I can’t think of any reason why this wouldn’t be a similar situation in other police departments across the United States. One of my companies tries to help people who are chemically dependant and I don’t see much hope of the drugs being shut off at the point of production and supply.

But it just seems to me that if this drug business is so important, as far as a policy against it to help the American people not become addicted to it, and if it’s so important from a national security standpoint, why don’t we tackle this problem of the cooperating local law enforcement official people?

MS. CYNTHIA RYAN: Well, I don’t really have a ready answer to that because I don’t really see the problem of the corruption, the extent of the corruption that you evidently think that there is in the United States.

I’ve worked with local, state, county and federal in my career and I see very hard working people. And I see police officers—there’s tens and hundreds of thousands of them across the United States—who are very dedicated to the profession, and when they see somebody beside them whom they believe is corrupt they have internal affairs, and they have reporting mechanisms.

I guess what you’re saying is that maybe we’re not seeing it, and maybe it’s there. I would say that my experience has been that when it is noted it is rooted out, and it is taken care of, and it tends to not happen very frequently.

AUDIENCE MEMBER: Well, I understand that this is, again, a general, ongoing problem all across the United States.

MS. CYNTHIA RYAN: Well, sir, that news to me. I mean I work with the other law enforcement agencies in the federal government and we don’t—I mean, yes, there’s probably some here and there, but we do not see it as a general problem, that it is everywhere or that it is systemic.

PROFESSOR KENNETH GRUNDY: Henry King?
PROFESSOR HENRY KING: My question is directed at Cindy Ryan. It’s a three part question. One, are we making progress, in terms of this so-called Drug War or fight if you want to call it?

My second question is, we have a Drug Czar, how does he relate to all this?

And my third question is, what about our domestic laws in terms—and also our international agreements, are they adequate for you to do your job?

MS. CYNTHIA RYAN: Okay. First, are we making progress? It depends on what your goal is. The goal, I would guess, is to make sure that the abuse in the United States is down. Stats differ on that. In some areas we see junior high school kids are way up in their use of marijuana and cocaine in the last six years. That’s not a good sign. In some areas we see that it is going down. Heroine, unfortunately, has had a comeback.

So we’re making progress. We’re making a little progress, but I think that with the new ads that are coming out we’ve noticed that—and there’s been a lot of studies done, when there’s a lot of pressure out in the media about why drugs are bad for you—we’re trying to reach the youth that haven’t started yet. There’s a gentleman there who says he works with chemically dependent people. You want to stop this before they start. And there’s a lot of issues there.

DEA firmly believes in demand reduction. We are primarily a supply reduction agency. We do have a small demand reduction program, but DEA believes firmly that the future of the United States and the drug problem is in the demand reduction.

The Director of the ONDCP, Office of National Drug Control Policy, is basically the umbrella person. He has a lot of authorities gathered over the years by Congress, and primarily that is the umbrella for the President to prioritize what the drug strategy is going to be for the United States. He comes out with an annual report every year and basically coordinates where the agency, at sort of more of a macro level, is going to go. That includes all the communities and all the agencies that I’ve talked about.

He also has some control over programming. If you’re going to have significant change in programming or in your budget then you have to have it cleared by the Director or the Drug Czar as he’s commonly called, and that’s General McCaffery. He came from the military and basically runs it like the Drug War, “We’re going to attack this war.” He’s a very strong leader, very vocal, and not afraid to speak his mind. And yes, sometimes we differ, but basically he is the person that’s supposed to be guiding the macro level, the national strategy.
Your last question about domestic laws, I think that we feel that the federal law is fairly adequate. As to our bilateral agreements, we focus a lot on current extradition treaties, extradition treaties that allow a foreign country to extradite their nationals, which is not the case in some countries; we also emphasize mutual legal assistance treaties, so that we can effectively, without having to go through Letters Rogatory, which takes a long time to exchange evidence, exchange witnesses, and things like that, so that we can assist foreign countries in their trials of drug traffickers, and they can provide us information and people to help us in our prosecutions.

So we have not as many of those with other countries as we would like to be able to have an effective way of doing business, although we're making some progress. The Department of Justice handles that.

PROFESSOR KENNETH GRUNDY: Yes, mam.

MS. CYNTHIA RYAN: I will say that the person coming to speak has a note I have read today. I'm going to embarrass him. This is Joshua Spector and he has written for the Journal of Law Reform here at the law school, "Extraditing Mexican Nationals and the Fight Against International Narcotics Crimes," in the summer of 1998. I found this very interesting. He did a nice, concise job of presenting the problem of Mexico not extraditing their nationals. So, thank you, Joshua.

MR. JOSHUA SPECTOR: Thank you. My question is for either of you. We have all these agents—my area of interest is Mexico—we have the agents and ambassadors and State Department in these countries, and for whatever reason the cooperation seems to not always work out very well, especially in Mexico. I know that with the certification debate that we've been reading about, it seems that the U.S. gives them information, and they either don't act or ignore it or act too late.

I'm curious who's job it is, among all the agencies, to do that, what kind of legal options we have when they won't act on our information and just in general, why it hasn't happened as yet?

AMBASSADOR ANTHONY QUAINTON: Cindy touched on it at the beginning there, there is always the sovereignty question. You can't force governments to do what may not be in accordance with their laws, or where there's ambiguity they don't enforce their laws. Governments are sovereign in enforcing their laws.

What can you do about when you provide a certain amount of information about a particular target, a particular person, a network, and action isn't taken on that? Well that's, in fact, what a whole range of people in an embassy would be dealing with in their liaison relationships, from the ambassador dealing with the president of the republic,
down to the liaison in the intelligence or law enforcement communities, everybody making the same point.

Now, ultimately, if the evidence becomes so dramatic, of failure to cooperate with the evidence provided, there is the certification process, which the President can waive for national security reasons as you know. And the Congress has been concerned about this very phenomenon, that we don’t always get the kind of response that we would like from other governments. Sometimes they are protecting a powerful individual for reasons other than drugs.

It’s a tough question and a very tough call when you are forced to make judgments like the certification judgments when you have both cooperation and non-cooperation. These things are never black and white. It’s not that the Mexicans don’t ever help us, they help us lots, but there are cases when they don’t. The Peruvians helped us lots, but there were cases when they didn’t. And when to lower the boom is essentially a political judgment taken in the White House or at very high levels in the Administration and in the Congress.

**MS. CYNTHIA RYAN:** Well, some of it is obviously driven by U.S. dollars. And they want—we can talk about Mexico. Mexico wants foreign aid from us, obviously, and so to a certain respect they have to tolerate us. And that’s basically what they do with DEA.

DEA has quite a large contingency in Mexico. We’re not as operational, maybe, as we are in Colombia, but we are there, and we’re very active.

We work very cooperatively with Mexico. We have a lot of counterparts that we know we can trust, and we can work with. We’ve actually moved into what we call the vetted units, in which we have a cadre of Mexican police officers, in which we’ve actually gone through a vetting process, including a polygraph, so that we know that we have a non-corrupt system, basically, that we’re working with. And that’s the big thing.

Basically DEA tries to work with their counterparts on a day-to-day basis and by working with them they can sort of figure out who is corrupt and who is not. Who can we share a little bit of information with and not worry about it being compromised, but who can we share, really, the good information with? And then we have to let them play it out. And it’s very frustrating to us sometimes, but we have to try to let them play it out and try to do what they do.

And we have a lot of mechanisms. We have a big information sharing mechanism, we’re trying to put together bilateral task forces along the Southwest border, so that we have assigned people that would basi-
cally have a constant communication and who would be working joint cases and joint targeting.

So we try to set up at least informal mechanisms to be able to work it. And it isn’t the 100 percent that we would like, but again it is their country, and if they don’t like something that we do—and sometimes we’ve gotten to the point where we’re afraid that, frankly, they’ll throw us out of the country, they’ll PGN us. And DEA, as we know, we’ll sometimes run up close to the line on that.

And it depends on the ambassador and what’s going on at the time and what Mexico has done. I mean sometimes they have really been out of line and we basically made a stink about it in the papers and there’s been a lot of political flack. And one of the biggest things has been about whether DEA agents can carry guns in Mexico. It’s a very violent country and they want us there, but they don’t want us carrying guns. But if we are carrying guns without authority there, without their authority it’s a felony of 30 years.

So these are some of the sticky issues right now that we’re dealing with in certification. And frankly, they’ll be certified because there’s a lot of other U.S. interests there besides drugs.

PROFESSOR KENNETH GRUNDY: And the bottom line, of course is that it’s not the only issue that we have between the two countries. There are important immigration questions, there are important trade questions, the NAFTA issue, so we’re not about to decertify them on a whim, just simply because they’re not cooperating. The ambassador, in particular, has to see that it all works together.

Elizabeth?

MS. ELIZABETH RINDSKOPF: If I could ask a question and I think it relates. I’m interested to know, from all three of you, what your reaction is to the Mexicans’ complaint, which I heard, actually just a couple weeks ago again, about the small arms trafficking that goes from the United States to Mexico?

They make rather harsh accusations and complaints about the fact that we are really the source of one part of this complicated problem of which, of course, drugs is, from our perspective, the most concerning.

MS. CYNTHIA RYAN: Frankly, Elizabeth, I don’t know that much about that. I think it’s linked to drugs in the sense that drugs come up in some of the payment and arms go back. I don’t have that much personal knowledge on the trade or the substance of the accusation, to tell you the truth.

AMBASSADOR ANTHONY QUAINTON: I really don’t know anything about this at all, but I’d venture a comment nonetheless, which is that because we are constantly in the posture of putting drug
producing countries or drug transiting countries on the defensive; constantly telling them what they are not doing and ought to do—that it is almost a psychological imperative to say, "There are some things that you are doing wrong in the United States."

And if it can be guns, or it can be demand. This isn’t to say that there isn’t a reality to this. There may be a factual basis to it, but it’s terribly important, I think, for them to be able to say across the table to us, "You’ve got to get your act together just at the same time you’re demanding that we get our act together."

I think we have to live with that. We’ll look at the allegations and see whether they are true, and obviously if there are violations of the law we’re going to take appropriate steps on our side of the border. But I think we’re always going to have something like this in this relationship, where we are the constant demander of another government to take actions, which may be political, unpalatable.

**MS. CYNTHIA RYAN:** I agree with that.

**PROFESSOR KENNETH GRUNDY:** Yes, sir?

**MR. DAN TURNQUIST:** My name is Dan Turnquist and I’m the diplomat in residence over at the School of Public Policy. I was in London with the responsibilities for international narcotics and law enforcement. And the Leon group, which is the senior experts group of the—it’s been set up by the G-8—has been working very much on this. And, in fact, the U.S. has changed it’s policy on guns during the course of the Clinton Administration. We’re now, I think, in the forefront of trying to see to it that all guns have registration numbers, and that there’s a lot tighter control on small arms exports than there ever has been in the past.

And I will say that, in the context of Great Britain, which has extremely strict gun laws, we discovered that there were U.S. manufacturers that were exporting 20,000 and 30,000 handguns a month to the United Kingdom. And of course this is a country where it’s almost impossible to get a license to own a handgun, much less to carry one and what was happening was the guns were going to the United Kingdom, they were then moving freely within the European Union to some other European Union member states that didn’t have very strict controls, and they were being re-exported to various kinds of trouble spots around the world.

And I think the U.S. government, now, is focused on this issue and it’s trying very, very hard to get a handle on it, and that is a turnaround from what our policy had been in earlier years. And it’s a turnaround that’s taken place during the Clinton Administration. But this is a frequent accusation, it’s not just Mexico. Jamaica is another country that’s
complained bitterly about this, that the weapons that are being used in all this violence are coming from the United States, but I think the U.S. government, now, is making a real effort in this area.

**MS. CYNTHIA RYAN**: Well I'm not sure, though, whether the trouble here is actually an export or are we talking about smuggling of guns across the border. Because the border is so porous we have money going back, we have guns going back, we have drugs coming in and so the commodity—I mean it's obviously a commodity.

**MR. DAN TURNQUIST**: At least now with the numbering system, if everybody does have a registration system at least when you find a gun you can eventually trace it back.

**MS. CYNTHIA RYAN**: What they're finding in Mexico is so violent and there's so many and none of it—some of it is not even connected to drugs, there's just a lot of petty crime and kidnapping and robberies and things that there are a lot of guns involved. And they're finding that these guns are being traced back to their origins in the United States.

**PROFESSOR KENNETH GRUNDY**: Yes, sir.

**PROFESSOR BRUCE ZAGARIS**: The last two questions bring to mind the adequacy of national versus international arrangements. And here there's been discussion of multilateralization of the certification and the other measures. I know that the State Department, in the context of the Santiago Summit, had an initiative, and there's been discussion both in Congress and also diplomatically, it's been on the CICOD agenda, and indeed the Mexican's have complained, not only about small arms trafficking, but about difficulty of extradition from the United States, including in drug cases, cases like Juarez Mesu, but there's ten or fifteen cases that I've documented in a law review article.

So this brings to mind what about the multilateralization of the efforts to improve narcotics enforcement? And could you comment on not only domestic, but also the diplomatic front of the multilateralization efforts.

**AMBASSADOR ANTHONY QUAINTON**: Well, there certainly is growing cooperation and a growing effort to work with the United Nations office in Vienna—I forget what it's name is—but there are now a number of mechanisms which make it possible to do some things together. So much of what we've talked about today are really bilateral efforts, which when aggregated become multilateral—that is, we have a program with Peru and a program with Colombia and a program with Mexico all focused, possibly, on the same network of money and drugs.

It's harder to get people together to deal with—I'm not quite sure what you're looking for.
MS. CYNTHIA RYAN: Well, I can give you an example of multilateral effort, in the sense that there's an international drug enforcement conference that the DEA Administrator is the co-president of and it consists of all the Latin American countries, all the Central and South American countries except Cuba, in which the other co-president always rotates around all the other countries. For the first time the annual conference will be held in the United States this year; the first time in 12 years.

Basically what they do through this mechanism is you bring in the top law enforcement people from the drug arena, and they have this conference, and they spend two to three days of putting their programs together. And it approaches the drug arena not just in sheer enforcement operations, but a lot of other ideas as well. And they have these committees, and they put together, and they work through the year. DEA in-country people then help to support those efforts and try to bring some substance to those.

As well as right now, for example, there's a multilateral approach in the Caribbean and, I think, in the Central American countries to try to get an intelligence sharing system put together so they can share drug information. What we have now, which the U.S. has been supporting, really has not been a real good two-way system, and so they're fed up with that, and frankly I don't blame them, and they're basically trying to have their own system so they can share information freely, and we're trying to help them with computer support on that.

So there are some multilateral and not just the bilateral, but we try some regional efforts is what we try to do. And we do a lot of foreign training in a regional concept. We do Southeast Asia Training Center, there's a training center going up in the Eastern Europe area, and I can't remember which country it is, and there will be one in South America as well.

PROFESSOR BRUCE ZAGARIS: There were three things that I was specifically referring to. One is the multilateralization of the certification effort, second is the ILETA South, International Law Enforcement Training Academy, which was in the '98 drug bill, but I think did not make it through, and then the third was the creation of a hemispheric intelligence center. The latter two both were going to be in Panama.

MS. CYNTHIA RYAN: Well, they were going to be in Panama, but South Coin kind of left Panama and went to Miami. So I think that interfered with the ILETA issue because that was tied to that. So I'm not sure where that is now. And as to certification, I really can't comment. DEA really doesn't have a primary role in that. We leave that to the
policy makers, and I really can’t comment on the certification. I mean we’re basically involved in the process; we supply information and then basically that’s the extent of it. So I can’t really comment on that.

PROFESSOR KENNETH GRUNDY: Well if there’s a common theme running through this session this afternoon it’s that whether we’re talking about a diverse policy agenda or a diversity of governmental agencies, the fact is that coordination is a nightmare and a necessity and so is guarding and enlarging one bureaucratic and operational turf and that is what makes it so difficult.

I want to thank the Ambassador and Cindy Ryan for answering a number of these questions, and we’ll surrender our operational turf right now.

Thank you.

(Applause.)

(A brief recess.)

ASYLUM LAW AND THE EXTRADITION OF TERRORISTS

MR. JOSH LEVY: To my left are two scholars who will be presenting the issue of “Asylum Law and the Extradition of Terrorists.”

To my farthest left is Professor Colin Harvey who makes me a proud member of Generation X. Professor Harvey is only a year my senior and yet has accomplished so much in such a short amount of time. I had the privilege of having coffee with him on his first day in the United States of America yesterday, and it was a great honor and privilege, and I encourage all of you to speak with him during the course of this weekend. He has accomplished a great deal in the field of asylum and refugee law, and we’ll get a taste of it this hour.

To his right is Professor James Hathaway, who has graced this law school’s presence this year, and we’ve been delighted to have him. I know from members of our journal that he has single-handedly rejuvenated their interest in international law. Thank you very much, and thank you for presenting your talk today.

So without further ado, Professor Hathaway and Professor Harvey.

PROFESSOR JAMES HATHAWAY: Thanks very much. Colin and I were speaking over lunch about exactly how were going to try to tailor our fairly refugee-specific presentations more to coincide with the subject of the seminar as a whole. And I think the best way to do that is to begin by endorsing Elizabeth Rindskopf’s call this morning, that the fight against terrorism be understood in slightly broader terms than may
traditionally have been the case, that to the extent the fight against terrorism is worth winning, it ought to be won in a way that is consonant with our own basic values.

The particular predicament that I want to put on the floor is that I believe there is a real risk that our response to terrorism, which itself, is a fight about the vindication of human rights has, in at least in some instances, been fought in a way that actually violates basic human rights and, in that sense, I think is antithetical to Elizabeth’s Rindskopf’s call of this morning.

The particular concern that I want to speak to is the proclivity of some anti-terrorism programs to run roughshod over the formal legal protections guaranteed to refugees under international law. It really struck me this morning how little the words human rights were spoken, and how when they were spoken, it always seemed to be the human rights of Americans that were our concern.

Where aliens are concerned there really has, I’m afraid to say, been a proclivity to try simply to rid ourselves of, quote, “the problem,” unquote, rather than seeing ourselves as ethically and legally bound to consider the aliens human rights as well as our own security concerns.

It seems to me that, while it is unquestionably the case that refugees can and sometimes do infiltrate the refugee protection process, the only ethical means of responding to that concern is to try to find a way of minimizing that intrusion without actually denying protection to those who need it. This isn’t just a matter—if I can stress this—of humanitarianism or even of compliance with formal legal obligations.

I sometimes worry that we forget, in our rush to other more urgent or at least seemingly urgent goals, that international refugee law is a system that was set up in order, in large measure, to serve our interests as potential states of destination.

International refugee law provides a principled means consonant with our own values of responding to the phenomenon of involuntary migration in a way that effectively allows the norm of border control to subsist. It’s, therefore, not simply an issue of doing the right thing, although I’d like to think we would want to do that, but of acting in a pragmatic way that ultimately sustains our ability to engage in border control exercises.

Let me begin with a little quotation from the Swiss observer to the United Nations, Mr. Ferder, in 1996, which illustrates one of three kinds of challenge that I want to, at least, put to you today to the ability of the West to fight its battle against terrorism in a way that is respectful of fundamental principles of refugee law.
As many of you will know, in 1996 the General Assembly considered and ultimately adopted a resolution entitled “Measures to Eliminate International Terrorism.” As a portion of that debate, the British government argued that all state parties to the Refugee Convention should be required to treat those who finance, plan or incite terrorism as persons who could not be protected as refugees. His approach was to demand a reinterpretation of Article 1(F)c of the Refugee Convention, historically understood to bar the Augusto Pinochets, the Pol Pots, and the Idi Amins of the world as a way of excluding anyone who had any involvement with so-called terrorist movements from every accessing international refugee protection.

That British initiative was forcefully and effectively resisted by, amongst others, the government of Switzerland. The U.N. observer who condemned the British government’s attempt to amend the Refugee Convention through the backdoor, arguing, as a good lawyer, that only the process provided by the Refugee Convention could require any such interpretation. Secondly, and perhaps more importantly, that the goal of fighting terrorism, could, in fact, be accomplished within the four corners of the Refugee Convention, without the need to decimate it in the interest of an immediate priority.

A second and similarly blunt effort to circumvent the refugee convention in order to combat terrorism can be seen in a unilateral effort by the government of the United States to amend its rules on access to asylum in order to meet the requirements of the bizarrely named 1996 Anti-Terrorism and Effective Death Penalty Act. I was never quite sure why those two went together, but such is the will of Congress.

The amendments that were passed in 1996 preclude persons falling under a peculiarly domestic definition of terrorism from even being considered for asylum. While it’s true that the more limited remedy of withholding of deportation is less easily denied on the grounds of an assertion of terrorism, the latter mechanism only partly implements U.S. obligations under international refugee law. And the results, some persons who are entitled by international law to advanced protection claims in the United States can only do so under the asylum rules, yet under U.S. law are completely barred from even making those arguments if they’ve been declared to be terrorists.

Now, apart from those two rather blunt, and I think clearly legally untenable approaches to bar access to refugee status, through rather an en bloc exclusion of mechanisms, there’s a third and much more prevalent mechanism that has been employed by a wide variety of states to exclude so-called terrorists from accessing the Refugee Convention. Succinctly put, it’s been to reinterpret clauses of the Refugee
Convention in a way that they were never intended to operate, in the hopes of achieving, with minimal effort, the fulsome exclusion of terrorists up front at the beginning of the refugee hearing.

And in order to give you some sense of how this works, I'm afraid I do need to delve a little bit into the Refugee Convention. For those of you not familiar with it, I hope that this won't be too painful, but I do feel that's an issue at least worth making clear. The Refugee Convention isn't, as some would like to believe it to be, a do-good, nothing-but-humanitarian kind of instrument. It's in an instrument that took three-and-a-half years, three-and-a-half painful years to draft and which is fundamentally dedicated to achieving an effective balance between the need of desperate people for protection and the rights of the states to which they flee to protect their own citizenry. This is not a "Pollyanna-esque" instrument.

The Convention, though, does require that to the extent an individual is to be excluded from status, it be on grounds that are clearly defined by law to justify that exclusion. Vague labels like "terrorism" or "atrocities" are not labels that work within the four corners of the Refugee Convention and quite frankly, after the discussion we had this morning in which no one was able to put on the table a satisfactory definition of terrorism, I think that's a good thing. This is a label that's bandied about far too often with far too little precision, and were it to be used as a mechanism to exclude persons presumptively at risk of persecution, it strikes me that we would have entered into an extraordinarily dangerous position.

Instead, the Refugee Convention allows exclusion essentially under two mechanisms. First, the Refugee Convention has an exclusion clause that flat-out denies refugee status to a limited group of people deemed fundamentally unworthy of international protection. Secondly, it has what amounts to an escape valve to the primary duty of nonrefoulement, the duty not to send a refugee back to the risk of persecution, which actually allows us, if necessary, to send a refugee back to the risk of persecution if a fundamental issue of national security or community safety arises. Some would suggest that those are unduly generous protections for states. It certainly seems hard, to me, to argue that they're insufficient.

For reasons that I'll come to a bit later, states have tended to gravitate toward the first of these two mechanisms, the en bloc exclusion found in Article 1(F)(b) of the convention.

This, I think, is the wrong place to deal with allegations of terrorism. This clause that allows states, summarily, to deny status to persons believed to have committed serious non-political crimes outside the country of refuge was not set up as a means of protecting the security
interests of receiving states, but rather as a means of reconciling international refugee law to the requirements of those same states extradition treaties.

Specifically what Article 1(F)(b) attempts to do is to deny refugee status to persons who are liable to sanctions in another state for having committed a genuine serious crime and who seek to escape legitimate criminal liability by claiming refugee status. This is not a means of bypassing ordinary criminal law, not a means of bypassing ordinary due process for acts committed in the state of refuge, nor a pretext for ignoring the protection needs of those whose transgressions are, for example, fundamentally political in nature, an issue that arises with great frequency in the context of so-called terrorist cases. Rather, Article 1(F)(b) is the means of bringing refugee law into line with basic principles of extradition law by establishing that important fugitives from justice may not avoid the jurisdiction of a state in which they may lawfully face punishment.

In keeping with that purpose, Article 1(F)(b) requires that refugees suspected of serious criminality be dealt with on terms of parity—and this is the important point—with those who face the prospect of extradition. A refugee is, therefore, not to be excluded in circumstances where extradition would be denied.

Most fundamentally that means that the only allegations of criminality that are relevant are those that involve acts which cannot be prosecuted in the asylum state. That clearly is no longer the case, in many instances, with the advent of universal jurisdiction for acts that we commonly refer to as terrorist acts.

Secondly, the extradition-based rationale for the exclusion clause requires that the criminal offense be justiciable in the country in which it was committed. If an individual has served their sentence, been acquitted, benefited from an amnesty, then there is no possibility of an extradition and hence, no possibility of legally using Article 1(F)(b).

And third and finally, the drafters recognized the seriousness of refusing to protect a person at risk of persecution and therefore sought to limit the criminality exception to persons at risk of prosecution or punishment for a serious crime within the usual realm of extraditable offenses. In other words, if a person could benefit from the political offense exception, as construed in the state of asylum, that individual could not be removed under Article 1(F)(b).

This latter duty, to apply one's own understanding of the political offense exception before excluding a refugee, induces an important element of ethical symmetry into the Article 1(F)(b) exclusion process. Simply put, no asylum state can refuse to protect as a refugee a person
who, in extradition proceedings, it would demand the right to protect. That was a way of ensuring that states would not end up with a double standard that would allow them to divest themselves of responsibilities to refugees in circumstances they would otherwise argue, grant them the prerogative to protect.

I think it will be clear from even this very brief introduction that Article 1(F)(b) is a problematic place to go about denying asylum to persons who may broadly be spoken of as terrorists. First, to the extent that terrorists can be prosecuted in the asylum state, again, an ever increasing prospect with advances in understandings of universal jurisdiction and with amendments to domestic criminal statutes, the dilemma sought to be avoided by Article 1(F)(b) just doesn't exist. Article 1(F)(b) is not a pretext for states to fail to prosecute cases which they are legally entitled to prosecute. Second, the prospect of abuse of Article 1(F)(b) is constrained by its insistence that states may apply it only to the extent that they can do so consistently with their own understanding of the political offense exception.

For states that have acceded to the 1977 European Convention on the Suppression of Terrorism and who have limited their own domestic discretion to apply the political offense exception to persons who have committed terrorist offenses, this may not pose a problem, but for countries like Canada and the United States, which have openly insisted on applying understandings of the political offense exception in the asylum context, completely at odds with their understanding in the extradition context, it presents a bar to reliance on Article 1(F)(b).5

The real tool that's supposed to be used to protect our security interests and which, to my mind, much more accurately allows the job that Ms. Rindskopf spoke about earlier this morning, fairly to be done. Balancing the interests of asylum states with the protection interests of refugees is, instead, Article 33(2).

Under Article 33(2) of the Refugee Convention it's possible to expel a person who is entitled to refugee status on grounds either of national security or where there's a danger to the host community consequent to an individual having engaged in serious criminal conduct.

The first category of persons to whom Article 33(2) applies is a very narrowly defined national security exception. The drafters of the Convention were, at that time, clearly concerned about the issue of Communist infiltration. If one reads the drafting debates carefully, their primary concern was the precipitation of a fundamental threat to the state of asylum. It was an argument intended to be invoked where the refugee engages in activities directed at the overthrow, by external or internal force, of the government of the asylum state—a matter which
may, of course, arise in respect of some so-called terrorist refugees, but certainly not all.

The procedure that's required to be involved, as the European Court of Human Rights pointed out carefully in its Chahal decision, is one where a careful balancing of the security risk posed by the refugee and the security interest of states is complied with. This clearly was not, in the judgment of the court—the British procedures for example, in the Chahal case, failed adequately to make that inquiry. They pointed out that a restrictive approach is called for, with the state asserting the danger posed by the refugee logically expected to establish the case that the refugee would then respond to.

More commonly, it seems to me, there's the possibility of addressing terrorist refugees, so-called, under the Danger to the Host Community Clause. However, I think, again, this clause is a fair place to do the work of balancing because it incorporates the kind of even-handed assessment of risks to the host state and risk to the refugee that Article 1(F)(b) doesn't incorporate. It requires, before removal can be occurred, that there be conviction by a final judgment of a particularly serious crime. It requires that the individual, in addition, has been found to be a danger to the asylum state. Because of those protections, the notion that it's not simply sufficient that the person have committed any crime, but only a particularly serious crime, that there has to have been a conviction by a final judgment, that there has to have been an independent finding of danger to the national community.

Many states have sought to avoid Article 33(2) and to rely, instead, on the extradition derived from Article 1(F)(b), the standards of which are much lower. To explain the difference to you again, whereas Article 33(2) requires conviction of a particularly serious crime, Article 1(F)(b) only requires a reasonable prospect of a plain old serious crime. Whereas the Article 33(2) procedure requires an independent finding of danger, Article 1(F)(b) requires no such procedure. Whereas Article 33(2) allows removal only as a last-ditch effort, Article 1(F)(b) allows the state not even to consider other options.

In practical terms, Article 33(2) seems to me to be very helpful in resolving refugee claims. And I'll just give you one example of a case on which I advised the Canadian government last year of an individual who had made an asylum claim from Sri Lanka, who was, in every sense, at risk of the most hideous forms of torture, were he to be returned to Sri Lanka, by reason of his political opinion, but who had committed what I would view as equally hideous acts of terrorism involving the explosion of a school bus with 17 children on board.
The Canadian government rightly took the view, in my position, that while it could legitimately exclude that individual under Article 33(2), it ought not to do so if it had another option open to it. It found that by virtue of the universal jurisdiction granted it under the Torture Convention, it had such an option. It prosecuted the individual, and it's expected that he will be subjected to life imprisonment in Canada, rather than being removed to the risk of torture in Sri Lanka.

That's the kind of approach, it seems to me, that the Refugee Convention commends, that Article 1(F)(b), on the other hand, if erroneously interpreted to respond to concerns of this kind may, in fact, not require. And I, therefore, urge you, in thinking through the relationship between refugee protection and the issue of the fight against terrorism, to try to think of how best to actually use the tools that the International Refugee Convention gives us, not to use Article 1(F)(b), as states are increasingly inclined to do to achieve the security goals of asylum states, rather to use Article 33(2), which does require the kind of balancing to which I've spoken, not to subject refugees to the en bloc exclusion for terrorist reasons that the 1996 American legislation does, and not to pursue the path of the British delegation to the General Assembly in that same year, which simply sought to rid the world of any need to consider the issues by redefining international law.

The point, simply put, is that we have the tools to achieve the balancing of interests that ought to inform the fight against terrorism, and we simply need, now, the will to take those tools seriously and to use them rather than acting precipitously and in disregard of our own legal values in the search of a fight and of a way to combat terrorism.

MR. JOSH LEVY: Professor Harvey.

PROFESSOR C.J. HARVEY: To start with, I've got plenty of copies of my paper here, which I'm prepared to give out to anybody who wants to—any masochist in the audience who wants to read it—and I can only really summarize it here.

It seems ironic to me to have traveled from Belfast to Ann Arbor to talk about terrorism. I can't escape the issue.

(Laughter.)

PROFESSOR C.J. HARVEY: These, of course, are changing times in Northern Ireland as we move to construct the new society in the wake of the Good Friday agreement. Now this situation may well nigh be resolved, but this audience needs no reminding of the security threats and dilemmas which must be grappled with today. We could not have chosen a more ideal week for this discussion. The Ocalan case captures many issues of law and politics which dominate here.
In a sense, the purpose of this paper differs in tone from some of the others today. I am concerned that the responses to terrorism do not compromise our expressed commitments to the rule of law and human rights, and in this case refugee law. To do so is to debase something fundamental to the values which we espouse.

Terrorism has forced its way onto the international agenda again. States are in the process of trying to increase cooperation in order to eradicate it. There is, of course, nothing particularly new in this. It is a problem which has plagued states for some time and which they have tried to address effectively for just as long. Recent initiatives have, however, demonstrated the international community to eliminate it. The U.N. Declaration on Measures to Eliminate International Terrorism 1994 and the Declaration to supplement it in 1996 leave little room to doubt the growing consensus in the international community. It is clear from Hathaway's paper that this has had an impact on refugee law. The 1996 Declaration, in particular, makes detailed references to asylum, extradition, and refugee law.

In addition to this, there is a new emphasis in the international community on individual accountability and with it the adoption of legal provisions, placing duties on states to punish, or facilitate the punishment elsewhere, of offenders.

The problem, however, is how the law should respond to those who have used political violence to achieve their ends and subsequently sought asylum in another state. Now, as Hathaway recognizes, how do we reconcile the principles of refugee protection with the duty placed on states to deal effectively with international terrorism?

Now, the repeated use of the word "terrorism," can, I feel, interfere with rigorous examinations, with what are much more difficult and complex factual situations. For example, it is important to address the root causes of conflict and to think more carefully about processes of conflict resolution which would bring an end to such activity in the long term. Over indulgence and self-serving rhetoric can do little but obscure the search for real solutions to the problems from which the use of political violence springs.

Having been born into a society where there was conflict, I learned very quickly that it's too easy for hard men—and I use the word "men" deliberately—on either side to perpetuate a culture of violence where toleration and compromise becomes impossible.

An emphasis on human rights, I believe, is important for a number of reasons. A starting point is that terrorists, by their use of political violence, infringe the most fundamental right of all, the right of individuals to life. It is also the case that individuals have the right to be
protected against terrorist activity. The problem from a human rights perspective, however, is that the public interest in eradicating terrorism may result in basic protection for the individual being ignored.

What is the role of the human rights lawyer in a conflict situation? The role of human rights lawyer here is to ensure that adequate justification is provided for the necessity of these measures, and that their temporary nature is consistently pointed out. In addition, those concerned with human rights protections should be asking serious questions about what the state is doing in practice to bring an end to the crisis. For example, it might be argued that when assessing derogations international courts should pay rather more attention than they have done in the past, to whether the state is actively trying to find a resolution to a conflict.

Now as with human rights, refugee protection and the institution of asylum can be presented as a basic irritation to states’ attempts to deal with terrorism. States’ duties in this area can lead to a temptation, I feel, to undermine refugee law in order to achieve these ends. And, as like Jim, I think it is important that the current emphasis in the international community on the elimination of terrorism does not lead to the abuse of refugee law. However, as Professor Hathaway’s paper makes clear, I believe, refugee law is more open to abuse on this than aspects of human rights law.

Hathaway’s argument is the use of Article 1(F)(b) is not the way to insure that refugee status is universally denied to terrorists. The purpose of 1F(b) is to link refugee law to extradition law and ensure that fugitives for justice do not benefit from its protections.

The implication is that individuals alleged to have been involved in terrorist activity need not all be excluded from refugee status. If the person has not committed an extraditable crime or has served her sentence, then exclusion should not be applicable. Thus, those who benefit, for example, from the political offense exception need not be excluded from refugee status.

As he notes in his paper, this does not mean that refugee law is wedded to a particular understanding of the political offense exception.

States have shown recently a willingness to narrow the range of activities which can be regarded as ‘political’ for extradition purposes. And Professor Hathaway has mentioned the 1977 Extradition Convention. I would also point you in the direction of the 1996 European Union Convention on Extradition, which follows a similar pattern.

By linking this provision to extradition law, I think it gives a suitable benchmark for assessing when exclusion will be applicable and also ensures, in practice, some consistency within states on this approach.
It is in his interpretation of Article 33(2), however, that Hathaway is likely to encounter dissent. The exceptional nature of the provision is, on occasion, not accorded due recognition within states. Although the matter of what are reasonable grounds is one left to the discretion of individual states, it is, I feel, arguable that this does import some standards of rationality. The idea, for example, that the Article might be triggered by a general presumption against a group of refugees would be clearly contrary to this understanding. This also raises the further issue of whether there should be some mechanism to challenge the claims made regarding security threats; a matter I mention below in human rights law, and which I feel the U.K. experience is particularly instructive.

One of the clear implications of confusion in this area, born out by Professor Hathaway’s paper is that the class of persons subject to exclusion under Article 1(F)(b) has been expanded. The suggested approach by Professor Hathaway would, I feel, remedy many of these problems.

What has happened in practice? Many of the issues discussed in this session and in this paper arose in the very, very important ruling of the House of Lords, in the case of T and Secretary of State for the Home Department, 1996. A case which involved an Algerian citizen who’d been a member of the FIS, who had participated in a bomb attack in which ten people were killed. He had also been engaged in planning a raid on army barracks, during which another person was killed.

Now the link to extradition law, which we have made in this session, was accepted in this case. The main problem, as everybody here I think will be familiar, is how to interpret political crime. The majority judgment on the meaning of Article 1(F)(b) was delivered by Lord Lloyd and I feel that all the judgments in the case require close examination.

I think it’s of general interest today to also mention other activities of Lord Lloyd that year. He was also involved in preparing a comprehensive report on terrorism. In this report, “Inquiry into Legislation Against Terrorism,” he recommends a definition of terrorism, which, given our discussions today, I think is worth looking at in detail. That definition has been taken forward by the new Labor government in Britain and in a consultation document—which there is still time to respond to if you feel like responding to it—they come up with a quite similar definition, which again, I detail in my paper and you can read later if you’re interested.

What’s interesting about the Lord Lloyd report, I think, is that asylum is mentioned as something that can complicate the issue, which is, I feel, an interesting way to characterize the protections in this area. As it’s acknowledged in the report, defeating an asylum claim under the
1951 Convention does not leave the Home Secretary free to deport an individual. Reference here is made to Article 3 of the European Convention. As I've mentioned, the report has proved influential with the new government in Britain.

Professor Hathaway has also mentioned in his paper the unwillingness of states to be bound in refugee law to the interpretation of a political offense in extradition law. In my paper I examine the two cases of Quinn and Robinson and McMullen and INS, to demonstrate, again, the problems that arise and consistency of application and the confusions.

So that's refugee law. That's where we've got to, and that's some of the problems and the gaps. I feel that there are gaps in refugee law. The argument that is being made here is that if you wish to exclude individuals, look to Article 33(2) and not Article 1(F)(b). International law, however, has moved on since the Refugee Convention.

Now, I want to change direction and look at developments in international human rights law, particularly the trend prohibiting return in the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and more explicitly, in the U.N. Convention Against Torture. What we have, in effect, are two parallel developments.

On the one hand, the development of international law to facilitate states in prosecuting individuals responsible for the commission of international crimes, while in human rights law, international human rights law, the development of a very specific and in the European Convention case, quite strong prohibition on return to states of origins. These two developments run parallel.

What I will argue is that there's not necessarily a tension here. Human rights law prohibits return on absolute terms, but there are, of course ways out of this problem and I refer back, in particular, to David Bickford's paper this morning for some interesting suggestions as to ways that can be found to facilitate a reconciliation between these tensions.

An individual might, for example, be returned to a state other than where she fears torture or persecution. As universal jurisdiction becomes the norm, with respect to some international crimes, it is also possible for the asylum state to take action on this front. The international community's drive to eliminate terrorism need not be completely compromised by the existence of these trends.

As many of you know, in the European Court of Human Rights, European Convention jurisprudence, the Soering case was a landmark decision. Since Soering the European Court of Human Rights has spent a lot of time and effort trying to clarify the implications of its judgment.
in that case. I'd refer you, in particular, to the case of Chahal versus the U.K., as particularly relevant to the issues under discussion here.

Chahal was a leading figure in the Sikh community in the U.K. and also a political activist who was involved in the U.K. and India in resistance in support of autonomy for the Punjab. Before the Court the U.K. Government argued, among other things, that the guarantees afforded by Article 3 were not absolute, and the threat posed by the individual to national security should be weighed in the balance when considering its applicability.

Now, the Court—and I state what the Court said on this and it makes interesting reading—the Court said, however, in these circumstances the convention prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.

The prohibition provided by Article 3 against ill treatment is equally absolute in expulsion cases. Thus, wherever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another state, the responsibility of the contracting state to safeguard him or her against such treatment is engaged in the event of expulsion.

In these circumstances the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is, thus, wider than that provided by Articles 32 and 33 of the U.N. 1951 Convention on the Status of Refugees.

It is worth noting, and I note in detail in my paper, the U.K.’s response to the Chahal judgment. The U.K.’s response has been to set up a Special Immigrations Appeals Commission to try to deal, in practice, with the difficulties of reconciling the different interests at stake in these types of cases, a problem faced, as Professor Hathaway mentioned, in a number of states. And anybody interested to see how you can reconcile these different interests, would do well, I think, to look at the new system that has been set up within the U.K.

Subsequent decisions in the court have confirmed the absolute nature of the Article 3 protection, and I think it has important implications for the issue under examination today.

Terrorism, then, to conclude is a confusing term which now acts as a far from adequate umbrella to include a large number of activities which the international community has decided it wishes to criminalize. There’s evident potential for the enthusiasm of states to result in violations of human rights. As stated in this paper, the concern with human rights should not, as too often happens, be presented as a lack of concern for the appalling implications for people of political violence. However,
too often, in practice, the state has responded by means which raise questions about the rule of law and human rights. It is often left to NGOs, social movements, and individuals to defend principals at a time when it is unfashionable or, in some instances, even dangerous to do so. If human rights means anything then rules must be able to exert some control over the bare exercise of power by the state in this area.

The suggestion in my paper is that there are normative constraints on the actions of states, as well as rules which facilitate the regulation of terrorist activity. These norms are not all as self-evident or absolute as Article 3 of the Convention, and they exist in a healthy tension in an area where checks and balances are crucial to ensure both accountability and transparency.

All this applies equally to refugee law. It is now well known that this regime reflects delicate compromises. For equally well-known reasons, refugee law has too often been swept along by the stronger currents of short-term state interests. The fear is, that in the drive to eliminate international terrorism, states may well undermine and eliminate valuable protections. Refugees and asylum-seekers can too easily become scapegoats for problems elsewhere in a political community.

I would end by saying that it is in contexts like this that our expressed commitments to human rights and the rule of law is tested. This is where the “human” in human rights matters, and where our response must not perpetuate a culture of violence. As we leave this, at times, barbaric century behind, all of us must resist “the means justifies the ends” logic and the atrocities to which it leads.

Thank you.

**MR. JOSH LEVY:** I’d like to open the field for questions.

**MR. DAVID BICKFORD:** This question is really to both, because I think—I mean with respect, I thought this panel posed some real questions in the relation to the balance of rights between the state and the individual. From my own personal perspective, I couldn’t agree more that the civil rights balance has got to be considered far more carefully in the future.

In relation to the Chahal case, I think it is the classic problem posed to law enforcement. The information on Chahal was clear that he was directing acts of serious terrorism from the United Kingdom to India, including murder of policemen. The problem was that the information could not be turned into evidence. So the decision was taken to deport. And, in fact, Chahal wasn’t a refugee, he’d come to the United Kingdom about 20 years earlier because this was a place he wanted to settle in because of the economic benefits.
The problem for the United Kingdom was that it was quite clear, from previous European Court of Human Rights decisions, that to deport Chahal to the country from whence he came depended on a decision by the European Court as to whether or not he'd be put in jeopardy by his return, for torture or inhuman treatment that followed from the Amichrain case. And it was clear that this was going to be a headline decision in relation to India, because there were obviously other possible deportations that might be relevant.

One aspect that the European Court delivered that I thought was interesting in respect to Chahal—apart from the fact that the United Kingdom deportation provisions for national security were deficient, which was also clear and which was also useful to have cleared up—was this, that despite the fact that the Indian government had instituted constitutional provisions appointing human rights oversight, through the Constitutional Court, to protect individuals in India from the depredations of the police and law enforcement agencies, in respect of torture and inhuman treatment, despite that, the European Court came to the conclusion that the deportation of Chahal to India would, in fact, jeopardize him.

And I'd like—the question after that long introduction—and I'm sorry about that—the question I'd like to ask Professors Hathaway and Harvey is how does the international community arrive at a balance where an independent review can reach a conclusion that a state that's doing its best to prevent human rights abuses can, nevertheless, be seen as a state that will allow human rights abuses? What is the balance here? What's the level?

PROFESSOR C.J. HARVEY: I think in the case—what was interesting about the case, I thought, was the weight the Court placed on evidence from Amnesty International about continuing abuses in India that contradicted some of the evidence that was presented by the U.K. government. So I would question whether your statement that there was clear evidence that—and the Court made reference to attempts made by the Indian government to try to remedy the problem, that it was clearly the case that the police in the Punjab had and were continuing to carry out human rights abuses, both in and beyond Punjab. And this was documented in reports by Amnesty International which the Court placed great weight on I think.

MR. DAVID BICKFORD: Didn't that run directly counter to the Irish state case where the same court, different composition, reached the conclusion that there is, in an anti-terrorist situation within a state, an acceptable level of administrative abuse, physical abuse, which was an interesting determination in that case?
Why did they reach the conclusion in the Indian case that there was no such level, and that the oversight provisions that the Indian government had introduced were unsatisfactory? Is there a better balance that could be found to enable deportation?

PROFESSOR C.J. HARVEY: There's been a lot of academic criticism, and there was a lot of academic criticism of specific paragraphs in the Soering judgment about relativizing Article 3, which I think you're referring to when you talk about the Irish state case, and the Court cleared up that problem in Chahal, and I think, answered it quite convincingly, by saying that there was no balancing exercise to be conducted under Article 3, it was an absolute protection.

I think you're talking about the levels of ill treatment and whether they constitute torture and—

MR. DAVID BICKFORD: Yes.

PROFESSOR C.J. HARVEY: Which is a different question from whether Article 3 is an absolute protection or not.

MR. DAVID BICKFORD: I agree. I've taken up a bit of time and there must be more questions. I'll leave it there. Thanks very much.

PROFESSOR JAMES HATHAWAY: Could I just try to come at your question from a more general angle, though? Because I worry that the implicit suggestion is that insofar as India was making best efforts and indeed, had codified its commitments constitutionally, that ought to be a critical factor in determining whether or not Chahal ought to be protected from removal. And I think that's to perceive the question from the wrong angle.

The issue in a case like this isn't whether or not India is a blameworthy state, whether it has somehow acted badly, the issue, rather is whether or not Chahal required surrogate protection of basic human rights in a state where, perhaps, the state was the author of the harm or alternatively, where it simply couldn't stop the harm from occurring, whatever constitutional guarantees and protective mechanisms might actually be in place.

The entire thrust of both international human rights law and of refugee law in particular, has been to deny the relevance of best efforts by states, it's to focus on the actual predicament on the ground. Put simply, given everything the state has been willing and able to do, is this or this not a situation where the unacceptable risk might well precipitate. And if the answer is in the affirmative, protection has been ordered.

So it's not an assessment of culpability so much as an assessment of whether or substitute or surrogate protection of basic rights truly is compelled. And I think that's a key distinction in these cases.
PROFESSOR BRIAN SIMPSON: I can talk from here, I think. Could I ask a question—sort of a nice example of the previous question—if the application of international human rights law and the application of international refugee law often depends upon estimates as to factual situations?

And there’s sort of a tension here, because on the one hand claimants to refugee status or asylum or—security services, in the nature of things, make use of undercover sources of information and that sort of thing and at the best this is very reliable and at the worst it’s simply tittle-tattle, but it’s not normally subject to the sort of ways we test evidence in courts.

Have, either of you, any sort of general observations on how an international court might grapple more satisfactorily with adjudicating what are, basically, questions of fact and probability, which we normally do by bringing people into open court, cross-examining, adducing documents and doing it all at the output?

There’s a tension here, because security services just don’t want to be there.

PROFESSOR C.J. HARVEY: I think one way, and this is from the European Convention system, is by requiring states to have effective remedies for protecting specific rights or as in Article 5(1), proper judicial oversight of, for example, detention and then that’s why the U.K. experience is quite instructive. After Chahal the U.K. then enacted the Special Immigrations Appeal Act, which set up a Special Immigrations Appeal Commission, which attempts to try to balance this a bit better.

So one way that international law could make a contribution here is by requiring effective remedies within states on issues like that. And this is where international refugee law is problematic, I feel, because without a supervisory mechanism, you just don’t have that facility in refugee law.

PROFESSOR JAMES HATHAWAY: I think I agree with that. Professor Simpson is clearly right, that the drafters of the Refugee Convention decided to err on the side of protection. I mean they speak of a serious chance, a real possibility of harm; no requirement for probability assessment. The U.S. Supreme Court quite rightly said, a one in ten chance of being tortured, shot or otherwise seriously having your human rights infringed is a bad enough risk and it’s appropriate, given the nature of the risk one confronts, to accord protection.

I see the evidentiary problem you point to and quite frankly, I was quite struck by Mr. Bickford’s suggestion of this morning, that one might find more effective and—if I may put it this way—methods of information gathering that could be more persuasively presented in
courts through a more collectivized enterprise of states that—and I thought this was the key point of what he proposed this morning, if I heard him correctly—that were subject to accountability. And hence the courts would be willing to trust, in a way that they’re, quite frankly, not willing to trust a great deal of security data today that they view as having been gathered under unsupervised situations and perhaps not being entirely reliable.

So it seems to me that there is something that governments can do and that’s to reform their information gathering mechanisms, or at least as Mr. Bickford proposed, to subject them to some form of ongoing accountability in ways that courts would have good reason to admit that evidence and to require claimants to respond to it.

Did I misquote you? If I did, I’m sorry.

MR. DAVID BICKFORD: Actually you put it a lot more eloquently than I did. What I find interesting is that you have both posed a situation where unless a refugee or, less, a resident alien is going to be prosecuted for his crimes, there is really no possibility of extradition or refusal. I think that’s pretty much the case, unless the state to which the person’s going back has actually no performance of police brutality, etcetera. What that really focuses on, I think, is performance of evidence gathering, and how these problems can actually be overcome so that terrorists, or whatever they are, can be successfully dealt within a regime.

PROFESSOR JAMES HATHAWAY: I think that’s exactly right. I know sometimes those of us who work in the refugee law field are seen to be shrill on the side of favoring human rights, but in truth, I see no interest in having refugee law polluted by persons who violate the human rights of others. That’s a fundamental commitment in the regime. And what we have is an evidentiary problem that I think what you’re suggesting may provide a fair-handed way of resolving as contrasted with the underhanded ways that I see states having used over the last decade, rather than having grappled with the problem head on. I’d welcome that opportunity to see states coming up with a principled way to put more credible evidence forward that would, in fact, exclude persons from benefiting from refugee protection who have, themselves, fundamentally disregarded the human rights of others. It seems to me the right thing to do.

AUDIENCE MEMBER: I wonder if you could comment that the whole system of refugees and refugee law seems to me to be under ferocious attack today from those that allege that large numbers of people who, in fact, are economic refugees not political refugees are trying to take advantage of the Refugee Convention and the various other legislation and international agreements in this area, to the point where, if I
heard correctly this morning on National Public Radio, they were saying that Austria, now, is lobbying within the European Union that the European Union should, in fact, withdraw altogether from the Refugee Convention. How do you see that impacting or playing out on these questions that you’re discussing today?

PROFESSOR JAMES HATHAWAY: Well, you’ve asked me the question of my life’s work. Having just written a book called, *Reconceiving International Refugee Law*, I could go on forever, but let me just put it simply. Austria was the President of the European Union at the time that it issued, last July, a policy proposal suggesting that, indeed, the whole rights-based regime of refugee protection should simply be eradicated. All that would happen would be charitable donations to countries in the region of origin, and that Europe ought, simply, to intensify the tools of deterrence that prevent any asylum-seeker from getting anywhere near to it. That’s the essence of the proposal.

I’m happy to tell you that with Germany having taken on the Presidency of the European Union that has been deep-sixed. A new proposal has been released which, while not perfect, does contain commitments both to a rights-based regime and to refugee rights as stipulated under the Geneva Convention as not being up for negotiation.

But I think the whole regime is in trouble. I think it’s in trouble because we spend resources badly, because it’s unilaterally administered, and, as Professor Harvey pointed out, because we have yet to do in this field what we’ve done in virtually every other field of international human rights law, namely to establish some solid international supervisory mechanism.

So there’s a host of issues that are out there that I think could be resolved to make the refugee law system radically more efficient and radically more fair. But I think what Colin and I have tried to do today is to say, with the woefully inadequate tools that states have thus far seen fit to give us, that it is possible to both do the job of excluding terrorists from refugee protection and ensuring that we only do that on a fair basis. And I think as rough an equation as that is, it is possible to do both, albeit not perfectly.

PROFESSOR C.J. HARVEY: Could I just mention as well that it raises an important issue, after the Treaty of Amsterdam, the fact that these issues, now within the European Union, have moved into the first pillar of European Community law and therefore, have moved into the super-national regional level and will be regulated at that level.

And that poses incredibly interesting and difficult questions. I have argued that that need not necessarily be a bad thing and that cooperation,
responsibility sharing, things like that at the regional level can work, but it's a very interesting time for the debate in Europe, definitely.

**MR. JOSH LEVY:** One last question from Professor Chodosh.

**PROFESSOR HIRAM CHODOSH:** You mentioned ambiguities with the definition of terrorism. Would you also point out any problems with the definition of inhumane treatment?

In particular I'm interested in how countries view that standard differently; for one country the death penalty itself may not be subject to that standard, for another country prison conditions may not be subject to that standard. I'm particularly interested on your views on that and a related question, which is where do you think the comparative risk should be?

You say a 1 in 10 chance, it seems to me, based on my limited exposure to a number of criminal justice systems that there are very few criminal justice systems in the world that could guarantee—even to a 1 in 10 chance—the kind of standard that may be expressed through the European Court of Human Rights.

So I was wondering if you could talk about comparative differences in the view of the standards of the human rights standard itself and where you think the comparative risk assessment should lie?

**PROFESSOR JAMES HATHAWAY:** I'll take your first one and I don't know if Colin wants to tackle the second one, if not I'll try it afterwards—

**PROFESSOR C.J. HARVEY:** I'll take the first one as well.

(Laughter.)

**PROFESSOR JAMES HATHAWAY:** I think there's a world of difference between saying that concepts like cruel, inhuman degrading treatment are fungible and arguing, as I do, that terrorism is a term without a meaning.

Cruel, inhuman degrading treatment, for example, is regularly interpreted, not only by the European Court of Human Rights but, for example, by the U.N. Human Rights Committee in the exercise of its supervisory jurisdiction under the Civil and Political Covenant. It's interpreted through general comments. There's a variety, at least, of politically credible and authoritative decisions that are regularly being issued that apply that concept to particular cases and elucidate its content.

There is no such mechanism to define terrorism out there. It just doesn't exist. All we have are the views of a variety of scholars, government officials and others who each import their own particular subjectivities in deciding what is and isn't terrorism. We saw that this
morning in the discussion of whether Nelson Mandela is or isn’t a terrorist. I think that could keep us going for a long time. I was appalled at the suggestion, but I can see how some would make the argument.

So I think we’ve got a radical difference between the two, and I would simply argue that we ought to use words that are capable of authoritative interpretation rather than fungible notions like terrorism that really have no mechanism to be defined.

The well-founded fear standard—are you sure you don’t want this?

**PROFESSOR C.J. HARVEY:** Well, what I would say is exactly what Professor Hathaway has said. International law provides supervisory mechanisms over a broad range of international human rights law these days, and these mechanisms all have jurisprudence that have given us further elucidation of what all these terms mean. And again, that’s a problem with refugee law.

As to the standard of well-founded fear of persecution, well, reasonable chance, reasonable likelihood, the idea that you’re trying to assess a future risk demands, I think, that the standard be lowered to reflect that fact and to reflect the fact of the risk—do I want to mention balance here?—obviously the interests of the individual in not being returned as well, requires that we do have a lower standard, reasonable likelihood, reasonable chance of the person suffering persecution.

**PROFESSOR JAMES HATHAWAY:** I mean keep in mind what we’re doing here. We’re trying to assess the prospect of a future harm in a foreign country, usually across language barriers, cultural barriers, often with grotesquely inadequate information and in the context of a threat of persecution—we’re not talking about hardship here—a threat of persecution, the drafters of the Convention, I think, quite rightly said, one will err on the side of protecting the individual who has otherwise substantiated the claim.

Remember, that’s only a decision about protection for the duration of risk. We, for our own peculiar domestic reasons, joined refugee status and immigration. The two are not remotely related in international law. The only obligation that follows from being a refugee is not to be sent back until the harm is eradicated. So that’s another reason why the drafters were insistent, given that it was inherently only temporary or risk-defined protection, that one ought to err on the side of protection. That seems to me the right judgment when the Convention was drafted in 1951, and I think it’s right today.

**MR. JOSH LEVY:** Please join me in thanking Professor Hathaway and Professor Harvey.

(Applause.)

(A brief recess.)
MR. ERIC FEILER: I am extremely excited to have Ambassador Anthony Quainton here to deliver the symposium’s Keynote Address.

Ambassador Quainton is currently the President and CEO of the National Policy Association and before taking his current position he served with the United States Foreign Service for 38 years, most recently as the Director General of Foreign Service and the Director of Personnel.

Ambassador Quainton has also served, during his tenure with the State Department, as the Assistant Secretary of State for Diplomatic Security and as the Department of State’s Deputy Inspector General. He’s also served as the United States Ambassador to Peru, Kuwait, Nicaragua, and the Central African Empire. In addition, Ambassador Quainton has headed the United States government’s counter-terrorism efforts as the Director of the Office of Combating Terrorism.

So you can understand why we’re so excited to have him here today. And without further ado, it’s my great privilege to introduce Ambassador Anthony Quainton.

(Applause.)

KEYNOTE SPEAKER

AMBASSADOR ANTHONY QUAINTON: Well, thank you very much. You’re all very patient—I was going to say at the end of a long day. I don’t envy the dinner speakers at all.

(Laughter.)

AMBASSADOR ANTHONY QUAINTON: After so much solid stuff on terrorism and drugs it’s with some apprehension that I get up this afternoon to talk about context.

All of you lawyers and people who are in the trenches of counter-terrorism or counter-drugs don’t often think about the context of who it is that’s going to carry out these programs, and how that role and the responsibilities have changed over time.

Some months ago I was invited to Rome to speak to the American College of Trial Lawyers on a similar subject, and I put myself forward a little bit as the Rumpol of Foggy Bottom, defending the indefensible, the Foreign Service of the United States, but it is the golden thread that runs through our bureaucracy and so perhaps the license that I took at that time I can take again.

There couldn’t be a more topical moment to think about the impact of drugs and terrorism and transnational crime on America’s place in the world and on America’s interaction with the world, through its diplo-
matic agents, very broadly conceived. Think about the Ocalan events of recent days, the closing of Israeli embassies, the warning to American travelers, the threats to Greek diplomats. Think about the bombings in Dares Salaam and Nairobi just a few months ago and the report of Admiral Crowell—which I’ll come to later in my talk—which dramatically raise the profile of terrorism as an issue for American diplomacy.

You probably hope, those of you who reviewed the early materials, that you were going to get Secretary Cohen or Sandy Berger, but as they say, you got me. And I’m delighted to be able to use this moment; this moment when the world really is beginning to think about terrorism and law enforcement as a major issue, to reflect on what this means for our diplomacy.

Let me take you, first, back 75 years. I do that with malice aforethought because 75 years ago, in May of 1924, the modern Foreign Service of the United States was created, created in something called the Rogers Act, signed by President Coolidge. It went into effect on the 1st of July of 1924, creating a diplomatic service for the United States. Well, there had been one before, it had 100 diplomats, and there was a Consular Service which had 600 consular officers, and they were brought together into the new Foreign Service of the United States.

Think about terrorism and drugs for them, 75 years ago. There was terrorism of course. We were only ten years from one of the most famous terrorist acts in modern history, the assassination in Sarajevo, which brought on the First World War. And when people thought about terrorism, they thought about it terms of the assassination of political leaders—presidents, our own and others, France and other parts of Europe—of important symbolic people who were influential in the political lives of their countries. But nobody thought, in 1924, that anyone would ever go after a diplomat. They were a world apart. And if people talked about drugs, we were only 20 years, I guess, from when Coca-Cola was made with coca, when cocaine was the drug of choice for the wealthy middle class and the social elite of America, and when if anybody worried about it, they worried about it only in the most frivolous context of the world of the Great Gatsby.

I exaggerate a bit on both counts perhaps, but the fact is that neither drugs, nor terrorism, nor transnational crime impinged on that little diplomatic service 75 years ago. A service whose job it was to protect American citizens overseas, to do a little bit of promotion of American trade and investment and to engage in a bilateral dialogue between the United States and the countries with which we had relations. Only some 50—it’s interesting how the ratio has changed. There were 51 or 52 embassies in 1924, and there were 300 consulates. There are now 160
embassies and well under 100 consulates. So the world has turned over
in a dramatic way in those 75 years.

That world that came into being for the American diplomatic service
in 1924 lasted essentially until the end of the Second World War, when
we began to take on, as one of the two great powers, some very special
activities in the world which went beyond the traditional protection of
citizens and the promotion of trade. What we took on, of course, was a
war of global proportions which we came to call the Cold War and
which we won 45 years later.

Throughout that period the United States government's representa-
tion abroad changed. In 1924 it was the Department of State abroad
representing the President through the Foreign Service. By 1950 that
was no longer the case. To be sure, the Foreign Service that was created
in '24 was still there. It had been reformed in the Foreign Service Act of
1945, but it had been joined in the embassies around the world by a new
and major player, the Central Intelligence Agency, by a new and
emerging actor in the Third World, the Agency for International Devel-
opment—actually it had several earlier names, but what we know as
AID today goes back to the early '50s - and by an agency whose job it
was to win the hearts and minds of people around the world, the U.S.
Information Agency—an agency which is to die, interestingly enough,
later this year—the CIA and AID go on strongly.

The reason we had a proliferation of those agencies, some of them
integrated into or associated with the Foreign Service and others not,
was of course, this extraordinary competition for the hearts and minds of
the world; the promotion of a whole set of values which were bound up
in what we understood by democracy and free institutions.

And we looked at the world, and we looked at our bilateral relations
through the optic of "Would they be with us, or would they be against
us? Could they be persuaded to accept our values, embrace our values
and not the values of the Soviet Union and all that the Soviet Union
stood for?"

That led us to do some extraordinary things. Not only did we em-
bark on major economic reconstruction in Europe, but beyond to the
eight programs that you know so well around the Third World. We en-
gaged in major efforts to support the military regimes—or I should say
the military services—of countries who were undecided in this great
competition and that led to enormous controversy in subsequent years as
we were seen to be supporting institutions that were not fully in support
of the values and ideals that we were promoting, but if they were not
against us, they were for us.
And I can remember when I went to my first embassy, the Central African Republic, ruled by a man called Bokossa. Some of you may have heard of Bokossa, he crowned himself Emperor on my watch. I had no responsibility for it. He was eventually overthrown by the French, after he had mowed down a large number of high school students and was then sentenced to death—a sentence that was suspended—for cannibalism. But Bokossa was a great friend, and Bokossa always voted with us, and we would never have thought of taking up with him questions, such as terrorism or drugs or transnational crime. What we wanted were allies and friends. And while that's putting it, again, much too crudely, the world in which we lived was defined by that competition between ourselves and the Soviet Union. And it was not until that competition ended a decade ago, that it became more clear that we had other interests in the world which needed to be pursued, what we now call the "Global Agenda," of which this conference's agenda is, in a sense, a part.

If you think of the speeches that the President has given at the United Nations, almost every year he has touched on the subject of transnational crime or terrorism or drugs or all of the above. But we also have to come to terms with the environment and population and refugee migrations and issues which are not susceptible, any of them, to strictly bilateral management or treatment.

So what has happened is that beginning in the 1970s, for some reasons I'll come back to, we began, behind the scenes of the Cold War, to take on a multilateral agenda, which profoundly changed the nature of our diplomacy and those who were carrying it out. That fact was largely obscured by the Cold War because we continued to see as the particular architects and agents of our foreign policy as State, AID, the CIA, the military, some particular military assistance roles, and the U.S. Information Agency, and they continued to be out front in the diplomatic activities and the representation and advocacy of American interests around the world.

Well why did we get onto this global agenda? In part, it was the direct result of events that impinged on us in a very brutal and radical way. Take yourself back 35 years now, to the earliest hijackings, to the fact that it no longer was safe to fly on aircraft, aircraft which had now moved into the jet age. And what came with those hijackings was a whole transformation of how we thought about security, and how we thought about terrorism.

We said, "This is something we've got to do something about." And what we did—and we all take it for granted—is we began to infringe on the freedom of every citizen who travels. We all accept that we are now
going to be searched when we get aboard a plane; we may be searched electronically, but it may actually be physically. The metal detectors are part of our everyday life, and it’s only 30 years since they really became part of everybody’s everyday life; driven by a series of events in which planes were seized, people lost their lives, and the public suddenly became aware that we had a problem which needed a solution.

And that solution was a certain set of security measures and a certain invigoration of the intelligence community’s activities focused on those who were the perpetrators of terrorist acts.

The same thing happened in the world of diplomacy, beginning with the capturing in Guatemala of Gordon Mean, the first American Ambassador to be taken hostage by a terrorist group and running through the 1970s when three other ambassadors were taken hostage and killed—in Afghanistan, in the Sudan, and in Lebanon. We suddenly became aware that we were targets, we the United States government, we the United States. The hijackings were all over the lot. There were American aircraft seized, to be sure, but there were a lot of other aircraft targeted, but suddenly diplomacy became the target of international terrorism. And that led to a transformation in the way in which we thought about our embassies and our representation overseas.

It wasn’t that we didn’t have security before the first ambassador was killed, we did, but we had it for one simple reason and that was to keep them out. And “they” were the Communists and the representatives of the Soviet Union and their surrogate states. Security was about protecting the information that was inside the embassies not the people who were inside the embassies. And to the degree we wondered about those people or thought about those people, we thought about them as targets of exploitation by hostile intelligence services.

Suddenly we saw those people as being targets in their own right, as pawns on a chess board which terrorists could exploit to gain concessions from us and from others. And we had a whole series of incidents in which our ambassadors were taken hostage, not all of them killed. There was a famous one that I managed when I was the Director for Counter-Terrorism. It was when our ambassador was taken hostage in Bogota with, I think it was 17 other ambassadors, very much like the incident which took place very recently in Lima in the Peruvian Embassy, about which you read.

But suddenly we realized we were targets and in a few cases terrorists tried to get into our embassies—Kuala Lumpur in 1975, for example—and we said, “We’ve got to keep people from getting in.” And we put in place what had been put in place in airports some few years
before, metal detectors, a certain amount of searching, some ballistic
glass so the people couldn't carry weapons in and out.

People complained quite vigorously about this then, as they have
since about some of the incremental steps. The reason being that diplo-
macy said of itself—and I use diplomacy now not just in the Foreign
Service of the United States, but in those people whose job it is to repre-
sent America abroad—that the job was to get out and that for people to
get in, and that if we couldn't interact with a whole range of actors in the
society where we were serving and promoting American interests you
couldn't be diplomats, you couldn't represent America. So medical de-
tectors were an abomination.

I visited, at one point, our embassy in New Zealand where they had
introduced the searching of women's purses. And I can tell you that
every New Zealander you met would tell you what an outrage it was that
we were forcing the honest ladies of Wellington to submit to inspection,
as though we suspected them of terrorism.

So it was very unpopular. It continued to be unpopular for some
time thereafter, by the way, as we took measures to keep people out.

That too, changed under the impact of a new round of terrorist vio-
lence beginning in 1983 and 1984; two bombings in Beirut of our
embassy and the marine barracks and the bombing of our embassy in
Kuwait. Suddenly it was no longer a question of "Can we keep the bad
guys out?" but "Can we keep the bad guys away?" And that began a
process which many of you will have seen, of a new round of fortifica-
tions—heavy walls, ballistic glass throughout the embassy, bollards,
planters, delta barriers that would rise up out of the ground and smite a
car trying to drive into the parking lot or into the basement—a whole
series of measures designed to say, "They must be kept away."

Those standards were standards which were designed under the im-
petus of a commission led by Admiral Bobby Inman. And Admiral
Inman, in 1985, looked at the world, post Kuwait and Beirut and said
that what we had was inadequate, that we ought to adopt rigorous stan-
dards, and that we ought to spend about $3 billion building new
embassies. The Congress, in its wisdom, appropriated about half of that
money and over the next 12 years we built some 15 embassies. Those of
you who have had a chance to visit an Inman embassy will know what I
mean. One of them was built in Lima shortly after I left.

That building, and it's a good one to take as an example, sits on a
plot of land several acres large, with a set back of several hundred feet
on all sides, far from the downtown area where the embassy used to be,
with almost no windows, and as one wag said, "This is the most
impressive fortress built since the Crêche de Chavelet. This is a building
which will stand for all times. It can only be destroyed with a nuclear weapon.

Now you may think that’s more likely than you’re used to, but the truth is, this is an extraordinary change, and if you go from Santiago, to Bogota, to Lima, to Caracas, to some of the places in the Gulf, Kuwait, Amman, a few places in Southeast Asia, you will see comparable monuments. Monuments to a reaction to a particular kind of terrorism which was in vogue and may still be in vogue, from the events in Dar-es Salaam and Nairobi in the world of the 1980s.

If you don’t think that doesn’t change the nature of diplomacy thought, when you must live behind—not just behind ballistic walls many, many feet thick, but behind multiple layers of internal controls, you change the way people think about themselves, and how they think about their relationships to each other. And those relationships become very important because of the changed agenda that I mentioned a minute or two ago. If, in fact, every section of an embassy is now walled off from every other section and you have a complex new agenda—which is this counter-terrorism, counter-drugs, counter-transnational crime, and others—managed by different agencies of the United States government, you suddenly have problems of coordination which impede the ability of the United States to effectively interact with its interlocutors abroad.

I don’t want to overstate that, because clearly there is good coordination, and I talked a little bit about that in the panel this afternoon on drug issues, but the fact is that we have created a security structure which is not ideally designed to the carrying out of American interests. And form does impose itself on substance—architectural form—and it’s well to think about what that means as we come up to another round of debate on this very subject because after the bombings in Dar-es Salaam and Nairobi the Secretary, as required by law, appointed an Accountability Review Board. This is patterned on the Navy’s tradition of looking at accidents at sea and deciding who was culpable if anybody; was the Captain responsible when the ship ran aground or was somebody else and if so, how did it happen and why? This has only been in existence as a law for about eight or nine years, and I, in fact, was the target of an Accountability Review Board in Lima when our residence was blown up, with three people killed and half a million dollars worth of damage. It really concentrates your mind as diplomat if you no longer have any windows in your bedroom and a piece of the car on your bed.

But the Accountability Review process raises all sorts of issues which are quite important, in fact, to the functioning of our diplomacy. One is, did we know, and should we have known, and could we have known? This is really a look at intelligence, as it is a part of the process
of supporting diplomacy, but it’s also because the intelligence community is now explicitly tasked with the responsibility for keeping track of terrorism and countering it. The mission of the CIA has been shifted from its old Cold War agenda on to the new agenda of global issues, more or less successfully depending on the issues, but there’s no doubt that there isn’t a CIA station chief in the world who doesn’t think it’s part of his job to make sure that he knows if there is any terrorist activity in the country where he serves that is likely to be targeted against the United States. So you get some very tough questions asked about what did we know and could we have known.

And that creates, by the way, both in the intelligence community and in what I would call the security community—the professional security officers who work for the Department of State—an enormously defensive attitude towards the world. We don’t want to be caught out. That’s healthy of course. You don’t want your embassies blown up. On the other hand, people become very, very conservative and cautious in the way they go about doing things, in order to make sure that they have at least covered themselves against future accusations.

No one has been found at fault in this regard in Dar-es Salaam or Nairobi, and nobody was found at fault in Lima or in the other recent cases, the bombings in Saudi Arabia, although faults in procedures were found, not faults in individuals. But that’s beside the point, because what Admiral Crowell has said, looking at these two incidents, is not so much that we have to have better coordination and a different way of categorizing our embassies for threats and so forth—all of which is perfectly sensible—but he has made three other recommendations which I think will profoundly affect the world of diplomacy as you will know it in the next 20 years.

One, he suggests that the Congress spend $14 billion; $1.4 billion in each of the next ten years on security, most of it to rebuild or to build new embassies. We’ve heard that before. That’s what Admiral Inman said a decade before. But the fact is that you will know that we are serious when you no longer go to the new embassy that is being built on the Pariser Platz at the Brandenburg Gate in Berlin, or you no longer go to Parliament Hill in Ottawa.

It isn’t easy, in fact, to say, move them all away; move our most prestigious missions out into the countryside where they—he didn’t by the way, argue that we should move Paris, but he does argue that most of our embassies that are downtown are at risk. They probably are under some scenarios and under some circumstances. So he has suggested that we look again at where we can construct more and move more, and that will move more of our diplomatic activities away from their clients. And
those clients may be police services with which we have liaison or intelligence services or armies or economic ministries or whatever.

Secondly he said, rather interestingly, we should right-size our embassies. Do we have too many people at risk? Terrorism raises, over and over again, that question. If people are going to kill, maybe you’ve got to accept some risk, but you can’t eliminate it entirely. But do we have too many people in our embassies abroad, maximizing the risk to them and to their families and to those that must support them? And that comes up, rather paradoxically, against the whole change in the agenda.

You heard Cindy, this afternoon, say there are now 400 DEA agents around the world. These are the permanently assigned ones, there are TDY ones in larger numbers, and there are probably close to that number of FBI agents. And you suddenly find that if you add up the total number of law enforcement officers serving abroad, INS, DEA, FBI, Customs, Secret Service, that you probably get a couple of thousand. There are, in the Foreign Service of the United States, that professional core created out of 700 people 75 years ago, under 5,000. And you still have AID, and you still have a whole range of military and other activities representing other agencies of the United States.

So you say we’ll have fewer people at risk. Which people go? When we had this issue raised in Lima we had 200 Americans, and they were pretty scared because the embassy was being rocketed all the time, and my house got blown up, and they didn’t think that was so good. So I said, “We’re going to reduce the staff. Tell me what everybody in every agency does.” In fact, I had never been able to find out what some of the agencies staff did, but I did this time. And they gave me a list and said so and so does this and does this and does this. And then I took a blue pencil and drew lines through these various people and said, “I don’t think that’s critical to our mission.”

Well, there was a terrible hue and cry, and they all went back to their agencies in Washington and said, “You can’t do this to us.” Sure the State Department people all said, “Cut the CIA station, they don’t do anything useful.” And the CIA station said, “There’s too many DEA guys. Go after them—or go after the AID mission. They’re the easiest to get rid of.”

And I suddenly realized that you have a problem. If you say too many people are at risk, and you’re going to have smaller embassies, somebody has got to go. And yet every one of the agencies that I’ve just mentioned has statutory authority to be abroad, has a mission overseas which is important to carry out and who have their own planning process to decide how many people they need to do a particular job in a particular place at a particular time against a particular threat or a particular
program. And yet we have to come to grips with that issue, it seems to me, in many places in Africa, Latin American, and Asia. I'm not so sure it's as important in Western Europe, but it may be. In any case, we have no mechanism, really for making this triage that Admiral Crowell says we should make—and which I agree with, by the way.

The third thing he suggests is that we should deal with the problem I just described by moving people to magnet embassies so that you, perhaps, wouldn't have embassies everywhere. Small places marginal to U.S. interests, you wouldn't have an embassy, you'd have a central point nearby which would cover the programs of various kinds that we have. We do this, by the way in the Caribbean. Our embassy in Barbados handles six countries, quite successfully, actually; lots of drug problems, lots of transnational crime problems and they do it fairly effectively with these little governments and their police forces and so forth.

But I hasten to say that this idea was not popular in Washington and has not been with succeeding Secretaries of State who were very much of the view that the flag should fly everywhere. This is not a political question between Republican Secretaries or Democratic Secretaries, they all want the flag to fly in as many different places as possible unless it's islands. I have a kind of Winnie the Pooh or Piglet view of the world which says that if you're a very small animal entirely surrounded by water—as you may remember Piglet was at one moment—you don't have to have an embassy. And if you look at the places we don't have embassies, they're all small places entirely surrounded by water. We've begun to think more creatively about landlocked countries, but only just. We must do that. We surely must ask ourselves, "How many places do we really need to be represented?" And once we decide that we need to be represented, then we have to ask ourselves, "How many people should we have to do that job?"

And finally Admiral Crowell says something with which I disagree, as succinct from the second and third things, which I think are quite sensible, is lets move everybody into the fort, onto the fortification, onto this platform which will be constructed. We still have quite a lot of government activities around the world which are not, in fact, in the embassy; in the embassy in the physical sense, behind this protected enclave.

And you might ask yourself whether you want them all to be there; the trade promotion function, the agricultural promotion function, some of the public affairs functions, which deal with culture and information; the U.S. Battle Monuments Commission—I can give you a whole list of things. You'd say, "Well, I don't know that they'd have to be on the platform." Sure the intelligence community does; the law enforcement
community probably does, because they’re rather specially at risk in the world in which we live; probably a certain percentage of the diplomatic personnel. But everybody?

I think it’s a question that needs a lot of thought. And I would suggest to you that as you read about the proposals, which will be coming forward in the next few months as I understand it, to implement Admiral Crowell, that you think about this question of what terrorism has done to the diplomacy of the United States, broadly conceived. And ask yourself how we should be represented and where. And I can tell you with absolute certainty that there is no consensus in Washington, either on Capital Hill or in the agencies of government or indeed, in the Department of State itself.

So let me leave you with this thought, that the world has obviously changed and that as we have responded to these changes we have begun to realize that we are dealing in a highly pluralistic implementation environment. Somebody this afternoon—the last panel actually—stirred my memory by saying, “Amnesty International got involved in that case, and they were the determining factor in how it actually came out.” What we used to take for granted, and what everything I have said takes for granted, is that when governments interact bilaterally or multilaterally they act through the mechanisms of federal agencies. It’s not at all clear anymore that the players in diplomacy are all government officials, even in that range and spectrum of agencies that I’ve just described for you. We wouldn’t have the Land Mine Convention if it hadn’t been for the activity and the energy and the use of technology on the Internet and in other ways that brought governments to do something differently. And Amnesty plays that role, as do a whole slew of human rights institutions—Helsinki Watch, America’s Watch, and so forth—and I think you will see the foreign relations of the United States increasingly impacted by non-government players. And that, too, will be a challenge.

And if, as I fear may happen, we wall ourselves in as a government, others will move in where we fear to tread and that the management of the external relations of our country will pass, as they have already passed from the hands of the Secretary of State, to a larger, inter-agency community, to a community which is not even under the direct authority of the President of the United States. And I think that is a trend which may be inevitable, but is one which certainly requires reform and transformation of the diplomacy that we carry out.

And let me leave you with one final thought, that all of these things that Admiral Crowell has suggested, and that I’ve been talking about can be dealt with, in part, by a new and changed use of technology. The reason we have all of these people goes back to where we were a century
ago, when communications were vastly different, that you had to have people in place in Paris and in Rome and in Mexico City or wherever it was because getting there was difficult—seven days across the Atlantic. There isn’t a Cabinet Officer that can’t be in Paris or Rome tomorrow morning if he gets the nod from the President to go. Or there isn’t a junior official that can’t be in Ulan Bator by tomorrow night if that’s what is needed to be done. The transportation revolution changed diplomacy radically over a 50-year period, and now the information revolution changes it yet again.

Answer this question, if you will, as you think about where we should be represented and how we should be represented. If to be represented is to be in danger because of the combination of violent circumstances and terrorism which we must face, is there any good reason why the desk officer for the United Kingdom in Washington should not be online with the desk officer for the United States in Whitehall every day, every morning, exchanging documents, information, conversations in ways that you all do as students or professionals in universities and law firms and so forth on a routine basis? You think of an open world of communications. We have perpetuated a closed world of communications in the United States government, and that world has to open up if we are to be effectively represented, beyond the government, to the new constituencies that are out there. And if we are to do the coordination internally—in most U.S. embassies there is no common e-mail that links all the agencies, not on a classified basis in any case—some embassies do it on a non-classified basis. That’s just not good enough anymore. We’ve got to use technology to deal, both with the new agenda and with this dangerous and violent world about which you all have been thinking for the last day and will continue to think for tomorrow.

Terrorism, transnational crime, drugs, and beyond have changed and will continue to change the way we do business in the world.

Thank you.

(Applause.)

AMBASSADOR ANTHONY QUAINTON: I’d be happy to try my hand at any questions that this may have provoked you to ask.

Yes?

PROFESSOR MARCELLA DAVID: It’s interesting that you started out talking about New Zealand. I was down in New Zealand, and I presented myself at the American Embassy. I wanted to see what it was like and I tried to show that I was a harmless American travelling abroad, a law professor and interested in seeing what was going on. I didn’t even get past the guard post. And, in fact, I said, “Well what would I do if I needed help.” And they told me that I could call and
make an appointment. So there really is a great sense of isolation, not only for the people in the community but also for American citizens.

But it’s interesting that you started out talking about the Cold War because some would say that terrorism—some of the sources of terrorism, not all, but some of the sources of terrorism arise from our actions during the Cold War, when we weren’t fighting for Democracy, per se, but rather against the Soviet Union, and sometimes we supported regimes which oppressed people and created bad feelings all around.

I would argue that, notwithstanding your characterization that there has been a fundamental shift in our way of looking at things, that there might not be that much of a shift and it might have been more compartmentalized. Because of the things that you started talking about today and where we are, what you didn’t mention is Turkey using military force against Kurds in northern Iraq. And notwithstanding that we say that we’re in favor of the Kurds and that we say that we’re hoping to help the Kurds in northern Iraq, the United States has done very little in either this instance of Turkish incursion or past instances of Turkish incursion.

So I guess this all brings me to ask the question, that although you talked about our diplomats and diplomacy, you haven’t actually mentioned our foreign policy, and what role our foreign policy has in creating some of these problems, and I’d like to hear your thoughts on that.

AMBASSADOR ANTHONY QUAINTON: Well you’re absolutely right on one part of what you say and I think fundamentally wrong on another. The logic that is the policies which we pursue in the world are often not consistent with our rhetoric and the results often are contrary to what we hope to achieve. And you can find your own particular case—or at least in the time frame that we say we are going to achieve the goals, and I think of my own role in Central America in the early 1980s. But it’s a very dangerous proposition to say that because of American policies we provide justification for terrorism—it goes to the whole definitional question of what is it—but if you think that if the cause is good the violence that goes with it is acceptable, which is kind of implied here, the Kurds have a case—the Kurds surely have a case—then what Ocalan and his supporters do is the result of their having a good case, which is not addressed or is the direct result of our misguided policy, I guess you would say.

I’m not so sure, because that gets you, very quickly, to a world view which says, “Yeah, terrorism is not good, but it’s one of the legitimate responses to inadequate treatment of real grievances.” This was the argument about the Palestinians, by the way, throughout the periods of
great Palestinian terrorism, when Fatah was the primary terrorist agent of the Palestinians. "Well, they had a point," people would say.

PROFESSOR MARCELLA DAVID: Can I comment? I guess it sounds to me like the State Department’s goal is to stop the violence. And one way to stop the violence is to stop causing all of the hostilities that create the violence. Without naming fault or passing judgment, if you want things to stop, perhaps if we had a different foreign policy there would be less like—some of the reasons for terrorism would go—not go away, but would be lessened.

AMBASSADOR ANTHONY QUAINTON: I guess I think you attribute too much power and influence to the United States. That is, hegemonic we may be, but our ability to stop all violence in the world vastly exceeds our reach. Look at the debate over the Balkans, and I certainly don’t know where I would come down if I were a policy maker, about Kossovo. It’s a small dispute, relatively speaking, and here we may commit—try to stop the violence, commit American forces.

Should we be committing American forces to try and stop Iranians, Iraqis, Syrians, Turks dealing with the Kurds? Maybe we should. Should we have done something in the Great Lakes Region of Central Africa? We certainly didn’t do much, and there’s a lot of criticism that is now ex post facto, after the genocide has happened, saying, "Well where were the Europeans and the Americans?"

So these are not easy decisions I guess. You know there’s something fundamentally wrong, but your ability to definitively affect the course of events—you can affect events on the margin, but to definitely affect the course of events requires the deployment of resources, human, financial, and others that, by and large, the American people aren’t prepared for, and the Congress won’t support. Maybe they should, but I think everyone of these cases—the Kurds is a classic case—do we really think—and maybe we do—that the Kurds ought to have a homeland, and that these four countries should be divided up, and the borders of the world redrawn in order to meet the legitimate aspirations of the Kurdish people?

It’s certainly one solution, but it sure looks to me like there’d be an awful lot of violence down that road. So I don’t know.

Yes?

PROFESSOR BRUCE ZAGARIS: The question I have is how are other countries dealing with the terrorism problem abroad, especially in terms of some of the solutions and the trends that you outlined? For instance, the downsizing overseas, using more fortress-like embassies, and especially because our doing this is going to leave diplomacy more to other countries unless they’re also following similar trends.
AMBASSADOR ANTHONY QUAINTON: Canada is a good example—well, there are a lot of countries that have put in place serious physical access controls—the Israelis clearly have, the British have, most of the Western Europeans have; Third World countries, not much; Second World countries, hardly anything else at all—but they have not gone in for the massive fortifications, by and large—even the Israelis—that we have, with a few exceptions.

Many, many foreign ministries have found that their budgetary resources have declined, as ours have declined, but ours have been compensated by the availability of resources for other agencies to do the kinds of things that we’ve been talking about today. So the overall numbers in our embassies have, in fact, not fallen. The numbers of State Department people continue to decline.

But other governments don’t deploy people the way we do. The Canadians, for example, what they have is both secure and unsecure desktop communications from every desk of every diplomat, connecting everyone else back with Ottawa. That means that there are no longer any communicators in any Canadian embassies. They’ve done away with a whole universe of people which we still have.

And there are ways that technology makes it possible to have fewer people. They still have the people that are doing the outreach, the public diplomacy, but they have changed the report staff requirements. We can do the same and probably will, only much more slowly than would be wise.

Yes?

AUDIENCE MEMBER: Well, I guess I wanted to express disappointment about your views on the limitations of foreign policy to make the kinds of changes that I think she was suggesting. If you look at Turkey, for example, there are a lot of options short of the United States saying the Kurds are entitled to a home land. For example, putting foreign policy pressure on Turkey to grant basic political rights to the Kurds in Turkey, and in context out of the present political borders. And the United States has not done that. Knowing that, we delegitimize even further the violence in the country. And it’s the kind of question that we still don’t hear too much talk about in the context of defeating terrorism.

And sometimes the part of U.S. foreign policy—when we say that our goals are democracy or human rights in Central America, but its never part of our foreign policy when the object is saying to the terrorists, "If you want political change, you do it through the democratic process, and we will do what we can to assure your political rights in a democratic country."
AMBASSADOR ANTHONY QUAINTON: Well I agree with that entirely, and I only put the extreme case with regard to the Kurds to say that there is that extreme case and you may start down that—you may start down the road you suggest and find that you are moving towards a much more difficult ultimate solution. But surely we ought, everywhere, to be adopting a human rights position, if we care about democracy, that minorities have rights, and those rights should be guaranteed within the constitutional structure of a particular state or others.

And I think it's a general principal, but it's not always observed because we end up with complicated tradeoffs on other issues. You heard me talk about this in Peru, but I would think in Turkey there probably are other strategic interests, which when weighed in the balance are considered to override this particular one.

Now that may be short-sighted—I’m really not trying to defend our policy towards Turkey, only to say that when you’re making policy it isn’t—that isn’t the only issue that you have before you. And the problem—I’m absolutely convinced, from every job I’ve had of any responsibility—is setting priorities among worthy goals. And I can give you a list of things we want to do in Turkey, and the question is where do the Kurds fit in that list. And you might say “Right at the top. If we don’t deal with the Kurdish problem we can’t deal with the Islamic problem, and we can’t deal with the security problem on their northern border.” I don’t know what the right priority is, but that we ought to be saying, absolutely, that the long-term solution of many of these ethnic problems is the participation of all the citizens of a society, in the corporate life of that society, through some constitutional mechanism, not of our dictating.

I mean there was a time when we had a sort of vision of what democracy would look like, and it had to be our kind and our way. I think you’ve got to get away from that, too, that what we care about is the way in which people are represented and their access to power and their ability to change the course of their own lives through the institutions in which they participate. And they may not all look like ours, they probably won’t.

Yes?

AUDIENCE MEMBER: Mr. Ambassador, I realize your brief this afternoon is to address the question of terrorism, but as you turn embassies into fortresses you still have hundreds of thousands of American citizens traveling throughout the world as tourists, students, business people, missionaries and so forth, and what you do is make the embassies invulnerable thereby making the likelihood of actions against
American citizens—American citizens the targets for the expression of frustration against the United States.

What’s being done, similar to Inman and Crowell, to address the question of protecting American citizens abroad?

AMBASSADOR ANTHONY QUAINTON: I don’t think there’s a lot of evidence to suggest that the rationale you give is correct, in the sense that there hasn’t been a massive turning to private citizen entities as a result of the Inman measures or the ones that have been taken more recently, although that clearly is a possibility.

The reason that embassies are targets is because they are the symbolic place in which the United States is represented and from which it exercises power and influence in a particular country and over a particular set of problems.

That having been said, clearly you have to care about the American citizens who may be at risk. You have to care about the families of the people who work in the platform, work in the fortress because they’re not there all day long. The children and their families are somewhere else in the city, just as the missionaries may be, or the businessmen may be. So you must have some kind of general strategy.

There are two elements to that, it seems to me. One is to have the best possible warning system so that—and this goes to the intelligence question—you can tell people that we think something is being planned, and you can take some appropriate measures for your own personal security, and you can tell them what those measures are. It may be staying at home, it may be leaving the country, it may be a whole series of things, but you’ve got to do that.

And you have to have a network, what we call the warden system, which enables someone in the embassy to get in touch with all those Americans through some kind of tree structure. So that if you get information that indicates that someone is at risk, you can tell them. That may be an individual, or it may be a group, or it may be a place or a building or a firm or whatever.

That will never eliminate all the risk, but if you don’t—at a minimum you must do that, to make sure that you care enough about the citizens who are in a particular country, and that you can make them know that you have a way of getting to them in emergencies.

Any last question before we—it’s six o’clock, straight up. Last question.

AUDIENCE MEMBER: Mr. Ambassador, how well have we looked at our intelligence and really advocated—in a fashion that gives it that warning time to do something different?
How can we have—I look at the Iran situation where the Ayatolla was coming about, and there were details warning the U.S. that this might happen, and we were given all sorts of scenarios, and we didn’t pay attention to them, and thus a situation developed.

Has that improved, or has it deteriorated in terms of that intelligence?

AMBASSADOR ANTHONY QUAINTON: There are a lot of questions there hidden behind that one question. I think the relations have improved in the sense of the sharing of information. It’s less compartmentalized, and there’s a greater willingness across agency lines to make information known to others. There are all sorts of constraints on that, but nonetheless, where it is a question of whether Americans are at risk, or the embassy is at risk, there is no hesitation to share the information.

The problem that arises with intelligence is the analysis you place on it. You get a piece of information from a source described as usually reliable. Usually reliable is not always reliable. Most reports say usually reliable—“a generally reliable resource,” “a resource with access.” There are all sorts of special phrases that are put in disseminated intelligence which tell you “Yeah, he’s usually right,” but it may be a one-time source with uncertain access. Do you make the same kind of decision on the basis of that report as you would of somebody who is controlled or may be fully knowledgeable about a situation?

There’s a judgment question, and I must say that it is the instinct of most people, but not all, to downplay the significance of bad news in embassies. People want to get on with their jobs, and they want to—whether it’s fight the drug war or promote democracy or whatever—and they don’t want to hunker down, and they don’t want to be told that the embassy is going to be closed tomorrow because there’s a threat of some kind. So there’s a kind of emotional desire to say, “You know, if it’s not really reliable—”

On the other hand, there are people who are accountable who are likely to overreact, who will say, “This may be flaky, but we better really batten down the hatches, because it’s one chance in a hundred. But, if that one chance goes down, really bad things are going to happen.”

So ultimately you have to find people with good judgment and put them in positions of responsibility. But, it will never be perfect. That the information is shared and available, that enormous resources are being deployed by the intelligence community and the law enforcement community to get at the threats to American interests abroad, I have no doubt. But, how you use that information in order to make our people
safe will continue to be problematic because people will differ in their judgment about the significance of the information, and how it should be used.

(Applause.)

MR. ERIC FEILER: Thank you very much, Ambassador, for your speech and thank you to all the panelists who made today such a productive and interesting day.

(Whereupon, at 6:05 p.m. the proceedings were adjourned to be reconvened the following day at 9:00 a.m.)

* * * * *
MR. ERIC FELLER: Good Morning, everyone. Thank you for coming back again for what should be, hopefully, another productive session and another day of good panel discussions and good question and answer sessions afterward.

I'm just here to sort of call us to order for the second day of our symposium and turn it over immediately to Mr. Bickford and Mr. Bowman.

LAW ENFORCEMENT AND GATHERING EVIDENCE

MR. M.E. “SPIKE” BOWMAN: Well, good morning all. I was talking the other day to my two sons as I was packing. They were asking where I’m going this time, and I told them. And they said, “What are you doing?”

And I told them about the panel on evidence and everything, and a few minutes later I looked around, and they were huddled in the corner talking to each other.

And I said, “Okay kids, what is this?” And they said, “Dad, you’ve been a spook lawyer for thirty years, what do you know about evidence?”
MR. M.E. "SPIKE" BOWMAN: And I hope the rest of you don't ask the same question later on.

David and I thought that we would try to do a little bit different presentation this morning. We have—we've come at this course with very similar, but still somewhat different perspectives on transnational issues. Both of us are experienced in intelligence, and both of us have come to the evidentiary concerns of using intelligence in criminal cases, but from perspectives that are separated by the Atlantic.

We thought we would go through some of the issues that we have seen, and that we see developing in evidence from the transnational threats that we see today.

One thing that I'd like to sort of make clear up front, we realize that a lot of what do is very esoteric. You know, only until a few years ago, national security law was not taught at all, and it's still not taught in very many places. So, when we talk about things like FISA, the Foreign Intelligence Surveillance Act, or the Classified Information Procedures Act, we realize that there are a lot of people who don't really know what we're referring to.

So we're going to encourage you to stop us and ask questions as we go along. And we'll try to direct everything that we're talking about to make sure that we are getting, you know, our information across in a way that makes sense, which will probably be novel to both of us.

We're talking about evidence, but transnational evidence: evidence that comes out of the transnational threats that we see today. First of all, I'd like to just say that from our perspective and our experience, evidence really is information. And information comes from a lot of different sources. How you get it into the courtroom, how to use it in a criminal case, doesn't change a whole lot because of the type of case you have.

But, there are some real issues that come up that are different in the transnational cases than there are in purely domestic cases. We also have to worry about, you know, where our evidence comes from. We have to worry about how we got it, or how we're going to get it. We have to worry about whether it's reliable, and, in the final analysis, can we use it.

Acquiring evidence across transnational borders adds a number of dimensions or issues, problems, procedures that need to be erected on the fly. One of the things that Professor Bassiouni mentioned last night were the issues that he sought in sovereign borders; sovereignty being, you know, a problem for the future in a number of different areas. We
have some of those same problems in evidence and in transnational threats.

The physical borders that he talked about came out of the peace of Westphalia, circa 1648. We’re still working with a system that is more than 300 years old. Borders you have where you have to have a passport are also borders that tend to stop investigations. They tend to stop government activity in a host nation or at least bring it to a halt, while we try to work out how we’re going to do it.

The sovereignty issues also play into the type of things we can do in other nations. In some nations, as Cindy mentioned yesterday, we’re allowed to carry weapons, and in some nations we are not allowed to carry weapons. That’s a problem of sovereignty.

We have the same problem in trying to gather evidence in a foreign country. Not only in getting cooperation to gather evidence and in trying to get the cooperation for it, but also in actually getting the evidence out of the country, in taking things away from another country. And it depends on the country and the type of cooperation you get from them, how far you’re going to get.

Just as a very quick example, when we were investigating the bombings in Kenya, we brought back three tons of evidence from Kenya, alone. And there are a lot of questions, which I could go into, about how we got it out of there and with what authorities and permission, and how was it was cared for, and what was the chain of custody. All of those are interesting issues.

One of the real big crime problems of sovereignty and gathering evidence today comes up, as you read in the papers, about the cybercrimes that we see. We have had a lot of computer intrusions in this country over the last year. Some of them have looked very significant. Most of them have turned out not to be significant.

The problem is that you don’t know what you’ve got. You only know that you have an intrusion and we know only, basically, where the last electron came from. So that when something comes from an overseas source, we know that the last place it touched was overseas, but we don’t know where it came from before that. And, much of the time it comes from the United States after it’s been routed around the world a number of times.

Overseas we don’t have the same types of capability for law enforcement collection that we have in the United States. And, historically, we depend a lot on the intelligence community to develop the information for us.

Now, let me very quickly say that we don’t use the intelligence community as an accent to law enforcement. They have their rules, we
have ours and under the system that the United States has—and David can explain whether this is different in the U.K.—under our system, the intelligence community is not allowed to collect for the purpose of law enforcement.

They may have coincident reasons to collect the information, but if I, as a representative of the FBI, say I would like you, CIA, to collect the information for me, so I can put handcuffs on somebody, they're going to say, "I can't do that." We have some very specific rules on how we use intelligence, and where it comes together with law enforcement.

Nevertheless, we do work a lot with the intelligence community. And we have issues that proceed from the type of the collection, the technical collection, human sources, whether the sources are official or unofficial, whether the sources can be named or not named, whether there is a chain of custody that goes along with information that we receive from other countries.

And, there are often restrictions on how we can use evidence that we get from another country. We may be able to use it for lead purposes. We may able to use it only for lead, or may be able to take it as direct evidence, depending upon what the other country permits. And, of course, depending upon what the reliability of evidence is.

One of the issues that we have to face every day is that the type of standard that we have for evidence collection in the United States is not always the type of standard that we'll find in other countries around the world.

Those are basically the issues that we are looking at. And, with that, I will turn it over to David, and we will sort of go back and forth here.

But, please, again, let me say that if you have a question, please stop us on the way, so that we make sure that we are not saying anything that is not making sense to anyone.

MR. DAVID BICKFORD: Two days into my job at MI5 and MI6, I was very excited to have an operation officer come to me and say that he was meeting an informant and he needed some legal advice. He spread out the story, and—I've just come on from the foreign office—I gave him a very good foreign office response.

I said on the one hand there's this and on the other hand there's that. And he stopped me and he said "Do you understand, that I'm meeting this guy in a bar in Beirut?"

And, I immediately came to a very fast understanding that, on the one hand this and on the one hand that, in terms of legal advice in a fast moving operation, that's not a luxury you can afford.
The objective, as Spike said—and, everything that he said is entirely from the U.K. point of view, as well, with one exception and that really is in relation to converting intelligence into evidence.

For a number of years now, the United Kingdom has worked a system where intelligence and law enforcement operate together in dealing with organized crime, including terrorism. And if I talk about organized crime, I'm including terrorism in all its guises; movement of nuclear weapons, etcetera.

This came about, obviously, because of the problems we were having with Irish terrorism on both sides of the sector. And in order to allow intelligence to work alongside law enforcement, we had to create a series of procedures which allowed secret intelligence to be brought in as evidence at trial. We borrowed those procedures from the United States. And, very briefly, they were that, all the information gathered by the intelligence agencies prior to any trial, related to that trial, have to be seen by the prosecutor, and then have to be seen by a judge ex parte, without the defense being present.

That was in order to ensure that no information gathered by the intelligence agencies, that may be relevant to the defense, was being withheld from the defense. So you have those two sieves to make that assurance absolutely plain.

I think with those procedures in place, we decided it was then safe for intelligence to support law enforcement in all aspects dealing with organized crime.

The next phase, as it were, was to create the administration for this. And we had two tiers of administration. First, there was a joint law enforcement intelligence agency committee, as it were, that dealt with the high policy issues, particularly the strategy of dealing with gathering intelligence, turning it into evidence; particularly on the international front. The problems of turf battles, those were sorted out.

And underneath that, each operation had a joint directing board of the agencies involved in that operation so that problems could be ironed out, but, much, much more importantly, the operation could be properly directed to a successful conclusion in the courts.

Third, we decided early on, that, if you're directing an operation to secure intelligence as evidence in legal proceedings, you have to make quite sure that the trial didn't come to a shuddering halt because some information was found by the trial judge to be relevant to the defense, which was absolutely vital for the intelligence agencies to keep secret. For instance, the name of an informant, the existence of an informant, perhaps even the existence of a telephone intercept or eavesdropping device.
The operations, therefore, had to be guided so that—and still have to be guided—so that when the trial was continued—and when it started and continued, the chances, the risk, of any information having to be disclosed to the defense that would bring the trial to a halt—because it couldn't be disclosed, because it was too secret—that risk had to be eliminated or reduced to the maximum possible.

In those circumstances we introduced a system whereby the MI5 and MI6 lawyers operated alongside the operational officers and alongside both the committee and the board to predict precisely how the law might interpret the operations when they reached trial.

That has now been going on for about eight years. Obviously we had teething troubles, but now the system flows extremely well and we find that the success rate at trial has just improved dramatically.

The success rate before the European Court of Human Rights has also improved dramatically because, at the same time that lawyers are predicting the evidential problems at trials, the legal difficulties, they're also handling the civil rights balances as the operation progresses.

So that's the difference, I think, between the U.K. attitude towards the coordination of intelligence in law enforcement and the United States.

MR. M.E. "SPIKE" BOWMAN: One of the major differences there, as David said, is that they can support with intelligence operations a criminal enterprise much more easily than we can. I think, in part, that stems from the fact that the U.K. started this process a little bit after we did and was able to take our process and sort of build on it.

In our case, the law in the United States, stemming from the 1970's and then primarily coming out of the Church Committee and the PIKE Committee hearings, pointed towards a need for some kind of regulation of the intelligence community by which the American public could be assured that their techniques and their ability be intrusive are not turned against the American public.

And so the way our law developed was that the intelligence community had its mission, and the law enforcement community had its mission, and those intrusive techniques that the intelligence community is permitted to use should not be turned deliberately towards help to the law enforcement community. They should, instead, be focused on foreign intelligence, which is something that, for the most part, occurs outside the borders of the United States.

That's really where we are. Our law—we have in our system a term of art that we call primary purpose. And it's a fairly poorly defined term of art, but it's one that we use to try and determine whether or not an intelligence technique is being used properly. And in our system, that's a
very, very important and a very rigorous standard that we try to adhere to. There are more lawyers in the process of this than Bayer has aspirin.

If we want to get a FISA or a physical search on the intelligence side of the house, it goes through—I can’t even begin to tell you how many lawyers it goes through or how long it takes, but to give you a sort of comparison, if I needed a Title 3, a criminal search warrant, or an electronic surveillance, in an emergency I could get one probably in an hour or two—and ask Gil back there who will tell you about the World Trade Center later and give you a better idea of how he did it as AUSA, but they can get those fairly rapidly—if I want to get a FISA or an intelligence search in a hurry, the “hurry” better be defined in terms of days. Usually it will take me several months in order to prepare a package for a FISA electronic surveillance. That’s how stringent we are on that sort of thing.

Let me turn to a couple of other things where we tend to have issues with some frequency. That is, since we’re talking about transnational threats, the type of—you know, the problem is not just that events occur in other countries and that evidence may occur in other countries, the problem is that the evidence that we’re looking for may occur in several countries.

Trying to bring all of that to some kind of a standard that will—to acquire it in a way that is acceptable for our standards and chain of custody and reliability and so forth, is extremely difficult. And the chances of our using the intelligence product for much of that are really very slim for all these—for the obvious reasons.

However, let me just say also that because of the way the threats are occurring, we are also having to adapt the way that the law enforcement community approaches gathering evidence for transnational threats. We don’t have the luxury any more of being able to just look at the domestic scene and try to use our Rule 41 search warrants and so forth.

But we are in the situation now of having to look overseas and finding out where information may be available. And we get assistance from a lot of different places; from our intelligence community, from other intelligence communities, from other law enforcement agencies around the world. We’re in the process now of trying to figure out how to marry-up all of this stuff in a way that is acceptable to us.

We are finding that there are a lot of countries in the world that would like to have—that would like to be like the United States in a lot of different ways. And a lot of them would like to help us and don’t quite know how to do it.

When we were in Kenya, for example, the Kenyans could not have been more cooperative in trying to assess the—in trying to help us
investigate the bombing incident there. But culturally, they didn’t have a clue about how to go about an investigation.

You know, in a crime scene in the United States you will see all that yellow tape out there and nobody goes beyond the yellow tape. So when we got to Kenya, we said “We need to preserve the crime scene. Can you station guards out here, Kenyan police, and post a security perimeter?”

Well, they were very happy to do that. However, the concept of security perimeter just doesn’t mean anything to them. So they posted the guards out there, but Kenyan citizens would walk right through the guards, and into the rubble and so forth, all the time.

That’s the kind of problem that we’re facing in trying to develop evidentiary product in these overseas investigations. What we’re trying to do, we in the FBI and DEA and others, is to try and train other countries in the world in how to go about an investigation. It’s not so much that we’re trying to tell them to adopt our standards. That’s not really the point so much. Most of them don’t have any real expertise in investigating. They don’t have the scientific methodology that we have.

We’ve built a training academy for law enforcement in Budapest, Hungary which has been extremely successful. We’re going to build another one for Asia that should be starting groundbreaking this year, I believe. And we bring a lot of foreign police officials into Quantico, where we train our own agents, and DEA trains their agents, and we train foreign officials there; with two purposes in mind, really. One is to establish the liaison relationships that we need. You know, if we have a problem in a foreign country you need to be able to pick up the phone and call somebody. And that’s an extremely valuable part of this training mechanism.

And the other part, frankly, is to get other police forces acquainted with modern technology, with investigatory procedures that will help them solve their own crimes. And, frankly, the way the transnational threats are today, terrorism and organized crime in particular, they spread across borders. They don’t have to stop at the borders like we do.

The chances of our being able to prosecute much of this are very slim so we’re very happy if another country can prosecute. And we are happy to send our investigators over at their request to help. We will send our technicians over to help. And this takes a lot of different types of—different permutations of how we send people over and whom we send over, from investigators to scientists.

But we’re doing an awful lot of that these days. Trying to find ways that we can cooperate so that the police forces of other countries and our police forces can work together and prosecute wherever it is possible.
We will provide whatever we can to try and stop organized crime or terrorism someplace else. Because that’s to our advantage as well.

**MR. DAVID BICKFORD:** Thanks, Spike. Same problems, obviously for the U.K. Perhaps the U.K. understands the objective of the final point of jurisdiction perhaps a little more than the United States, where the focus is on trying to bring the jurisdiction back to the United States.

The U.K. tends to follow an operation and then seize the best opportunity and the best jurisdiction to bring the individual to trial. That could be anywhere.

For instance, I remember in one particular jurisdiction—I won’t tell you what it is because it might pinpoint an individual—but we had an informant involved with a terrorist group, and he had told us that the arms and explosives were now situated in the apartment. So we arranged with him that the individuals would be picked up at around about half past ten at night, at which time he would have gone out to buy them pizzas.

So, this was all planned two days beforehand, and we went, and we spoke with the law enforcement authorities and the prosecutor of the jurisdiction concerned who said “That’s not going to work. If the individuals have gone peaceably into their apartment between the hours of 6:00 p.m. and 6:00 a.m., you can’t arrest them. You have to wait until six o’clock in the morning before you can arrest them.”

Well that threw a sparrow in the works, I can tell you. We had to try and get our informant back out for another meeting, which we managed to do, actually, and fortunately, he was out buying them milk for breakfast when we went in.

That’s the sort of thing you can really slip up on if you’re not planning ahead. And in the early days we made slips. One gradually learns to try and predict these problems as you go along.

For instance, if you’re using telephone intercept, you need to know beforehand whether the jurisdiction will allow that telephone intercept to be used as evidence. The United Kingdom doesn’t. You can’t use telephone intercept as evidence in the United Kingdom. So if we’ve got good telephone intercept we’ll try and find another jurisdiction in which to use it.

But then you’ve got a problem because the warrants, the telephone intercepts in the United Kingdom are executively granted. They’re not judicially granted warrants. There’s judicial oversight of them by—what is quasi-judicial oversight by a judge who’s appointed to oversee the telephone intercept activities of the agencies.
You try and persuade a jurisdiction that insists on judicially granted warrants that the United Kingdom warrants can be accepted into their evidence. Not at all or—the United States gets very frustrated if they want to try and use intercept in the United Kingdom, and they can’t.

Eavesdropping. Now, in some jurisdictions eavesdropping has to be—and telephone intercepts in the United States as well—has to be disclosed to the individuals involved at some point. In the United Kingdom that’s not necessary.

In long-term operations, which these are—they can take years to develop against terrorists groups or organized crime groups—if you’re trying to pick off individuals in prosecutions, and you then have to come to a point where the telephone intercept has to be disclosed, in those proceedings and circumstances where you don’t want to disclose it, you’d better know what the situation on the ground is before you conduct your operation.

Informants. In some countries informants’ evidence just isn’t permitted. In some countries informants can be—their features and identities can be kept from the defense. The United Kingdom is one such country. In Italy, it’s rather nice, you’re allowed to wear dark glasses.

But if you have an informant who’s a long-term informant, in a situation like, for instance, the United Kingdom which is an extremely small country compared to the unit, once his features are disclosed or once the features of an intelligence officer are disclosed then he’s immediately at risk. So you have these sorts of problems you have to combat.

AUDIENCE MEMBER: Sir, how is telephone intercept to be distinguished from wire tapping?

MR. DAVID BICKFORD: Yes. It’s the same thing. But, curiously, in the U.K., eavesdropping, which is bugging, is on a different level. We introduced the legislation later, and bugging is permitted to be used as evidence. So, wiretap and telephone intercept are the same issue. Bugging is different, it’s planting an eavesdropping device.

AUDIENCE MEMBER: Mr. Bowman, I have a question for you and Mr. Bickford. You said that sovereignty—restrictions on use of evidence. What—and you’re handling it on a case by case basis. Is there any need for an international structure to deal with that problem so that you have certain benchmarks that would deal with what you’re talking about?

It seems as though you’ve got good relations with a number of countries, and that it depends on personalities. Do you need more structure there?

MR. M.E. “SPIKE” BOWMAN: I think we do, and that can take a number of different forms. To give a very quick example, one of the
things that we have the greatest problem with in organized crime and, to a certain extent, with organized terrorism as well, is transfer of money around the world.

There is no requirement right now that when you electronically transfer money, that all of the transactional data go with it. So that—you know, if you’ve read the John Grisham books, it accurately shows how you can transfer money around the world and sort of hide it.

I think that some of the international structure we need is financial. We need to require that financial data transfer with money. We need to have more international standards on international banking. We need to develop standards for cybercrime. Because, of all of the crimes that you see today, that’s the one that requires the most immediacy of pursuit. And once you get to a sovereign border, you’re stopped cold. That doesn’t mean you can’t eventually get back with cooperation of other countries and trace them, but it’s very different.

We need to have some method of regularizing the ability to follow a criminal process across borders, know what the process is, but it will be a number of different processes.

Cybercrime certainly is going to be different from the money laundering issues and the problems that you have with chain of custody, and standards for evidence are going to have to come in in yet another dimension where countries can begin approaching investigations with similar type technologies and similar type goals and so forth.

We’ve got a long ways to go, but I think the short answer to your question is, yeah, we need a lot more in the way of international standards.

MR. DAVID BICKFORD: Yes, I agree. And, for instance, if you look at informants, the United States has the Attorney General’s guidelines which provide strict criteria for the recruitment, the control, the information gathering, the fact that informants can go on frolics of their own, the facts that informants have their own personal problems.

What happens if an informant has told his spouse or her spouse that they are an informant, they’re getting a salary? The marriage comes to a conclusion. Thus one that is not the informant will be seeking financial settlement. That goes directly to the salary that the informant has displaced as theirs. How do you deal with these problems?

In the United Kingdom we have no such guidelines on a national law basis. We have them, and we adopted them. In fact, we adopted, in the intelligence agencies, most of the FBI work and the CIA work. We have those internal guidelines in the agencies, but you can’t find them elsewhere.
So when an informant goes to trial, the defense will go straight to these problems. How was he recruited? How was she controlled? And, if you don’t have controls that are common, the defense will slay your informant before he even starts to give evidence.

AUDIENCE MEMBER: Don’t worry, I’m not going to make a speech, I’m just going to observe Josh Levy’s invitation to get on the recording.

You’ve given us a lot on the cooperation and the roles of the law enforcement community and intelligence community in these transnational cases. I wonder if you could add some comments on the involvement of the prosecutors, the U.S. attorneys, and the Queen’s counsel in these cases and give us some idea of the particular problems, if there are problems, from that standpoint?

I have maybe one or two things in mind. Is it—I mean, I know you have your specialists in both the Bureau and in the Department of Justice in National Security and Transnational Crimes, but the case may actually be tried by an Assistant U.S. Attorney in Texas or California, New York, Massachusetts. Is it, in fact, common that a transnational investigation will be carried further before the prosecutor gets involved than would be the case of a domestic investigation of a Grand Jury proceeding?

MR. M.E. “SPIKE” BOWMAN: Yeah, a lot of that, for the United States, depends a little bit on what the offense is that we’re looking at. The two most stark differences, I think, will be between terrorism, a terrorism event, and, let’s say, espionage.

The way our system is set up, as I mentioned earlier, our intelligence community cannot collect for the purpose of law enforcement. As a consequence, if we have a purely intelligence investigation going—and the FBI does purely intelligence investigations for terrorism and for espionage and for weapons of mass destruction and things of that nature—if we have a pure intelligence investigation going, we will not go the AUSA on that. Because once you involve AUSA, his only purpose is criminal prosecution. And, at that point, the techniques that we would use for intelligence purposes would have to be dropped, and we would have to go on criminal standards for criminal purposes when, very likely, we are not looking for criminal prosecution, we are looking for intelligence data.

A terrorism event, on the other side, when you have something that has happened—we may have had significant intelligence investigations that are related to the events that went into it, or to the individuals who went into a terrorist event—but once the event has occurred, we’re going to take this as a criminal event.
In the case of the bombings in Africa, among the first persons airlifted out were both AUSAs and Department of Justice criminal attorneys to go over and help the investigators put together evidence as they were sifting it out, to help them with things like chain of custody and things of that nature.

Sort of splitting the difference—that's probably not a good way to put it—but, because the AUSA, or the U.S. Attorney's Offices, are likely to be involved at some point in some cases which have an intelligence predicate, there is always a need to try and assess—as David says, they do all along—there's a need to assess where you are in a case, and whether or not the intelligence value merits continuing in an intelligence vein, or whether the criminal value is becoming paramount.

Every U.S. Attorney's office in the United States now has an AUSA who is a designated National Security lawyer, a person to whom we can go and talk things over if we need. He will not be a prosecutor. He is just a sounding board; a person from whom we can get some kind of advice and so forth and sort of keep the U.S. Attorney's Office in the loop.

But, there are a lot, in fact most of the intelligence cases that the FBI runs there is no U.S. Attorney involvement in them. And most of our intelligence cases remain intelligence cases. They do not go to criminal prosecution.

**AUDIENCE MEMBER:** I know this is a complicated area. Much of what you're saying is—how do I say it?—traditionally, what my understanding has been is there has been an amendment to the CIA's legal authority with regard to collection of information that will be used to further an investigation. I'm surprised to hear you not mention that at all.

Is it the case now that if the Bureau needs the assistance of intelligence for furtherance of criminal prosecution that it can actually task the intelligence community, the CIA, to assist in that regard so long as it's overseas and no U.S. persons are involved?

**MR. M.E. "SPIKE" BOWMAN:** Yes, that is true. This is a law that was passed about two years ago. And as Elizabeth says, what it does is it permits us—it actually doesn't permit us to task the CIA. What it does is it permits the CIA to adjust its priorities to satisfy a law enforcement collection.

It is for non-U.S. persons overseas. It is a law—it is an option that will probably be used infrequently, for the simple reason that virtually everything that we would be interested in, in the nature of things that the CIA could do for us, are probably going to be things that they already have, that the DCI has already included on their intelligence requirements. Because they now have, by executive authority, a requirement to
collect on organized crime and a requirement to collect on terrorism, a requirement to collect on weapons of mass destruction and so forth.

So, while that authority is there, and it is the first such authority that Congress has seen fit to give to the intelligence community to collect specifically for law enforcement, it's only been used once or twice that I know of right now. It has not been—it just has not been needed, I think.

AUDIENCE MEMBER: I guess, two other questions. David mentioned yesterday the idea of—I'll perhaps bastardize your comments—but international criminal for G-8, a multilateral arrangement, where presumably, G-8, G-7, you have standards somewhat more in common, and it would be a slightly more manageable kind of structure.

I'd be interested, Spike, in your reaction to that. And I'd also be interested, since this is our only shot at you, in hearing your assessment of the scope of the threat of international organized crime—and David's comments on that as well.

MR. M.E. "SPIKE" BOWMAN: I would be all in favor of a G-8 international court for, I think, pretty much the same reasons that—the same thought process that Professor Bassiouni went through last night.

I think that we are at a point in history when we cannot confine the threats, the very serious threats that we face, to purely domestic processes.

The G-8 would only be a step in the right direction, but is certainly a step in the right direction. Now, why do I say that is really the second part of Elizabeth's question? I've spent my entire career in intelligence, unconventional warfare, things that are sort of different. But I'm very much an intelligence type of lawyer.

Many years ago I was a prosecutor, but that was many years ago, and what we're talking about, from the Bureau's perspective, at least in organized crime, is a criminal enterprise. Which is something that I would not normally be involved with.

I am involved with it for a number of different reasons, but my personal view on organized crime, international organized crime, is that it is the single greatest threat to the United States and to most countries of the world right now. I think it is greater than terrorism. I think it is greater than weapons of mass destruction. I think that it is a threat that is—that can very easily subvert not only the financial systems of any country in the world but also the social framework of virtually every country in the world.

We see that with the incredible amounts of money that are involved. We see a lot of public corruption around the world. We see the type of bonuses paid to criminal lieutenants; Christmas bonuses of a half million
dollars a year. This kind of money has the capability of subverting virtually every institution we hold dear.

That is Spike’s view. That’s not necessarily the FBI’s view, but that’s my view.

AUDIENCE MEMBER: I have two questions which are really about the activities of the intelligence community—(inaudible).

MR. DAVID BICKFORD: It’s a crucial question. Just leading with the two issues you raised, the in camera trials. Those trials are basically ceased in the U.K. now. They may come up for espionage perhaps.

But, certainly, my first view when I took over at the 5 and 6 was that in camera trials didn’t work, and if you’re going to deal with organized crime and terrorism they have to be in the open. That’s one of the reasons why we developed these ex parte procedures so that the judges could look at all the information, determine what could be kept back, what didn’t have to be kept back, so we could go to trial in open court. So, in camera is dead and good riddance to it, really.

On the other issue of secrecy, I couldn’t agree with you more. We are now living in a world where, as I said yesterday, international communication is instant. We are on the direct threat, as Spike says, from organized crime.

I mean, look at communities of middle income/high income earners who are actually putting themselves inside prisons at the moment because they’re worried about what’s going on outside. I think that’s the biggest indicator of the threat of organized crime.

It’s not the kids on the street we should be worried about, it’s the guys at the top who are causing the kids on the streets to make us “ghetto” ourselves.

So, we have these two tensions coming together. In the United Kingdom we’re trying to fight that in total secrecy. We have this extraordinary situation where, to get an eavesdropping warrant, or a warrant to allow agent activities, or a warrant to have telephone intercept, we go to the executive. We go to the Secretary of State for Home Affairs or the Foreign Secretary and then that is overseen by a judge.

What’s the need for that secrecy? In the United States you have FISA judges. Now I know that system has been attacked. But there’s no reason why one should not get an open—I’m sorry, an ex parte warrant from a judge, so that you have the judiciary focusing directly on the activities of the agencies.

The need for the—for society to understand why governments are not doing enough to protect them against organized crime and against terrorism is going to break open the forms of secrecy, certainly in the United Kingdom. You cannot fight this battle in secret. Society has to
know. They have to be warned for a start, and if you warn them you’re warning them on the basis of information you’ve collected from secret sources. You have to understand how to convert that information, so you can protect your sources.

So secrecy is dying. And with the new information age I think we’ll find that secrecy for governments will be forced down to a very, very narrow perimeter, indeed, literally dealing with sources, methods and technology as far as the intelligence agencies are concerned.

If you take, on the other hand, the control—Spike’s already talked about the idea of an ICC—that we can have a more immediate control—and I spoke about that yesterday, which is the French system where you have a judge who controls the activities of the intelligence and law enforcement agencies as these operations continue—the legal ramifications, the balance of rights ramifications are discussed with the instructing judge as the operation continues. So when you get to trial you don’t have these problems of, “Will our evidence survive?” Will the defense be able undermine something that we failed to do or conceive of in terms of law or balance of rights as the operation continues?”

And that breaks open secrecy more because here you have an instructing judge who’s let into the most fundamental secrets of the state and its operations as these operations develop. Unless we accept this diminution of secrecy we’re not going to allow these operations to develop in the way they should.

AUDIENCE MEMBER: (Inaudible.)

MR. DAVID BICKFORD: I think everybody sort of takes these things as so different. The model’s there. It’s in the Napoleonic Code. The problem is Parliament in the United Kingdom—which is conservative, which is defending the common law—doesn’t want anything to do with this French rubbish.

(Laughter.)

AUDIENCE MEMBER: I think the initial objection would be the one that sometimes the FISA—(inaudible)—and that if there’s a separation of powers issue when you bring the judiciary into what is a traditional executive branch of responsibility.

That has been one of the principal challenges to the FISA support, along with the other one, which I think is frankly speeches and that is that they have never, with one exception, found an application that they didn’t like.

The response to that, as Spike has said earlier is that, in part, that’s because 20-odd lawyers from different departments, agencies and so on have—(inaudible)—before the judge ever gets a look at it. Moreover, FISA is a very—what do we say?—professional, formal statute. There’s
not a great deal of room for discretion. It's really almost an administrative procedure.

AUDIENCE MEMBER: Spike, I'd like to ask a question of you. You've been talking about the challenges in trying to gather evidence in other countries. Of course, I don't know what the number is, but I highly suspect—since I know there are about 20 British policemen of one sort or another who are permanently posted here in the United States, I would assume that the number for the whole world would probably be several hundred foreign policemen here in the U.S., busy trying to collect evidence and pursue investigations which they hope to then prosecute in their home countries.

Would you address any special problems or experiences you and the FBI and other U.S. law enforcement agencies have had in trying to cooperate with these people and help them do their jobs just like, you know, they help you when you're in their countries?

MR. M.E. "SPIKE" BOWMAN: Actually, I don't think we have any real special problems with it. There are not a lot of police who are here. And those that are here are like the legal attaches the FBI sends overseas; they are liaison officers.

Their purpose is not to investigate so much as it is to get us to investigate for them and to the extent that everybody follows that rule, there really aren't any real problems.

We can do a fair amount of investigation on the request of a foreign law enforcement organization and do a number of things. All the things that we could do on our own. I mean, it's nothing—we can't ignore any of our own regulations for them.

But it is a liaison function and it's one that we engage in overseas. We do not have—as somebody mentioned yesterday—400 agents overseas. We have about a hundred, and we'll probably not grow more than to about 120 at its maximum, as now projected.

But the purpose is liaison. The purpose is to go out and get other countries to do things for us. They will receive—our legal attaché will receive a request from one of our field offices which says, "We're investigating this subject, this person is, maybe, a citizen of the country that you're in or one that you're accredited to. Can you find out anything about his businesses?" And, they'll try to go to whatever the local constabulary is and get information.

They do the same thing with us. And we do quite a bit of work with them that way. I don't really see any real problems with it. It's a little bit cumbersome and it's—there isn't a real clean way of performing investigations in another country, or even in this country, for someone else. But, there's not a real problem.
AUDIENCE MEMBER: What is the dividing line, or what structures are put around cases that you’re investigating that are kind of a dual, domestic/international nature?

For example, with the World Trade Center bombing, much of it could have been handled simply under domestic law, but there obviously was an international component to it as well. How do you handle and investigate where there may be one set of rules that apply to a domestic case and another set of rules that might apply to a more international side of the case?

MR. M.E “SPIKE” BOWMAN: That’s a very good question. As I mentioned, we have a requirement in our system to separate those two different kinds of authorities; the intelligence authority and the domestic authority, the criminal authorities.

What we will do in a case like the World Trade Center and in fact—in the World Trade Center, for that matter, you obviously have a criminal case. It’s a criminal case that’s going to be pursued with great vigor. An AUSA is going to manage that criminal case, and he’s going to manage it within the—we will investigate it within the Attorney General guidelines and so forth.

To the extent that there is a foreign connection to it, a foreign power issue, an international transnational threat that’s involved, we will start a different case. We will separate it. It will have different individuals who are working it. They will be managed by different people. They will report in a different chain of command, and we will pursue an intelligence investigation with intelligence authorities while the criminal investigation may be going and on its own.

MR. ERIC FEILER: I don’t mean to cut the panel short, but we have a very full panel coming up. So we’d like to take a break here.

Thank you very much Mr. Bickford and Mr. Bowman.

(Applause.)

(A brief recess.)

RENDITION OF FOREIGN CRIMINALS FROM FOREIGN SOIL

PROFESSOR SYDNEY PICKER: I’m Sydney Picker, yet another faculty member from Case Western Reserve Law School. We seem, in some way, to have taken this place over.

The name of the panel this morning, is “Rendition of Foreign Criminals from Foreign Soil.” The recent apprehension of Ocalan by Turkish
authorities in Nairobi the other day couldn’t make this panel more timely.

I noticed from the news reports that Turkey acknowledged it did receive some foreign assistance in connection with this apprehension but it wouldn’t say who. Frankly, I suspect Josh Levy.

(Laughter.)

**PROFESSOR SYDNEY PICKER:** He’s been doing everything else to make this conference the success it’s been. In any event, we have four people this morning to explore this issue and I want to introduce them and I will do so in the order in which they will be talking, not in alphabetical order.

We will first have Edgar Brenner. Mr. Brenner is going to be speaking on—he’s going to set the stage for us by discussing the rendition within the context of extraterritoriality and internationalization of certain crimes. He’ll also discuss a number of U.S. cases, principally Alvarez Machain and the recent Virginia cases.

The second speaker will be Bruce Zagaris. Mr. Zagaris is a partner in the Washington law firm of Berliner, Corcoran and Rowe in Washington D.C. His practice included transnational white collar criminal cases, and he advises on international tax and money laundering matters.

In addition, he’s an adjunct member of the faculty at American University’s law school as well as Fordham law school. He’s the founder and Editor-In-Chief of the *International Law Enforcement Law Reporter*.

I’ve incidentally, apparently, omitted mentioning Mr. Edgar Brenner’s background. He’s an adjunct professor at George Washington University, the National Law Center at G.W., as well as Senior Counselor to the Terrorism Studies Program there.

In addition, he served in the legal task force of the Second Hoover Commission, and he’s a former partner at the Washington D.C. firm of Arnold and Porter.

The third speaker will be Francis Boyle. Professor Boyle is a member of the faculty at the University of Illinois at Urbana-Champaign, where he teaches courses in constitutional law, criminal law and international law in those areas.

He served as legal advisor to the PLO and as counselor for—as a counsel for Libya. He, in the past, had been General Agent for Bosnia before the International Court of Justice. He also was at the State Department, at the Bureau of Political Military Affairs, and he will be discussing the Lockerbie case, especially from the Libya position.

The final speaker will be Marcella David. Professor David is an Associate Professor of Law at the Iowa College of Law where she teaches
in the civil procedure area as well as in the international law and international human rights areas.

Professor David was formerly at the Ford Foundation where she was a Fellow in Public International Law at Harvard. In that capacity she participated in an investigatory mission to Iraq. She has traveled to both South Africa and to Iraq where she has done research on the effect of sanctions in both of those countries.

I notice, also, that she is the one member of this panel who is a graduate, an alum of this law school. Professor David will be discussing or focusing on the implications of the Security Counsel’s position, inconsistent with previous treaty commitments, in her analysis of those situations.

We’ll start with Mr. Brenner.

PROFESSOR EDGAR BRENNER: Thank you Professor Picker. And I want to thank the Michigan Journal of International Law for inviting me to participate in this interesting panel.

I thought I’d start off by taking a step backward rather than forward in terms of how we should look at rendition. And I’ll give you my approach to it.

Mainly, that you have to look at it in the context of related concepts, which include extraterritorial jurisdiction, extradition, rendition itself, retaliation and, if we have time to get to it, the internationalization of criminal law to provide better methods of dealing with some of these problems.

Some of the extraterritorial jurisdictional concepts that we deal with are recently enacted. They were designed to combat terrorism overseas targeting U.S. citizens. And to make this a crime, U.S. courts can exercise jurisdiction of a criminal action against a perpetrator—and this is an important caveat—if the U.S. Attorney General finds that a terrorist act was committed.

This is an important and recurring concept and one not to be ignored. It means that the litigation itself does not involve the definition of terrorism. It does not involve defining terrorism and finding out whether the perpetrator committed a terrorist act and is a terrorist. It goes right to the heart of the criminal offense. And we’ll see how that plays out in the Kasi case shortly.

What is the significance, then, of having this extraterritorial jurisdiction? Well, you want to bring the terrorist to justice. It’s useful when the foreign country fails to prosecute those committing a crime within its border. It may be useful if you want to issue an arrest warrant to restrict the movement of the terrorist. And, in certain instances, it may encourage the foreign country to prosecute the terrorist in its own courts.
That brings us, then—assuming that the prosecution doesn’t take place, and we get to the concept of extradition—you want to bring the perpetrator to justice and you want to do it in the proper jurisdiction. You may have to decide what jurisdiction that should be, since there may be multiple jurisdictions that will have a claim.

And one way to look at it—and I won’t belabor this—is that you look to the jurisdiction that has the biggest and best equity in the case. With the Pan Am 103 bombing, the flight took off from London and crashed in Scotland after the bomb went off. American citizens were killed.

There seemed to be a consensus that the trial should take place under Scottish law with Scottish judges, and a lot of people wanted it in Scotland. Professor Boyle will undoubtedly talk to this issue.

The Libyans, as we know, did not agree to extradition, and negotiations started to have the trial take place in the Netherlands with Scottish prosecutors and Scottish judges.

Now, to just emphasize how current this issue is, if you read the papers this week you’ll know that the U.N. is engaged in negotiations with Libya that may involve producing these people for trial in the Netherlands, but at the same time making concessions to Libya on the trade sanctions, restricting the amount of proof that may be shown about Libyan official government complicity and regulating where the prison terms would be served by the perpetrators were they to be convicted.

A related concept of extradition is one that appears in the Effective Death Penalty and Counter-Terrorism Act of 1996. This important legislation permits the United States to extradite aliens found within its borders to foreign countries for the purpose of trial even if we do not have an extradition treaty with that country—which is an interesting change from prior practice. There must be certain findings that the acts charged would constitute a crime not only in that country but in the United States, but it shows our involvement in the reciprocal processes of extradition.

There’s a political crime exception in this instance, one that is very important and will be discussed by another member of this panel in much more detail.

Now, at this point, let’s focus on rendition for a moment. The 1992 Supreme Court decision in U.S. versus Alvarez Machain held that the kidnapping of Alvarez Machain, a Mexican doctor, at the behest of DEA agents in Mexico, and bringing him to the United States did not violate the Mexican-U.S. extradition treaty and did not preclude his trial in the United States.
The allegation was that Alvarez Machain had kept the agent alive so that he could be tortured for a longer period of time than would have been possible otherwise.

The decision created a sensation. It led to a temporary break in U.S.-Mexican diplomatic relations. Subsequently, Machain was acquitted. There were very severe issues of proof in the charges against him.

Obviously, our relations with Mexico are very important. And we entered into negotiations with Mexico and developed a treaty that would preclude cross-border kidnapping in the future. But, as far as I can tell, a treaty has not been submitted yet to the Senate for ratification.

Now, I can defend the decision of the Supreme Court in the Alvarez Machain case, but I have to question the judgment of the officials that would risk our relations with Mexico, including an ongoing extradition relationship, on a border that's so important to us, to apprehend one person in one case, even though it was a terrible case, when there are such other overriding considerations around.

Now, is it ever really proper to have a rendition, a kidnapping? Well, the United States government policy clearly is, yes. Presidential Decision Directive 39, promulgated by President Clinton in June of 1995 sets forth our policy. We are strongly in favor of extraterritorial jurisdiction. When somebody should be apprehended and brought back to the United States, we will exercise maximum efforts to get them back. If we don't have a treaty, we'll negotiate, we'll do whatever we can to get them there. We're going to make maximum effort.

And then there's the critical caveat; where possible and appropriate our people will work through negotiation and the inclusion of new treaties. That is the caveat that opens the door to rendition. And we'll see how that plays out in the significant case, Amir Amal Kasi v. Commonwealth of Virginia, a 1998 appellate case, it's 198, Virginia Alexis, 140.

Kasi was a Pakistani national living in Fairfax county Virginia. He became upset and critical of U.S. policy toward Pakistan and the Muslim world. He bought himself an AK47 and ammunition and developed a plan to go to the entrance to the CIA headquarters in Washington early in the morning when people have to line up on Route 27 for a left turn arrow to make a turn into their building.

He had contemplated doing something similar at the Israeli Embassy in Washington, but concluded that the Israeli Embassy people had guns. He didn't want that risk. And, the CIA people are just government people going to work, in a certain sense and they're not armed. He went up there at eight o'clock in the morning, shot two people dead, wounded three others, and was able to drive away.
A few days later he went to Pakistan and so he disappeared into Pakistan and Afghanistan. He was indicted for murder and malicious wounding. Nearly four-and-a-half years later he was apprehended by FBI agents in a hotel room in Pakistan.

The apprehension is described as follows—and let me read to you this brief paragraph from the Kasi opinion on appeal, because it gives you the flavor of what a rendition is.

Near 4:00 a.m. on June 15, 1997, Agent Garret and three other armed FBI agents, dressed in native clothing, apprehended Kasi in a hotel room in Pakistan. Defendant responded to a knock on the room's door, and the agents rushed inside. Defendant, who had a master's degree in English, immediately began screaming in a foreign language and refused to identify himself. After a few minutes, defendant was subdued, handcuffed, and gagged. Garret identified him through the use of fingerprints. During the scuffle, defendant sustained minor lacerations to his arm and back.

He was then taken, temporarily, to a Pakistani prison where he was held two days. The FBI agents stayed with him. The Pakistanis released him to the custody of the FBI. The FBI put him in a private plane. He was back in Fairfax County in a few hours. He was tried and convicted and sentenced to death in a bifurcated proceeding. His appeal was denied largely on the basis of the Alvarez Machain Supreme Court decision. The death penalty was upheld.

Kasi contended the crimes were political, and he was entitled to First Amendment protection. The Court observed that he received the death sentence, not for his political views or motives, but because of the brutal and premeditated murder.

Now it's very interesting to note how the trial judge conducted the trial. He did not permit the prosecution to call Kasi a terrorist. That's an epithet, of course, and if he had done so, it would have involved issues, some of which we discussed yesterday, of defining what is terrorism and then to define and figure out whether Kasi came within that definition.

So it was a very wise ruling by the court not to inject the issue of terrorism into a murder and malicious wounding trial.

I think another interesting aspect of the case is that from what I can see, the rendition of Kasi did not poison our diplomatic relations with Pakistan. We have enough problems with Pakistan, but this did not rise to the level of the Alvarez Machain upset of normal relations. And I suppose there's an untold story that someday we may hear who did what and talked to whom, how they arranged it. It seemed to have worked.
But, rendition stirs very high passions. And as we saw just within the last few days, the rendition of a Turkish leader—a Kurdish leader by Turkey involving PKK activities unleashed great passions in many places where there are Kurdish citizens.

Now, I don't want to defend Turkish policy toward the Kurds, but we should all recognize that Turkey feels itself beset by terrorism to the West, by Greece—and they believe the Greeks are committing terrorism against them—and by the Kurds in their West and they believe that their country will be destabilized if the PKK continues to function.

So they have a good claim on the surface to have custody of somebody who is disrupting lives and causing many deaths, arguably, in their country, notwithstanding the broader issues of what would constitute justice for the Kurds and then overall settling.

I'll stop at that point.

PROFESSOR SYDNEY PICKER: Mr. Zagaris.

MR. BRUCE ZAGARIS: Good Morning. First of all, I want to thank the organizers for inviting me. It's both an honor and a privilege to be here and especially to discuss these subjects.

The globalization and the rise of technology has facilitated the rise of new, international criminal groups and has enabled them to convert their economic power to political power. We see that with the narco groups in Colombia and Mexico. We see that with the groups in former Yugoslavia; groups that can do not only economic crimes, but mass violence.

So this puts a lot of pressure on extradition and rendition and other alternatives. And I want to look, first, at some trends and then apply the trends to extradition from, and then to, the United States; look at some of these alternatives and make some concluding remarks.

In terms of the trends, we see that the United States is actively moving to close the safe havens, and the United States has been quite successful in negotiating nineteen treaties in the last couple of years, including some with countries with which we haven't had treaties; the Philippines, Jordan.

In my paper I point out that the new treaty with Jordan was successful in immediately extraditing an alleged terrorist.

The treaties have modernized many of the provisions including abandoning the list method for dual criminality, eliminating the defense of denying extradition just because a person is a national of the requested country and a number of other important transformations of the law.

We also see that in extradition for terrorism, that the U.S. has put in the exception to the exception in many of its treaties which enables vio-
lent international and other crimes to be excluded from the political offense exception.

Perhaps the most important recent development in international extradition is the conclusion of several multilateral treaties that include extradition and those would be the 1988 U.N. Drug Convention, the OECD Convention of Bribery of Foreign Public Officials that just went into effect on February 15th and the proposed U.N. Convention on Transnational Organized Crime, which is working its way through right now.

Well, applying these developments to, first, extradition from the United States, in my paper I’ve noted a recent decision in the Ninth Circuit, a decision on October 9th, which, despite the exception to the exception, shows that the U.S. judiciary is still finding a way to very closely scrutinize extradition requests when there is a reason the do so.

We also find that, despite the complaints from the United States, other countries, such as Mexico, are not doing their share when we want offenders. The reality is that other governments, including Mexico, have even more problems when they try to extradite persons including persons that are alleged organized criminals from the United States. So we see it’s not just a one way street. However, they don’t have the money and the power to publicize their own difficulties.

With respect to extradition to the United States, I think the big developments are the Soering and the Short cases whereby the United States had difficulty extraditing individuals from Western Europe as a result of the European Human Rights Convention and eventually both Soering and Short were extradited but only after the United States agreed to the conditions; namely, not to use the death penalty.

We also see that with the Pinochet case and with other human rights cases, such as the Marcos case in Hawaii and the Holocaust cases involving, first, Switzerland and now Germany, Austria, and other countries. We see that international human rights has made an enormous penetration in the international criminal law area.

And this, I think, will make it more difficult in a number of cases for the United States, when the United States is requesting the extradition of persons. And that’s because the United States is going a different way in a number of areas, such as the use of the death penalty, the use of mandatory sentences, prison conditions and so forth.

I set forth, anecdotally, some of those discussions in the context of the Convention Against Torture. So that will put pressure for alternatives to extradition.

And here we have expulsion and deportation, which was discussed yesterday. We have the use of abduction; both abduction by force in the Alvarez Machain case, but also abduction by fraud.
I have a hearing, actually, on March 5th, in the Inter-American Commission on Human Rights with respect to three cases involving abduction by fraud which I have brought on behalf of three individuals at the Inter-American Commission on Human Rights, which, incidentally, is also simultaneously considering the case of Alvarez Machain.

But you also see other alternatives to extradition, namely, the bombing of Afghanistan and Sudan. And I think you’ll find a very interesting test will come in the case of Saleh Idris, the Saudi national who owned the pharmaceutical plant and who also is trying to effect the unfreezing of his money which was frozen under the anti-terrorism provisions because of his alleged connection with Osama Bin Laden.

Idris has the money and the lawyers to challenge the anti-terrorism law. And I think you will see, increasingly, more tests of these alternatives to extradition. You also see it in the international criminal court. And you will see that former political and military leaders of not only the United States, but of many other countries are going to be increasingly held to account for their actions.

In closing, let me say that the biggest challenge and need is, as Cherif Bassiouni mentioned yesterday night, a more comprehensive and balanced approach to international criminal cooperation and criminal justice.

And I think the exciting development—there are the developments in Western Europe with the construction of supranational criminal cooperation and criminal justice machinery. And that only points to the comparative absence of such machinery and mechanisms in the Western Hemisphere and the rest of the world.

I think that puts pressure on all of us as legal professionals to figure out ways to bring the role of law into developing these mechanisms. I will stop there.

Thank you.

PROFESSOR SYDNEY PICKER: Professor Boyle?

PROFESSOR FRANCIS BOYLE: Yes. I’d like to thank the Michigan Journal of International Law for guiding me here to speak today and to congratulate them on 20 years of outstanding scholarship in my professional field of endeavor; international law.

My paper will be available later today. And, as it makes clear in the paper, I’m here only speaking in my personal capacity, and nothing I say can be attributed to the government of Libya.

If you look at today’s New York Times, there is an article updating the situation. The United States has threatened another round of economic sanctions against Libya, as of Friday, when the sanctions came up for review, up to and including an oil embargo.
I'm not going to go through the whole history of the Lockerbie dispute, but I will review the two World Court judgments of 27 February, 1998. These are great victories for Libya, for the world of international law, and for the principal of the peaceful settlement of international disputes.

I believe these judgments can serve as a basis for a peaceful resolution of the Lockerbie matter. First, the World Court, by overwhelming vote, rejected the contentions by the United States and the United Kingdom that the Montreal Sabotage Convention did not govern the Lockerbie dispute.

And, in the precise words of the Court, itself, "Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention and, in accordance with Article 14, Paragraph 1 of the Convention, falls to be decided by the Court."

Second, the World Court overwhelmingly rejected the contentions by the United States and the United Kingdom that Libya’s claims against these two states under Articles 1, 5, 6, 7, and 8 of the Montreal Sabotage Convention were invalid and should be rejected and dismissed.

The International Court of Justice will now rule upon the validity of Libya’s claims under Articles 1, 5, 6, 7, and 8, inter alia, of the Montreal Sabotage Convention and, in particular and especially, whether Libyan domestic law precludes the extradition of its two citizens to the United States and the United Kingdom.

Third, rejecting contrary contentions by the United States and the United Kingdom, the World Court overwhelmingly ruled that there currently exists a genuine dispute between Libya and these two states over Article 11 of the Montreal Sabotage Convention which provides, in relevant part, as follows: “Contracting states shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect to the offenses. The law of the state requested shall apply in all cases.”

The Court ruled that this dispute as well “falls to be decided by the Court.”

Fourth, the Court expressly rejected contentions by the United States and the United Kingdom that it was not for the Court to decide upon the lawfulness of actions taken by these two states to secure the surrender of Libya’s two accused citizens.

In the precise words of the World Court itself, and this is overwhelming, “The Court cannot uphold the line of argument thus formulated by the U.S. and the U.K. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1 of the Montreal Convention on
the lawfulness of the actions criticized by Libya, insofar as those actions would be at variance with the provisions of the Montreal Convention.”

In other words, the World Court has ruled that it will exercise juris-
diction over Libya’s claims that both the United States and the United Kingdom have blatantly violated the Montreal Sabotage Convention by means of their deliberate exploitation of the Lockerbie incident as a pretext to inflict grave harm upon the people and state of Libya.

Fifth, the International Court of Justice overwhelming rejected the contentions by the United States and the United Kingdom that Libya’s rights under the Montreal Sabotage Convention were somehow superseded by Security Council Resolution 748 and 883, which imposed the sanctions on Libya by means of Article 25 and 103 of the United Nations Charter.

According to these two judgments, Libya’s right under the Montreal Sabotage Convention remained in full force, in legal effect, irrespective of Security Counsel Resolutions 748 and 883.

Sixth, the World Court expressly rejected the contentions by the United States and the United Kingdom that Resolutions 731, 748, and 883 require Libya to surrender its two citizens to the United States and the United Kingdom for trial, irrespective of Libya’s rights under the Montreal Sabotage Convention.

To the contrary, according to the overwhelming vote of the World Court, these rights of Libya under the Montreal Sabotage Convention still remain in full force and legal effect irrespective of resolution 748 and 883.

Seventh, the International Court of Justice expressly rejected the contentions by the United States and the United Kingdom that the World Court legal proceedings should be immediately terminated on the grounds that the decisions of the Security Council could not form the subject of any contentious proceedings before the Court.

Furthermore, the Court expressly rejected the bogus contention by the United Kingdom that the Court should not proceed to the merits of the case because they were “likely to be lengthy and costly” and also because “the handling of evidentiary material might raise serious problems.”

In these two judgments the World Court clearly deemed the issues at stake in the Lockerbie dispute to be justiciable and therefore subject to the mandatory jurisdiction of the Court.

Eighth, in their joint declarations appended to the Court’s judgments, Judges Bedjaoui, Ranjeva, and Koroma point out that it is not sufficient to invoke the provisions of Chapter 7 of the Charter so as to
bring to an end, ipso facto, and without immediate effect, all argument on the Security Council’s decisions mentioned above.

Or, as Judge Kooijmans mentioned, the former Foreign Minister of the Netherlands phrased it in his separate opinion in these two cases: “Whether the eventual finding of the Courts on the merits is compatible with binding decisions of other U.N. organs, in particular the Security Council, is quite another matter and in the Courts view must be considered at a later stage.”

A careful reading of these two judgments will indicate to any astute lawyer that at the end of the day the United States and the United Kingdom will lose the entirety of the Lockerbie cases when the World Court comes to the final judgment on the merits.

This is because Libya filed the lawsuits before it was illegally and unjustly sanctioned by the Security Council. The filing of the lawsuits, the day before Libya was originally scheduled to be sanctioned, perfected and froze Libya’s legal rights under the Montreal Sabotage Convention, the United Nations Charter, and the Statute of the International Court of Justice into perpetuity.

Despite the fact that Libya had submitted all of the legal aspects of the Lockerbie dispute to the Court, the U.S. and the U.K. abused their powers as permanent members of the Security Council resolution to try to ram these sanctions resolutions through while these legal issues were pending before the Court itself.

The two states set out to usurp, thwart and render nugatory the powers, competence, and authority of the International Court of Justice. And I note, that in his book, “The New World Order and the Security Council,” 1994, Judge Bedjaoui, the former President of the Court, agrees fully with this analysis. I would encourage you to read it.

If this dispute goes on, the United States and the United Kingdom will get judgments that undercut their Security Council resolutions. In addition, they will get two World Court resolutions that will undercut and undermine the significance of all resolutions that the Security Council has adopted or will adopt under Chapter 7 of the Charter. In other words, creating a precedent for the judicial review of Chapter 7, Security Council resolutions by the World Court. The establishment of some system for judicial review of Chapter 7, Security Council resolutions by the World Court is long overdue.

I am sure that Judges Bedjaoui, Weeramantry, and the other judges from Third World countries would love to have the opportunity to begin examining the legal validity of Chapter 7, Security Council Resolutions.
This is exactly what is happening now in the Lockerbie cases. And, if this goes on, the Lockerbie cases will become the Marbury v. Madison of international law and politics.

That being said, I am still prepared to use whatever influence I might have with the Libyan government to get it to agree to the trial of its two citizens in a manner that protects their basic human rights under customary international law and international treaties, including Article 10 of the Declaration of Human Rights and the International Covenant on Civil and Political Rights, Article 14(1).

The current proposal does not. I have recommended to my client that it be rejected. I do not know what’s going to happen this week. That matter, as you see in the newspapers today, is currently being negotiated. I’m not party to the formal negotiations myself.

At this point, I will conclude my comments. Thank you.

PROFESSOR SYDNEY PICKER: Professor David?

PROFESSOR MARCELLA DAVID: Gosh, it’s interesting to be back again. My clearest memory of being in this room is a moot court argument where Justice Brennan was sitting, I think, where I’m sitting right now. So I’m slightly intimidated by my own recollections of this room.

I, too, am going to speak on the Lockerbie case in the World Court. I start out with just a note that my interpretive take on the February 27th decision is slightly different from Professor Boyle’s. It’s not worth going into the points where we differ at this point.

I have shamelessly plugged an article I have forthcoming at “Harvard Journal of International Law.”—sorry it’s not here at Michigan—and you would see where we differ on some of these points.

I do agree with Professor Boyle’s conclusions, implicit conclusions, that this brings about a huge tension between the Security Council and the ICJ and one that is problematic.

I have another question that I think is also posed by the Lockerbie case that I’d like to talk with you about today. And in what I think is the tradition of this conference, at least what I observed yesterday and this morning, I’ll raise what I think are some difficult questions and then make no pretense that I have the ability to answer them myself.

The Libya Resolutions 731, 748, and 883 are considered a post Cold War phenomenon of unusual cooperation in the Security Council. Even the fact that we’re up to resolutions numbering now in the thousands is somewhat shocking given how few resolutions there were in the first 30 or 40 years of the United Nations history.

Here’s the point. The position of the United States and the United Kingdom is that even though the Montreal Convention apprised to this
dispute—and the dispute is whether or not Libya, under the Montreal Convention has the right to try them themselves. That is a right under the principle of ut dedare ut judicare that somebody has to try suspected air terrorists but not necessarily any one jurisdiction having primacy over another, and if there is not provision for extradition, then a state with custody has the right and the duty to try the suspects themselves.

Libya is a state with custody. And so, under the terms of the Convention, it has the right to try them themselves. The United States would prefer not to have the Montreal Convention apply in this circumstance.

So the position of the United States and the United Kingdom is that they can go outside of the parameters of this Convention, violate the duties that they have to cooperate with the Libyan prosecution under the convention and further, go outside of the principals, general principals of extradition law and use coercion and demand the surrender of the suspects.

Thus, in effect, the United Nations Security Council's resolutions that are enforcing this position are, in effect, endorsing the national policy of two influential members of the United Nations, not to mention permanent members of the United Nations Security Council, to ignore the applicable provisions of a treaty endorsed and sponsored by the United Nations that is to be administered primarily by the International Civil (inaudible), an organization—an affiliated organ of the United Nations.

This, to me, is somewhat of a shocking premise that the Security Council is endorsing the view that a treaty that it has encouraged to be adopted be ignored. And my question for you is what are the implications of this, if what I am saying is correct?

Now I admit that like a good litigator, I have tried to stack the cards in my favor by framing the question in somewhat of a provocative manner. Therefore, it seems only fair that I start with a response that the United States and the United Kingdom might give.

First, they say this is a special circumstance. These are new times. We're talking about terrorism, and terrorism is, in fact, all the things that we heard about yesterday. It's horrible. It's violent. It's shocking. It's hard to combat. And so, the United States and the United Kingdom might say, "Well, this calls for new ways of trying to approach the problem."

Another response the United States and the United Kingdom might give is, so what? The U.N. Charter in Article 103 requires United Nations members to follow the directives of the Security Council even when those obligations conflict with prior existing Treaty obligations.
And Chapter 7, through its operation of Resolution 748 and 883, presents just such a case.

Now, I could present an argument similar to the argument Professor Boyle stated, that the dispute about the choice of forum for trying suspects in a three-year old crime, notwithstanding how terrible a crime it might be, is not a threat to international peace and security, thereby raising the question of whether or not it justified invocation of Article 103, but I'm not going to go there because my problem is the process argument.

The political machinations of the United States and the United Kingdom and to some parts of France, to force some Security Council members to vote in favor of these resolutions even though many argued that the jurisdictional question was a valid question and properly and appropriately before the International Court of Justice, before the resolution was, in fact, adopted is troubling enough in itself so that I don't have to get to the question of whether or not the action is ultra vires.

A number of countries, in fact, voted in favor of the resolutions in spite of these concerns about the legality because of the threatened loss of monetary and other benefits. The United States used its clout pretty well.

And notwithstanding the fact that under the United Nations all nations are supposed to have sovereign polity, Libya wasn't worth the effort to take a stand at that time.

This gives rise to another response. The United States might say, "Well, so what?" again. The Security Council is intended to be a political organ. It's not a legal organ. It's not a democratic organ. That's why we have five permanent members, and that's why we have the veto.

And, I must confess, I have no direct answer to that point, but let me now raise my three affirmative concerns. The Security Council is undermining the rule of law. Now, we've heard some talk about Westphalia and sovereignty and whether or not these principals have any bearing in our modern world, notwithstanding the questions we might have, that is a playing field we're supposed to all be operating on.

And with regard to Libya, and to some extent Iraq and the Bosnian crisis, the Security Council has ignored principal, long-standing provisions of custom and treaty based law in favor of what, in some circumstances, is a highly individualized self-interest. It has the effect of creating disparate justice and unpredictable justice, and I find that troubling.

There is also a disincentive to states to participate in treaty formation. Why bother signing a treaty when you're never too sure whether or
not the treaty is going to actually be enforced or when—in the exact circumstances when it’s expected to apply?

Finally, and what is perhaps the most troubling, is that the Security Council has become so politicized as to lead to a distrust of the Security Council and the United Nations. You have some countries saying “Oh, I wish we were back in the good old days of the Cold War stalemate.” Because the Security Council not doing anything, in some ways, is better than the Security Council running amok.

That’s led to the curious point that this summer at the Rome Conference on the International Criminal Court, what many countries considered to be an important victory was limiting the role the Security Council would play in matters involving international peace and security of the world and war crimes, crimes against humanity.

That so many countries believed that it was important to limit what the Security Council could do in that area, I think, is a telling point at this time about where the Security Council is going. I don’t think this means that the United Nations is going to fall apart, but I do think that the system is at risk.

Yesterday, we heard about how the quest to fight terrorism has sometimes led to suppression of human rights norms that we hold so dear, and there are similar trends in the drug war. We’ve heard a little bit about the Alvarez Machain case where the United States has resorted to kidnapping and torture and in the case of Noriega, armed intervention in order to fulfill criminal justice goals.

My point is to caution us all that we should not undermine the principals of international law in an international legal system in order to vindicate small aspects of the system itself.

I think I’ll conclude there.

Thank you.

PROFESSOR SYDNEY PICKER: Thank you very much. Happy to open this up to questions now.

There’s no microphone so please speak loudly.

AUDIENCE MEMBER: I’m going to give this to you, Professor David, because if Professor Boyle will allow me to say, I think you may have just a slight conflict of interest.

PROFESSOR MARCELLA DAVID: I’m not representing Libya, so I can have a conflict of interest.

AUDIENCE MEMBER: No, I know, and I’m more interested in policies.

The point that has not been made here—and I’d ask you just consider this as a fact; it may or may not be—what if Libya, itself, had instructed and employed and used these two individuals as the
implements in this act of terrorism? That is the question that I was hoping I would hear talked about and didn’t.

And so I did a little bit of thinking myself, and I have a personal reflection which I guess I’d just ask you—when I graduated from Michigan, I went to the South where the civil rights struggle was underway, and there was a tremendous jurisdictional tension between state courts and the federal courts.

I remember the first task that I had was to address the disarray that had been created when the Supreme Court decided that removal—that is to say, taking the prosecution that those of us in support of civil rights felt could not be fairly tried in the state court and removing it to the federal court would not always work.

There’d been a huge use of this technique and so all these cases then moved back to state court.

You had the jurisdictional tension there. There was a clear recognition that the state courts were biased, that you didn’t want them trying those whom they had probably encouraged or at least not discouraged for taking certain kinds of actions.

Well now I refer you to the situation now, and I’d be interested in your reaction to one more fact, that possibly it could be argued—and there is some evidence to suggest this—that Libya is implicated in this. So should Libya really be given the right to try this matter?

And then I suppose, secondly, how do we deal with whether we are—actually I suppose one might argue, this is really an act of war, what happened in the Pan Am 103 case. Some might argue that.

Is it appropriate under these circumstances for being treated under a Convention, I think, that does not contemplate that type of a situation?

Is that being discussed and thought about in these contexts?

PROFESSOR MARCELLA DAVID: This is interesting because it’s one of the points where I would differ in interpretation from the February 27th opinion of the World Court. I think the World Court has left open the possibility to interpret the Montreal Convention as excluding Libya, in the special circumstance where there are credible allegations that Libya in itself was involved as excluding Libya from holding a trial itself.

I think the Court has left that possibility open. That’s one of the issues that was raised by the United States and the United Kingdom, and it was not directly addressed.

Judge Schwebel—I never say his name right—has opined at length in his dissent in the case that that should be immediately apparent from the face of the document and the context of the document, much like our
kind of responses to a number arguments here, in the United States Constitu-
tional interpretation.

The Court didn’t address that, and I think that issue is still open. But the Treaty itself doesn’t put any limitation on it. And it’s an interesting thing to ask the question about time of war because Iran, after the United States military shot down an Iran air flight killing 300-odd people, argued that the United States—which went and did a very brief investigation and decided that not only was there no crime, that there shouldn’t even be a reprimand in the service files of those officers involved in making the decision—that they shouldn’t have the authority to conduct the investigation themselves, and that also implicated Montreal Convention.

We took the position, of course, that we were, of course, the only people who should do this investigation. So it’s interesting that you raise that question because I don’t think it’s foreclosed by the Montreal Convention.

We don’t like it when it happens against us, but we do, in fact, like to have that flexibility when we, ourselves, are perhaps at risk. But I’d be interested in hearing Professor Boyle.

PROFESSOR FRANCIS BOYLE: Sure. All these arguments were raised quite extensively by the U.S. and the U.K. in their preliminary objections, both in the written pleadings and the oral arguments and they were overwhelmingly rejected by the World Court.

And that’s why the language mentioned here—I’m quoting the Court—“Such a dispute in the view of the Court concerns the interpreta-
tion and application of the Montreal Convention.”

Putting that aside, Libya realizes full well that there is a problem in the world’s perspective of them trying these individuals. So actually, they tried very hard to work out a fair, impartial, objective proceeding by some neutral forum.

Every effort they have made until after the World Court ruling was rejected by the United States and the United Kingdom. When Libya was first blamed in late 1991 they offered to submit the entire dispute immediately to the International Court of Justice, to some type of international tribunal, to an impartial, international commission of investigation, or any other type of impartial proceeding.

That was summarily rejected by both the U.S. and the U.K. Then Libya invoked Article 14 of the Montreal Sabotage Convention, as was its right, to demand arbitration by an impartial panel of the entire dispute.

Ambassador Pickering and Ambassador Hanning rejected this with so much arrogance in the Security Council that I was able to take their
statements that they made as ambassadors in plenipotentiary and file them in our World Court proceedings to prove that the United States and the U.K. were not interested in negotiating and therefore Libya had done all we could to negotiate.

They were not interested in arbitration so we could sue them immediately despite the six month time limitation in the Montreal Sabotage Convention and the World Court agreed with me.

So, Libya has tried. They have done everything possible to come up here with a fair, impartial proceeding.

Finally, after these judgments came down a year ago, it was very clear to lawyers in the U.K. Foreign Office, in the State Department that they were going to lose the cases. These were massive, overwhelming victories for Libya. And so they cobbled together their current proposal. That’s the only reason they did this. Because they knew, at the end of the day, they’re going to lose the case.

The current proposal, as I said, if you read it, clearly violates the basic human rights of the two Libyan citizens. I want to make it clear; I do not represent the two accused Libyan citizens. But I have spoken with their lawyers. I have given them my advice. And in my dealings with the Libyan government I have always encouraged them to protect the basic human rights of their two citizens when it comes to working out a trial.

Article 14, Paragraph 1 of the International Covenant on Civil and Political Rights applies to the United States, the United Kingdom and Libya. All three states are a party.

It says, “All persons shall be equal before courts and tribunals in the determination of any criminal charge against him or of his rights and obligations in a suit at law. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Clearly, the U.S./U.K. current proposal does not; a trial by three Scottish judges on a U.S. Air Force base in Holland, in a proposal, rammed through the Security Council by the U.S. and the U.K. and then attempted to be imposed on Libya by means of a dictat with no negotiations at all. In my opinion, they’re not going to get a fair trial. This is not an independent tribunal. It is not an impartial tribunal. It is not established by law. It’s a show trial.

And so I have recommended, in the strongest terms possible, it be rejected. I don’t know exactly what the Libyan government will do this week, but, as I said, if the U.S. and the U.K. really want to have a fair trial before an impartial tribunal in a neutral country that is, not a show trial, this could be done. They could vest jurisdiction in the International Criminal Tribunal for the former Yugoslavia. That could be done.
They could set up a separate tribunal as the U.S. has proposed to do on Cambodia. They could give authority to the—the United Nations General Assembly could set up a tribunal under its powers under Article 22 of the United Nations Charter to establish subsidiary bodies.

Whatever proposal Libya has made for a fair, reasonable trial that would protect the basic human rights of its citizens, the U.S. and the U.K. has always rejected it. That's where it stands now.

I do not know what proposal they will make. This morning's paper indicates now that Libya has requested clarifications from Secretary General Kofi Annan. My advice, still, is that this show trial be rejected because it violates the basic human rights of the two Libyan citizens.

That being said, certainly, I am prepared to use what influence I might have to set up a fair, reasonable negotiated trial. There've been no negotiations. This is just a dictat. Take it or leave it. You can read that in the press.

This is not the way you deal with sovereign nation states and members of the United Nations organization, parties to U.N. Charter, parties to the ICJ statute, parties to the Montreal Convention. There are rights involved here. There's a right that Libya has. There are basic human rights that its two citizens have. And, certainly, in my dealings with my client, that's always the position I've taken.

CYNTHIA RYAN: Professor Brenner, you had mentioned that you questioned the judgment of the officials that made a decision to orchestrate the abduction—and by the way, DEA doesn't use that “a” word—on the apprehension of the doctor.

I just wanted to go back and maybe fill out the record a little bit. At the time that occurred I did not know about it until I read it in the papers, which is not the way a lawyer wants to find out about it.

When at the time—you have to understand that the government of Mexico has never—then, or now—has never extradited any of its nationals into the United States in response to a request for extradition.

The government in Mexico at that time had not only not helped the investigations, they had actually hindered the investigation because they had—(inaudible)—the government officials that were actually implicated in that event of the death of the agent.

At the time we felt the evidence was strong in that case. We were basically relieved that the directed verdict by Judge Rapidi was—what we call Rapidi's Revenge for being overturned by the Supreme Court on the motion to dismiss.

This doctor had committed cruel and unusual acts against a federal government agent for doing his job very well. So the U.S. government interests were obviously to deter anyone around the world who wants to
emasculate U.S. government agents while they’re trying to perform their job.

So I think the strong U.S. interest here was the fact that we were trying to protect our own for doing our job and for deterring others who were doing this kind of crime or feeling that it’s a free-for-all against government agents in foreign countries.

But I’d like to go back and maybe switch a little bit. At that time there were no real internal procedures at DEA for an incident like this. They have to be vetted through the highest levels of the agency.

And that decision at that time, even though the plan was not formally formed at the time—at the time of the—the Mexicans put him on a plane and told him he was coming in to El Paso, this was not vetted up—formally vetted through the agency.

Now, if something like this was proposed, whether it be FBI or DEA, we both have very strict internal procedures. It also involves the National Security Directive—which President Bush signed and was adopted by President Clinton—and that is, if you want to do this kind of thing, what we call an extraordinary rendition, this has to go up through the highest level of the government. William Agee has to approve it before it goes to the President.

The same would be true if it was a covert action. Obviously, the FBI—(inaudible)—or the CIA. So, I propose to you, what do you do with these things that we’ve been talking about, international things, where we have an interest here, a U.S. government interest, in that sometimes we have—(inaudible)—whether it just be our neighbors in Mexico and certainly the U.S. interest would be thoroughly vetted and, you know, in balance—(inaudible).

But what do you do? I mean, do you let these people go out and free-for-all or do you try very targeted situations in which you go and get your person and bring them back to justice if the host nation is going to protect them and they’re not going to ever be brought to justice for these kind of crimes?

PROFESSOR EDGAR BRENNER: The effect seems to have been, though, with Mexico we have the treaty now saying that we’ll never abduct anybody again. Assuming that gets ratified by the Senate, you’ve lost the battle forever with Mexico on that kind of rendition.

In the Pakistani situation there was not the great hue and cry, and I think your explanation is that if you had procedures in effect at DEA at the time this happened and more mature people at higher levels considered the issues, they might have decided it was not prudent in the long run to insist on that kind of activity, though on the surface it seemed de-
sirable but, in terms of long range interests with Mexico it was not ad-
visable. And that’s really my suggestion and my comment.

PROFESSOR FRANCIS BOYLE: Could I comment? Maybe all
of what you’re saying is right, but the problem is it considerably compli-
cates my situation because I’ve had to advise Libya that there is an
overwhelming likelihood that if their two citizens step out of Libya they
will be kidnapped in a covert operation by United States government
officials.

So the policy currently pursued by the United States government has
complicated immeasurably the ability of negotiating any arrangement for
a fair, impartial trial of these two individuals before a neutral tribunal
because of the well standing, well known policy approved by the United
States Supreme Court—of course, condemned by the Inter-American
Judicial Committee I should point out—that, somehow, the United
States government feels it can just go out and start kidnapping people.

And Libya has insisted—as I certainly would insist—on absolute
guarantees—and I don’t even know how we can get guarantees—that
U.S. agents are not going to go out and kidnap these two people and
bring them back to the United States for a show trial.

PROFESSOR SYDNEY PICKER: One last question, and then
we’ll have to take a break.

AUDIENCE MEMBER: I am not an international lawyer.
(Inaudible) interesting from the standpoint of protecting the human
rights of the accused in various places.

You know, on the one hand you have the United States government
violating the human rights, I believe, of the individuals in Mexico that
were kidnapped more than, potentially, of anyone they might kidnap.

But on the other hand it has, in the Libyan incidents, pursued a pol-
icy of state-to-state relations, negotiations where you characterize as
coercion, perhaps treaty violations, but at least it’s state-to-state match
up.

I’d just like your comments on making a claim that sovereignty of
Libya is what matters here as kind of a proxy for protecting the human
rights of the accused defendant. I find that, as a human rights lawyer,
very troubling, to tell you the truth, because I don’t think that Libya, as a
country, really has any concern about the human rights of anyone.

It’s just a very interesting and confusing area of the law to talk about
a case in the World Court which is about infringing the equal sover-
eignty of another nation. The question is, well, how does that then
impact and how do we have some international protection for individual
rights?
PROFESSOR FRANCIS BOYLE: Well, has anyone here been to Libya? I've been there three times. I've spent a sum total of four weeks over there. You'd be amazed at all the human rights that women have been given in Libya. There's been a great deal written about this in the scholarly literature if you want to read it.

Women in Libya have more basic rights in Libya than probably anywhere else in the entire Arab world. So I reject the contention that Libya does not care about the human rights of its people. It does.

Second, however, to get back to your point, yes, there is a tension here. As I said, my client is Libya, which technically does not have a government. It's a jama harea, the state of the masses. That's their internal rider under their constitution.

Clearly, there is a tension, now, between what we would call the government of Libya and the basic human rights of these two individuals. That is correct.

I have always taken the position in dealing with the government of Libya that they must uphold the basic human rights of their citizens under international law, this treaty, and the UD, the Universal Declaration of Human Rights. I still stand by that position. I cannot say if, ultimately, that is the position that's going to prevail. I simply do not know. But the United States government sells out the rights of its citizens all the time.

I've been involved in many cases where—the Ben Winder case. I worked with CCR on that, where the State Department helped the Contras. The Nelson case, that Professor D'Amato litigated against Saudi Arabia, where the State Department helped the Saudi government in justifying torture against a U.S. citizen.

So, it's not untypical for governments, all governments, including our own, to sell out the rights of its citizens for political reasons. Libya is no better and no worse than anyone else in this regard.

I certainly hope they don't sell out the rights of these two individuals, that they insist on a free, fair, impartial trial.

As for the U.S. threat of sanctions, those of you who are United States government officials, I have told Libya I am fully prepared to go back to the World Court this week for another round on provisional measures of protection by the Court on behalf of Libya to prevent any more sanctions, any more threats, or coercion.

I will do all I can in my power to stop any more threats, violence, or coercion against Libya. And I have those papers and I'm ready to go as of Monday.
PROFESSOR MARCELLA DAVID: If I could just say one little thing. I didn’t jump in immediately, because I had to kind of formulate this.

I think you’re right that extradition is a question of state rights, and it only implicated individuals’ rights to the extent, for example, that I as an American citizen can assert to my government that it is not complying with the laws and procedures that it has that are supposed to protect me from extradition in circumstances where there is no real valid basis for extradition.

But, other than that kind of flowing, I don’t really believe that there is—it’s not an international human right, the way we think of torture or some of the other global human rights. It’s really a matter of state rights and a matter of sovereignty.

Having said that, I am somewhat troubled, going back to the previous question, by the idea that if a state doesn’t participate—maybe the state is actually, as in the case of Libya, following its own law that says there’s not supposed to be extradition of its citizens—that we can violate that by going in and kidnapping the person just because the country isn’t cooperating.

This is not necessarily because I’m concerned about the Libyans, but I’m concerned about me. If I was accused of a crime, I don’t want some other country coming in here after I’ve won in District Court, snatching me out of my happy little home in Iowa and dragging me off for a trial someplace. So that, for me, is a troubling thought.

PROFESSOR SYDNEY PICKER: The time is absolutely up.

AUDIENCE MEMBER: I promise to be very brief.

PROFESSOR SYDNEY PICKER: So does everyone else.

AUDIENCE MEMBER: You describe extradition and kidnapping as if there were only two points on a continuum.

In fact, there are several middle points.

Among them, as we talk about nations that are not as sophisticated and yet able to handle the expensive, complicated rights that we’ve begun to take as our due—I mean, we hope the whole world would one day—are those states which would like to make use of extradition but cannot because they worry about political circumstance—

PROFESSOR MARCELLA DAVID: But we only mind our own—in our own rights, so search and seizure and unreasonable detention unless we’re kidnapping someone from someplace else, at which point we ignore rights to search and seizure—

AUDIENCE MEMBER: What I’m suggesting to you is there are states in which they do not—(inaudible) We would much rather escort this individual to the border—
PROFESSOR MARCELLA DAVID: And I think that’s a problem. And I actually—I credit Libya. I know it has its own political reasons for doing it, but I understand Libya has its own political reasons for doing it, but I credit them with actually standing firm for the rights of the citizens by protecting its own sovereignty, in some weird sense. I mean, I understand that’s a somewhat strange position to take, but, in some weird sense I think that’s the last word.

PROFESSOR SYDNEY PICKER: Good. This proves a professor has no control over the timing of a class or a panel.

I want to thank everybody for participating in this panel and we can continue this informally at lunch. But there is another lengthy panel that is going to follow.

(Applause.)

(A brief recess.)

WEAPONS OF MASS DESTRUCTION AS IMPLEMENTS OF TERRORISM

PROFESSOR BARRY KELLMAN: I’m Barry Kellman. I teach at DePaul Law School. I’m going to exercise, or I am exercising my authority as moderator to not be moderator.

We have five people who all want to say something. We have remarkably little time so we’re each going to take 12 minutes to make a statement. Each of us is going to introduce ourselves.

If you’ve got any doubts about our credentials or about our right to be up here, our credentials are in the notebook.

Speaking for myself, I know I would never want to be a member of a panel that had me as a speaker, but accountability for that rests with Josh.

(Laughter.)

PROFESSOR BARRY KELLMAN: We’ve all gotten wake up calls about catastrophic terrorism. I use the term catastrophic instead of WMD (weapons of mass destruction). It’s a bit broader. We’ve all seen the “60 Minutes” reports. We’ve all seen the “Front Line” reports.

How realistic is the threat? How easy is it to make a catastrophic weapon? Why would anyone want to kill hundreds, thousands, tens of thousands of innocent victims? I don’t know the answers. I’m very skeptical of anyone who says that they would know the answers on an empirical level.

But there’s three things that I think I do know. First, the technical capabilities to make a catastrophic weapon will increase with time. That
is, whatever the technological burdens, difficulties there are with making a catastrophic weapon, those burdens, those difficulties will diminish the longer we go.

Two, after an event actually happens, there will be very little consideration of civil liberties. There’ll be very little consideration of constitutional rights.

And that leads, necessarily, to point three. We Americans will be better served by careful legal planning in advance that prevents such events to the extent that we can prevent them and recognize the legality. And it serves to organize responses that are consistent with our constitutional rights and civil liberties.

With that in mind, I’d like to address five questions if I might. First, is the federal government properly organized to deal with the threat of catastrophic terrorism? Is there sufficient coordination between relevant agencies to maximize protection, detection, investigation and remediation? Are appropriate controls in place to forestall an overreaching of authority?

Before 1998 this authority to respond to terrorism, to counter terrorism, was vested in the Department of State on the theory that terrorism was a foreign problem best dealt with through the means of diplomacy.

Well, the World Bank and the Oklahoma City bombing rather shattered that supposition. In addition, having the Department of State serve as the coordinator between any number of agencies that would have to deal with catastrophic terrorism, it was not a very efficient way of allocating authority within the federal government.

A final problem was that, obviously, any response to the threat of catastrophic terrorism or to an event of catastrophic terrorism would fall primarily on the FBI. And there was some friction, some not-meshing of the ways between the Department of State and the FBI.

So last May, President Clinton announced Presidential Decision Directives 62 and 63, establishing the National Coordinator for Security Infrastructure Protection and Counter-Terrorism within the National Security Council. Richard Clark was named as the first National Coordinator.

Clark has implemented a four-part program coordinating local agencies, coordinating federal agencies, detecting and intercepting the flow of weapons and equipment that can be used by terrorist groups and disrupting terrorist organizations.

Clark has also announced that the government reserves the right to use first strike in self defense against terrorist groups.
Moreover, and I think this is the critical point for my discussion, substantial FBI resources and activities have come within the operational ambit of the National Coordinator.

I think it’s reasonable to presume that these recent changes, moving central authority from the Department of State to the National Security Council, does serve to better coordinate activities, does serve to enhance interagency communication about these problems. However, I think at the same time, serious legal questions are raised by having the National Security Council serve this role.

Remember, the National Security Council is not a regulatory agency. It’s an advisory group to the President of the United States. It has no statutory role in and of itself. It is, again, to advise the President on matters of national security.

To my knowledge, and I would welcome correction, but to my knowledge the National Security Council has never exercised regulatory authority in—at least overtly. We could point to the Iran Contra, perhaps, as a counter example—but at least never overtly exercised regulatory authority.

Yet, under PDD 62 the National Security Advisor—not the National Security advisor, excuse me—Richard Clark, the National Coordinator, had some operational oversight of FBI activities with regard to prevention and response to catastrophic terrorism.

Where are the legal controls? Were are the limits to what can be done? And my concern really doesn’t focus on Richard Clark. Every indication that I’ve gotten is that he understands the limits of authority and is not prepared to exceed them.

My concern, quite frankly, is about the next Dan Quayle Administration when Oliver North is National Security Advisor. Because then, the obvious point being the Department of Justice, the FBI, etcetera, etcetera, have constitutional and statutory limitations on their exercise of authority. No such limitations are attached to the role of the National Security Council, and I think that that’s something that lawyers should address.

Question two. Are weapons agents and precursors of those agents subject to sufficient and efficient legal regulation under domestic law? Unfortunately, the answer to this question is remarkably straight forward and remarkably negative.

First, nukes. We do an excellent job of controlling materials, we really do. We highly regulate the control of—highly regulate their production. You can’t just walk into a nuclear processing facility at all. They’re very secure.
Talk about storage sites, we have lengths and lengths of regulations as to how they’re monitored. Again, access to them, it’s a very elaborate procedure.

Transportation of nuclear materials, a very highly regulated, very precise procedure.

Acquisition by others, by users of nuclear materials, you’ve got to have a license and that license is subject to very strict criteria and very strict oversight.

Finally, we have crews within the FBI and, to a growing extent, within state and local law enforcement agencies that are trained to detect nuclear materials should this system, by any chance, fail.

Turn the discussion, please, to chemicals and the situation changes quite radically. Many chemicals are subject to environmental regulation under TOSCA (Toxic Substances Control Act) and FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act). But remember, environmental regulation serves quite a different purpose than does counter-terrorism, and there is not a perfect overlap.

Do we strictly regulate, even under TOSCA and FIFRA, the production of chemical agents that could be used in weapons? Not really. We regulate their entering into the marketplace, yes, we do, but we don’t seriously regulate the production of these chemicals.

We certainly don’t regulate the storage of these chemicals. We regulate the transfer of these chemicals, again, to the extent that it enters into the environmental regulation. Yes, we do that. But do we have any mechanisms in place that focus on the clandestine movement of these agents? No.

It was only, frankly, in December, two months ago, at the passage of the Chemical Weapons Convention Implementation Act, that we really took steps to begin to get controls over the chemicals that could be used as chemical weapons.

Yes, it is illegal to use chemical weapons in the United States. Yes, if you do it, and a death occurs, you may be subject to the death penalty. That’s true. But once we get beyond the question of use—or, I should say until we get to the question of use, there’s substantial legal gaps in the system.

We do not, for instance, even have a licensing system to govern what the Chemical Weapons Convention calls its Schedule 1 Chemicals: those chemicals that are most likely to be used as weapons agents.

Now turn the discussion to biological. There’s basically nothing. We don’t have a serious licensing system for the production, storage, transportation, or handling of the kind of biological agents that could be used as weapons.
Until very recently—and, I dare say, even today, although it’s getting to be a bit harder—you can get this stuff in the mail.

We don’t have any serious kind of reporting system of biological agents, including those that can be made as weapons. We don’t have any means to make secure the kinds of facilities that would have them. We basically have no regulatory system out there to deal with biological weapons precursors.

Frankly, in one sentence, if lawyers are going to do anything with regard to catastrophic terrorism my first recommendation would be to develop regulatory systems to deal with chemical and biological precursors.

Third, how can the private sector be mobilized with regard to counter-terrorism in a manner that is sensitive to individual privacy, rights of citizens, reasonable commercial rights and interest of private enterprise?

I think it goes without saying that private enterprise has to be drawn into the counter-terrorism effort. This cannot simply be a governmental effort. We need the cooperation, the active cooperation, of the private sector. We need the research and we need to exchange information.

If members of the private sector get together to develop mechanisms to counter terrorism, will they be subject to antitrust constraints? I hope not. I think we should develop regulatory mechanisms to ensure that they’re not.

If the private sector is required to furnish information to the government, as part of a government effort to monitor activities, will that information be subject to reasonable protections of confidential business information? If not, then we will turn a cooperative private sector into a hostile private sector and instead of cooperation, we will get resistance.

It is important that we develop legal mechanisms that tell the private sector we need this information as part of a counter-terrorism effort, yes, but we will do what we reasonably can to keep it secure, to keep it from being divulged as a competitive loss. We will, if necessary, draft an exception to FOIA so that this material will not be released under a FOIA request.

Security specialists, private security specialists, at this time they’re subject to basically no regulation whatsoever; qualifications, conduct, licensing doesn’t exist. But these kinds of people are going to be assisting the private sector in undertaking counter-terrorism efforts.

Should we consider a regulatory system or at least a licensing system to deal with private security experts so that we can gain some control over who is entering this process, what it is they do, what serv-
ices they furnish? Are they accountable for the furnishing of those services? I think that that’s something that we should seriously consider.

The most important question, within this question of private enterprise, concerns information about employees. Should private enterprises be required to furnish information about their employees to the government, state or federal? Should private employers, in the effort of hiring people be able to get information about their prospective employees that might indicate terrorist proclivities?

We all know that there are very serious legal constraints on either divulging that information or obtaining it. Those legal constraints are no doubt motivated by very important purposes of protecting privacy, rehabilitation of persons, etcetera. We all know the reasons why, and I’m not arguing against those reasons, but I think we have to consider whether private enterprises in certain sectors, certain sectors that are vulnerable to catastrophic terrorism, whether we shouldn’t on balance, constrain those employee rights in favor of better information.

Same point with regard to polygraphs. We have exceptions under relevant law for certain persons entering certain industries. Should we expand those exceptions? In other words, allow polygraph tests to be taken of prospective employees for a broader range of industries that might be used—probably against their will—in the context of catastrophic terrorism.

Fourth question. What should be the role of the military with regard to domestic terrorism? I think no issue has received so much heated controversy as the role of the military and, I should add, the CIA, with regard to counter-terrorism, with regard to domestic activity.

This issue—I think the doctrine is quite well known, quite well understood. My issue is not with the doctrine so much as it is a normative question. Should we reconsider some of the doctrine concerning military involvement in light of the threat of counter-terrorism?

We know that the doctrine focuses on four questions. Is the threat about national security, or is it about crime? To the former, greater role of the military, is the military activity an assistance of law enforcement, or is the military taking the lead in a particular activity?

Third, is the military activity directed at foreign or is it directed at domestic activity? And, is the military activity in response to an emergency, or do the contacts allow for a more deliberate law enforcement response?

And, if we go through the case law we see that these four factors have in some way influenced how we regard the role of the military in undertaking domestic action.
Fair enough. But what do these concepts mean in the context of catastrophic terrorism? What do we mean by these four criteria when we talk about possible infiltration of subversive groups that might undertake a catastrophic terrorist event, but before it has happened?

What do these terms mean when we talk about the gathering of intelligence about foreign sponsored terrorist activities? And I’d like to ask, what do we mean by foreign terrorist activities when the activities are cyber terrorism, when the activities are directed against the Net? What is the distinction in that context between foreign and domestic activities?

Who should have a role in supervising and training state and local officials with regard to chemical, biological and perhaps other weapons? Who should undertake responsibility along this line with protecting borders and developing customs regulatory techniques?

What should be the role of the military in searching for evidence? Maintaining civil order, I think that’s an easier one. I think in the event of a catastrophic event I’m going to want the military to maintain civil order and I think that they’ve got sufficient authority to do that.

The question is not whether they are doing that. The question is how are they doing that, and what limits are going to be placed on their behavior? I’d like to suggest that we think that through in advance.

I think that the military clearly has a role in detecting chemical and biological weapons agents. They have the necessary expertise and I think they ought to use that expertise.

But, when that expertise goes forward to the apprehension of potential suspects, I think we’re ranging into more difficult territory. Should we use the military with regard to apprehension of suspects? I’m deeply troubled by that because I’m not at all sure what is the application of the exclusionary rule when the military is involved; I think that that’s an ambiguous question that we would want to resolve.

What happens when the military oversteps its authority as part of a legitimate law enforcement effort, perhaps, but it is the military which, in some Fourth Amendment context, is not behaving kosher?

These are questions that, I think, deserve some special attention.

Fifth and last, international conventions. The theory of our international conventions—international conventions focus on denial of choke points. That is, cutting off of choke points; identifying the technological or materials that are difficult to come by and then regulating those particular choke points so that we know when states are acquiring a weapons capability.

Second point to make here is that they focus on militarily significant quantities of weapons. The nuke treaty, a little separate, but certainly the
Chemical Weapons Convention makes no pretense of trying to eliminate chemical weapons from the face of the earth. It tries, and I think successfully tries, to eliminate chemical weapons as a military weapon possessed by states capable of being used in a war-like context.

The Biological Weapons Convention is an altogether weak letter, and I won't go into much detail except to say that the biological weapons are—at this moment there are negotiators in Geneva negotiating a protocol. This protocol will make the BWC look more like the CWC.

I frankly think this is nonsense. I frankly think that having a convention which looks into acquisition of militarily significant quantities of weapons agents by monitoring industrial activity—in this case pharmaceutical and chemical activity and biological activity—is looking, like Cherif said last night, they're looking where the light is rather than where the problem is. We have to be talking about developing international conventions that are basically law enforcement conventions. That direct our—in other words, merging arms control with a fight against international crime.

In summary of these five points, there is an enormous amount of work for us lawyers to do.

Thank you.

MS. SUZANNE SPAULDING: I'm Suzanne Spaulding. I'm the Executive Director of a commission established by Congress to look at how the federal government is organized to combat the proliferation of weapons of mass destruction.

There are 12 commissioners, five of whom were just recently appointed. So this is where my disclaimer comes in, right off the bat. The views that you'll hear today—and I hope to mostly just, again, address questions to be resolved, but to the extent that you can read anything into these comments, they are strictly mine.

And any similarity between what I have to say and what any commissioner might be tending toward or think is purely coincidental. So this is not meant to give you any insights into where the Commission might be coming out in its report which is due July, this summer.

The Commission was created through legislation initially sponsored by Senator Arlen Spector. Senator Spector, some of you may remember from his “chart from hell” on the health care program. He also has a “chart from hell” on proliferation/non-proliferation activities of the federal government which shows 96 different federal entities involved in non-proliferation related activities.

So the legislation calls on the Commission, among other things, to look at whether there needs to be greater centralization of this effort. The Commission is looking at should there be a central coordinator for
non-proliferation? If so, where should this person be located? What’s the scope that they should have? What kinds of authority should this individual have if there is a decision to go with a central coordinator?

The Commission is focusing—it’s looking at all of the agencies that are involved, but its focusing a great deal of attention on the inter-agency process, development of policy; both in terms of, you know, should there be an architect, a grand architect who looks at the development of policy both in the context of other national security objectives and foreign policy objectives as well as ensuring that the non-proliferation strategy is clear from the top down.

We’re looking at how that policy is formulated, and then how is that policy implemented in the inter-agency context in terms of operations and programs.

For example, several years ago there was a decision made that with the deteriorating situation in the Republic of Georgia, there was some fissile material there that we really out to get out of that country, lest it fall into the wrong hands. This was a very insecure environment.

It took three years before that material was removed from the Republic of Georgia. As we’re looking at that, is that a problem with the inter-agency process or is that just, you know, a result of events beyond our control? It’s something we need to look at.

We’re looking at the allocation of resources. For example, as agencies come up with their strategic plan, how is that translated then into budget allocation decisions? And do the allocation of resources seem to match the rhetoric or the stated objectives of priorities attached to non-proliferation?

And is it being done efficiently both within agencies and then on the inter-agency—again, across the board at the OMB level?. Are the right agencies getting the right kinds of resources involved in the right kinds of missions?

Finally, we’re going to look at technology development. How are decisions made about how technology is developed? Which technologies are going to be pursued and how are they being pursued?

For example, almost nine years after the Persian Gulf War we still don’t have effective sensors or detectors for biological agents. That’s a very hard problem. The science of it is very hard. The technology is very hard. But are there process issues that are also at fault here? And we’re looking at that.

In terms of technology, do the right players come to the table early enough in the process with an appropriate level of resources to drive that technology development in ways that match our national security objectives? Or, does DOD always come to the table with the most money, and
we always wind up with a battle field sensor, and after the fact, the first responders, or the clandestine collectors, or law enforcement tries to retrofit that technology to meet their objectives?

Those are some of the issues the Commission is going to look at and focus on. But looking at—before you can even begin to look at how we should be organized, one of the key issues is how do you size the threat?

Some of the—I mean, we’ve heard a lot of talk about the nature of the threat from weapons of mass destruction and particularly, terrorist use of weapons of mass destruction. Some of the experts are telling us that it’s not as easy as some of the literature out there would have you believe for a terrorist group to acquire effective biological weapons.

Is this, as some of the experts would say, a low probability even with amazingly high impact, should it occur? If you have a high impact low probability event, that affects how you organize for it.

So one of the things the Commission is struggling with right off the bat is how do we size this threat.

The chart from hell causes you to look at—leads you, immediately, to look at the potential overlap, but the Commission is also going to be focused on areas of underlap, or gaps.

There’s been a lot of talk about the overlap between intelligence and law enforcement, and Elizabeth Rindskopf did yeoman’s work in trying to resolve those issues when you’ve got overlapping jurisdiction and work out those problems, but there’s also a concern about whether things are falling through the cracks, whether there’s a gap there that needs to be addressed.

At the Intelligence Communities Non-Proliferation Center, which focuses on stopping the spread of weapons of mass destruction, you’ve got the Counter-Terrorism Center, whose core mission is to look at terrorist acquisition of weapons of mass destruction. If neither center thinks that’s part of their core mission is it being adequately addressed?

There’s a gap between regional analysis and technical or issue analysis. You see that in the intelligence community, you see it at the NSC, you see it at the state front, you see it throughout the bureaucracy.

A lot of people think that some of our surprise in the India/Pakistan test was largely a result of this gap between those folks who focus on the regional analysis and then proliferation, for example, becomes a very technical analysis focused on equipment and technology. And, clearly, a big part of that analysis has to focus on motivations of states to acquire weapons of mass destruction.

Our major successes in non-proliferation have really come when we’ve addressed the demand side of that equation. It’s countries
realizing that it’s not in their best interest to pursue weapons of mass destruction programs for one reason or another.

Yet most of our efforts are focused on the supply side, on trying to cut off the flow of technology to these countries and, you know, we need to look at that issue.

There are a number of issues that the Commission, I hope, will get into that have implications for how we organize. One of them is proliferation, or even terrorist use of weapons of mass destruction primarily a law enforcement issue or primarily a national security issue?

That has clear implications for how you organize. And there’s been a lot of talk in this conference about using the tools of criminal law enforcement against these—and it’s not clear to me that there’s been a thorough discussion within the bureaucracy as to whether we want to treat these always as, first and foremost, a law enforcement issue or not. And I think that discussion needs to take place.

That’s one tool we have in our tool bag. Another tool we have is economic leverage. Are we making the best use of the economic leverage that we can bring to bear on this issue?

Sanctions is one facet of it. Congress has forbidden the Commission from addressing the adequacy or usefulness of sanctions laws. Nevertheless, I think we will discuss the implementation of sanctions laws and certainly, as a broader issue, I hope, of economic leverage. That’s an area we need to be sophisticated in when we come to the table to respond to an activity or to address a threat; when we thoroughly analyze the military action and decide that we’re not going to go down that route. Do we then say “Okay, we’re going to impose sanctions,” and leave the room?

Do we have sufficient planning, the way we spend time and effort to plan military operations, to plan economic warfare, or ways to use our economic leverage? Is the intelligence community tasked to let us know where are the key points of leverage that we might have with a country?

Sanctions work very poorly against a dictatorship, and yet we very often impose them in those contexts. Can we be more sophisticated in targeting the elite in a dictatorship? Which is more likely, then, to bring pressure to bear against the leadership to change its policies than if the common people are starving.

We need to be a lot smarter about our use of economic leverage, and it’s something we hope we’ll look into.

Export controls. We’re going to look very carefully at the export control regime. The focus in export controls in the non-proliferation arena has come to rely more and more on the end user. Several years ago there was the Enhanced Proliferation Control Initiative adopted; catch-
all controls, which focused less on the nature of the technology and more on the nature of the end user because so much of this technology is dual use technology. And yet, it doesn’t seem to me, from what I can tell, that the catch-all controls have been very effectively used.

Could we bring—and this is something that Cecil could address—could we bring, from the money laundering context, the kind of “know your customer” requirements on the industry that we brought to the industry? It’s the industry that’s going to have the best intelligence about its customers.

We need to think more creatively about that, and we need to think more creatively, as some of the speakers have indicated, about using the private sector.

We have a wonderful federal infrastructure on nuclear. We’ve got nothing on biological. So do we build a huge federal infrastructure or do we think more creatively about how to use the private structure capabilities in that regard?

And, finally, Congress has also forbidden us from looking at all at the consequence management issues, domestic response capabilities, but I certainly hope—and I know that Lisa’s shop is looking very carefully at that. I hope that the lawyers in this room will bring their expertise to bear there as well.

As Barry alluded to, the concerns about the potential erosion of civil liberties—when we do these simulations and war games and exercises for consequence management, do we look at the tremendous pressures that will be brought to bear to restrict civil liberties?

Can we anticipate those and can we come up with alternatives? And part of that is looking at Congress. How is Congress going to respond? How much pressure are they going to be under to pass some new legislation?

Can we begin that dialogue now when we’re not faced with the—in the aftermath of a threat to begin to come up with alternative ways to make people feel secure?

I’ll stop there. Since it says, “Stop now.”

Thank you.

PROFESSOR JACK BEARD: Well, good afternoon. My name is Jack Beard. I work in the office of the General Counsel at the Department of Defense, and I’m the Adjunct Professor of International Law at Georgetown University.

In the General Counsel’s office I’m responsible for a variety of counter-proliferation programs and the activities of the former Soviet Union. So it falls to me to be the lawyer for a variety of programs that the Department of State delegates to us that the Defense Department has
inherited and the Defense Department is entrusted by Congress to pursue.

More and more U.S. programs, international programs, are funded, not through traditional foreign assistance accounts, but are put in separate items in the Department of Defense budget or the Department of Energy budget, forcing a broad range of lawyers in the U.S. government to spend a lot of their lives in really fine places in the former Soviet Union trying to do the will of the American people, to stem this dangerous threat of weapons of mass destruction and their proliferation.

I have listened to speakers in this conference talk about the things that we need to do with foreign countries, and I am a sad witness here to the fact that the nation-state system is alive, and that negotiations on almost everything we do are laborious and painful.

The previous speaker referenced an action which was undertaken to remove some highly enriched uranium from Georgia. Most of the details are still classified, but it was a very, very painful, excruciating process inside the U.S. government with the U.S. Congress and with Georgia as well.

Every single activity in these countries with new legal systems, sometimes not very well developed border security systems and questions about where their Parliament's control ends and begins, leaves so much work for lawyers that I cannot begin to describe the problems that good, well-trained, hard working, government lawyers have to be out there doing for you.

But that brings me to the point that I must make at the outset. And that is, that I do not speak officially for the United States government, so any of the frustrations I indicate are just my own personal musings.

I would take this chance to repeat the comments of many public leaders that the greatest threat to U.S. national security, in my view and in their view, is the threat posed by weapons of mass destruction, their related technology, and expertise and delivery systems flowing out of the former Soviet Union into the hands of non-state actors and other entities, rogue states and so forth.

These entities that have—if you believe the reports in the papers and if you work in this area, you do feel a very real and serious and terrifying threat that we must face as a country.

Billions and billions of U.S. taxpayer dollars now have been put into this effort. I want to describe a couple of the programs that we are working on. And I make no—I don't know how the system should be organized. I'm the lawyer entrusted with the responsibility for making the programs work that are given to us.
The system may appear fractured, with so many different funding sources and so many different statutes and so many different interlocking programs, but to stop doing it would clearly not be in American interest, and so we press on.

It has been five years, to this week, that the President of the United States issued a finding that the proliferation of nuclear, biological and chemical weapons, and the means of delivery of such weapons constitute an unusual and extraordinary threat to the national security, foreign policy and economy of the United States of America and declared a national emergency.

It went somewhat unnoticed. It activates a variety of legal mechanisms that some of you are experts on; allowing all sorts of administrative actions—technically not sanctions, but administrative actions to be taken against countries.

This battle is now described by our President and his administration as a national emergency. And the money that is being put into it leaves the administration saying that great achievements have been made, but that there are great issues or areas of uncertainty left.

The great achievements that are usually cited are that Kazakhstan, Belarus and Ukraine are no longer nuclear states. And that the effort to turn them into non-nuclear states and ship these weapons back to Russia were very much aided by United States taxpayers with a variety of programs principally through the Cooperative Threat Reduction Program, which I have had the privilege of working on since its inception in 1991.

This program—expenditures on this program, which is basically directed toward dismantling weapons of mass destruction in the former Soviet Union and eliminating the proliferation of related systems—expenditures on this now are reaching three billion dollars, which is a huge amount of money for a foreign assistance.

In fact, Ukraine and Russia receive—in this assistance they now begin to—they’re the next ones on the list after Israel and Egypt because we’re so concerned about this program.

So much money is going into this not just from the Department of Defense, but a huge amount from the Department of Energy as well.

What are these programs doing? Well, there is a fissile material storage facility deep in Russia, still under construction funded by the American taxpayer. It is a highly complex and difficult project with the Russians.

This facility is supposed to be the entity that will stop the bottleneck that we now face with respect to many Russian weapons dismantlement programs, transportation of fissile materials across an increasingly difficult former Soviet Union and difficult Russian Federation.
Again, assistance is provided for the railcars, for armored blankets, for the storage facilities, for the detection facilities all along the way. In the north, submarines being dismantled in Soviet ports are receiving an enormous amount of U.S. assistance, with contractors there on the ground actively involved in removing the spent fuel and other related components in these submarines.

Strategic offensive arms elimination is a large category of activities underway. The Department of State and the Department of Defense have both funded a thing called the International Science and Technology Center—which some of you worked on—designed to stem the flow of expertise of former Soviet weapons experts across the former Soviet Union.

We are engaged in assisting the Russians in shutting down the remaining plutonium producing reactors; a process that you could argue is also frustrating because I urge you to remember that there are so many legal problems to guaranteeing that anything works on any project. It's hard enough to make sure it works in New Jersey.

It's even worse to try to make it work in Russia and to see that contractors fulfill their duties and the assistance provided is used for its intended means and that guards at the airport do not tax the things coming under the theory that a tax is to be levied, whatever a tax is in the former Soviet Union.

These are all enormous legal disputes that we have to have in these documents setting these activities up that consume a lot of time and reinforce the fact that we must establish business, we must establish partnerships with these countries no matter how hard it is. And it is such a frustrating process.

The Department of Energy is actively involved in material protection control and accounting of nuclear materials across the former Soviet Union. There's an enormous plutonium disposition agreement being negotiated as we speak here.

And, in a week and a half, I leave again for Norway where we work with our allies to try to assist the Russians in dismantlement of certain weapons systems which are of particular concern to our allies.

In the face of all this, the United States Congress imposes more and more report requirements, certification requirements and notification requirements. These requirements consume vast amounts of time—the American bureaucracy—that could otherwise be spent elsewhere.

But in any event, the report process, sometimes it's as bad as a quarterly—four times a year the reports have to be made about how pro-
gress is going on some of these things. Certifications that are very difficult have to be undertaken, and the process marches on.

In the meantime small programs with the customs—U.S. Customs Service and the FBI, to try to stem, or try to build border guards and border systems in countries like Uzbekistan and Moldavia and Georgia go on as well. And, although there have been images at this contract of large walls built around countries, in fact, many of these former Soviet states do not have effective control of their borders. They lack a professional border security service.

Clearly, it would be in our interest as a country to have a border service armed with radiation detectors that they would be in a position to use and monitor at various portals in the country.

Simple, apparently simple objectives, which are so complex to make real in agreements with these countries. But, the process goes on. And it involves so many different lawyers and parts of the federal government and funding sources that I conclude my remarks with an appeal I make all across the country to you, my academic brethren.

It is this. Last night a speaker mentioned how the terrorists do not lack, and the money launderers do not lack, having accountants and lawyers to do their evil bidding. Apparently, that’s true.

I would like to make the other point that the good guys also need lawyers. And that the federal government, charged with all these programs which are perhaps not as well organized as they are pending the release of commission recommendations, are not as well organized as they could.

While they’re like that, we need lots of lawyers doing really competent work with all these different programs. As I go to law schools I am shocked and aghast by the complete lack, in some places, of the public service government service angle.

It’s not well publicized. It’s not at the front of many law schools. I would encourage you all to return to your faculties and at least support, in whatever way you can, the externships and internships that bring law students from our fine institutions into government for a little bit of exposure to this, so that we can have them where we desperately need them right now, in these places arguing to get these agreements in place and doing what we can to stem the tide of what is increasingly a great threat to U.S. national security that demands our constant attention.

I think I’m out of time. Thanks.

MR. CECIL HUNT: We haven’t had lunch, and I regret to be having to say to you, good afternoon. I’m going to use the Chemical Weapons Convention as an example, both of some potential and some
limitations on the applicability of weapons treaties to dealing with this concern with terrorism.

I’m Cecil Hunt. I’m counsel to the Bureau of Export Administration at the U.S. Department of Commerce. The Bureau of Export Administration, among other things, administers export controls including, for many years, the controls on exports of precursor chemicals.

My involvement with the CWC, with the Convention began fairly late in the game, shortly before the conclusion of negotiations. At the time it was decided within the government that the Bureau of Export Administration would be the agency charged with the responsibility for overseeing the declaration of U.S. private sector industrial facilities that would be required under the convention and would be the agency to escort the international inspectors conducting inspections of these facilities.

This is the time for two disclaimers. I disclaim any expertise in the CWC that even approximates, even comes close to that of Barry Kellman who has been working on this for quite some time.

My other disclaimer is the conventional one you’ve heard from the last two speakers that the highly opinionated remarks that may follow certainly do not purport to represent views of any part of the U.S. government.

First, a little bit of background on the Convention. It entered into force in 1996. The United States has ratified—late last year Congress finally enacted implementing—necessary implementing legislation. The Department of Commerce has already drafted the regulations, and their issuance awaits issuance of a Presidential Executive Order under the implementing legislation.

Now, why do I use this Convention in the context of terrorism? There is no mention of terrorism in the Convention, not even in the preambular discussion of objectives and concerns.

Well Barry Kellman, I think, was wondering about that, too.

Some of the background on the Convention, very, very briefly, that could be useful, is that it breaks new ground among weapons treaties in several ways. One aspect of it—and I may have a different take on it than Barry did—is that it moves beyond, say, the commitment of the parties, the 1925 Geneva protocol, because it—where that dealt with use of these weapons against other parties in warfare, the CWC has moved on to any use, even retaliatory use, against any person or state, including non-parties.

In the disarmament area, whereas the things like the Nuclear Non-proliferation Treaty, in effect, sanctioned for an indefinite period, the continued possession by declared nuclear states of these weapons, the
Chemical Weapons Convention calls for a scheduled and complete destruction and verified destruction of these weapons by all parties.

In the non-proliferation context, whereas the NPT had some fairly general language about not assisting anyone in the acquisition of nuclear weapons capability by a non-member of state, the CWC not only prohibits the assistance by a state party, it also commits the parties to impose on persons subject to their jurisdiction a system to prevent proliferation that encompasses accounting for and restrictions on trade in precursors.

That's why the first thesis up there is that under national legislation, bringing non-state parties under a system of control, is perhaps the first thesis as to potential utility or application of this in the anti-terrorism context.

Now, one problem is that some of these limitations on making it unlawful to develop, produce, acquire, stockpile, retain chemical weapons or transfer them directly or indirectly to anyone, is expressed with reference to chemical weapons, although the treaty goes significantly and extensively into control of agents and precursor materials that are not weapons and may never have any connection with weapons.

There is a gap as to whether this reference to chemical weapons can prevent the national legislation from being effective as a means to deal with upstream or preparatory activity.

I guess my thesis here is that perhaps it can. Perhaps it can, but only by offering in conjunction with legal structure that exists independent of CWC requirements such as conspiracy provisions, aiding and abetting provisions, attempt provisions in the national legislation combined with the mandated outlining of the chemical weapons activity.

The next thesis is that the destruction of stockpiles will make it more difficult for terrorists to acquire chemical weapons. Certainly the acquisition of existing weapons would be the most frightening shortcut to terrorist capability, and there are a lot of these weapons out there in many, many countries.

The locations under the treaty, locations of which weapons are stored pending destruction, and the destruction sites themselves are required to be subjected to both physical security and the international verification through on-site inspection and monitoring.

State parties required to continue physical security activities and the purpose of the verification by the international body shall be to ensure that no undetected removal of chemical weapons in facilities takes place.

I would say that this expression for concern—I mean, here are signatory states—this expression of concern is concern that parties not under the control of a state party will be actors that must be guarded
against in the physical security of the storage facilities. These actors—terrorism, that’s the link there.

The international group will have the authority to put monitoring devices, continuous monitoring devices at these facilities. And I can conceive a situation in which a well intentioned but resource-poor party to the Convention would welcome the involvement of the international body in strengthening the facility’s security.

Now, then, of course, it leads to a question of how much. What kind of resources are we willing to give this international group?

The legal assistance language in the CWC is—I say modest, it may be that’s an understatement. I’ll quote it to you. “Each state party shall cooperate with other state parties and afford the appropriate form of legal assistance to facilitate the implementation of obligations under the Convention.”

Terribly general and imprecise compared with provisions in some other treaties directed at terrorist activity. For example, the Hague Air Piracy Convention requires greatest measure of assistance in connection with covered criminal proceedings and has extradite or prosecute obligations and custody obligations.

However, the modest CWC provisions can be viewed in light of not only the political commitment involved in the Convention, but against the background of their impact on other conventions. For example, the European Terrorism Convention that requires the contracting states to afford the widest measure of mutual assistance, has a political offense provision in it.

And to shortcut my thesis, I think that there are elements in the adherence to the Chemical Weapons Convention that greatly reduce the political acceptability and therefore the likelihood that a state requested under an extradition treaty would say, impose the—would invoke the political offense exception.

The next thesis: that the Convention may help establish chemical weapons activity as a universal offense, but further steps are needed to provide the basis for the aggressive assertion or jurisdiction over terrorist states.

Universality. Well, 128 states around the world are already parties to the Convention. Fifty more have signed and not yet ratified. The scenario of concern—perhaps as much as I can hope to get out in time—is that this widespread recognition and given the language of the universality that the restatement of foreign relations law uses about offenses recognized by community of nations is universal concern can provide, can be pointed to as the basis for universality of jurisdiction.
Even though the Convention does not, like some of the terrorism or piracy conventions call upon states-parties to extend their jurisdiction to the fullest extent over activities without their usual jurisdictional lengths, it would support such an extension. The United States hasn’t done so yet.

As the chain is being pulled, we will pass up the discussion of trade restrictions, but they are out there, and their impact, the idea that you can be cut off, party or non-party, from trade—either a non-party because of the terms of the Convention, or a party because of the Convention’s potential for the organization’s own imposition of sanctions—has a strong incentive to adherence.

Okay. And, the last one speaks for itself. And I guess the concluding remark that I would make, to tie my thesis together, is that given the worldwide concern with the horrific weapons that this Convention was addressing and given the breadth of conversions of interest, I think these CWC negotiations were a strong force that could have carried a much bigger load with respect to the establishment of supportive legal cooperation regimes on this extension that is inherent in the body of the treaty, this extension by state parties of these prohibitions and obligations to persons within their jurisdiction.

And, I hope that there’s still chance to do more on this in the BW negotiations. I’m not at all sure that that’s the case, but I think it’s a proper focus for scholars and government officials in the future to see these negotiations as an opportunity to improve the, if you will, the cooperative legal infrastructure.

Thank you.

PROFESSOR MICHAEL SCHARF: For those of you whose stomachs are starting to rumble, I should let you know, for your expectation, that we’ve been granted somewhat of an extension.

And, I have timed this out to exactly 14 minutes, which under Barry Kellman time is only seven minutes.

(Laughter.)

PROFESSOR MICHAEL SCHARF: Let me begin by asking you to sit back and imagine that you are in the situation room of the White House. It’s the second week of August 1998. There’s an emergency meeting of the National Security Council.

The President’s intelligence officers say something like this, “Mr. President, sir, we’ve got human intel confirmation, Bin Laden, the terrorist mastermind responsible for the bombings of Tanzania and Kenya, now has the poor man’s version of the nuclear bomb. That’s right, we’ve got confirmation that he is operating a chemical weapons plant in the Sudan.”
So the President probably responds with many expletives, which I won’t repeat. And then he’d say something probably, back in August, like “Agh, first it’s that Monica mess and now this.” And then he would say, “What exactly are my options?”

And the purpose of my presentation is to explore the costs and benefits of the various means for responding to a flagrant violation of the international ban on biological and chemical weapons.

This is the type of assignment that Elizabeth Rindskopf and I used to be involved in regularly when we were at the State Department. Although I have to tell you I’ve heard third-hand that the State Department lawyers were not involved in the decision making process leading up to the August 20th bombing.

Instead, they were told on the night of August 20th, “We need a defense to present to the Security Council.” And that’s not exactly the way one would hope that the process would work.

The first option? The first option is Security Council action. Under Articles 41 and 42 of the U.N. Charter, the Security Council has a wide range of very creative and flexible responses to such a situation.

The Security Council could, for instance, impose an economic embargo on the state supporter, Sudan. It could freeze assets of the responsible terrorist leaders, Bin Laden and the supporting government leaders. It could ban their travel. It could create an investigative commission like UNSCOM that was utilized for Iraq. It could expand the jurisdiction of the international tribunals on an ad hoc basis and have an international indictment of Bin Laden or the Sudanese collaborators. It could order the arrest of the perpetrators, and it could even authorize the use of force against the BCW sites.

The advantages of Security Council actions are clear. You have collective action. You’ve got a guarantee of international support and you don’t have to present your intelligence sources and methods in open court, you can give it to the Security Council members in a closed session.

The disadvantages are also clear. The Security Council moves slowly. It takes time to get a consensus for a resolution to pass. It is very diplomatically difficult to get the permanent five to agree on anything, let alone a strong response.

When the Security Council acts, and it deliberates, it often tips off the target, which would undermine whatever action you want to take. And frequently, even when the Security Council acts, you end up with pieces of paper that are passed that lack the political will for effective enforcement. For instance, in Yugoslavia they created a no-fly zone that
was violated 200 times over a two-year period before there was any bombings or air strikes against the violators.

In Yugoslavia, again, there were safe areas that ended up being the site of the worst massacres like Srebrenica.

Option number two, unilateral air strike against the BCW sites. Under Articles 2, 4, and 51 of the U.N. Charter, unilateral use of force is generally prohibited except to respond to an armed attack.

It has been said that international law is not a suicide pact and therefore, if there is lots of U.N. precedent that anticipatory strikes are sometimes allowed, the criteria are that the threat must be immediate, the response must be necessary—meaning you have to exhaust any peaceful means that are available—and the action must be proportionate.

The advantages of a unilateral air strike is that it immediately removes the threat and it, perhaps, deters future threats. The disadvantage is that there is a risk of an asymmetrical retaliation. For instance, when we bombed Tripoli, three years later Pan Am 103 blew up.

There’s also the risk of collateral damage. It was estimated during Desert Storm that if we directly hit one of the biological weapons sites in Iraq that up to six million Iraqis could die because of the fall out depending on the environmental conditions prevalent at the time.

And most importantly, there’s a risk of international condemnation. Let’s examine the fall out from the August 20th air strike. The U.S. argued that the El Sheifah plant had no commercial uses, that it was owned by Osama Bin Laden, this terrorist mastermind, that it was closely guarded, and that they had some soil samples that showed the existence of empta, which is a precursor for nerve gas.

At first, world opinion seemed to indicate that this might have been a legitimate use of self-defense, until it turned out that Bin Laden did not have any financial connection to the chemical weapons plant. That the chemical weapons plant was not a chemical policy, in fact, it produced 50 percent of Sudan’s pharmaceutical needs and in fact, that the U.S. knew this because it had approved, under the sanctions committee, a contract to send chemicals, pharmaceuticals from this plant to Iraq under the humanitarian exception.

So, there were calls for an international investigation from such places as the Middle East countries and even our own former President, Jimmy Carter.

The U.S. refused. It blocked, and it refused to provide any further proof. And then the international community is looking at the United States and saying “Was this a great mistake? What happened here?”

No one is saying that it was unlawful to strike against a chemical weapons plant, they are saying you have to have sufficient proof. The
lesson here is that a country like the United States has to be in a position to offer its proof to the international community.

I'm reminded of when I was the attorney advisor for U.N. Affairs, and Iraq tried to assassinate George Bush, and we did air strikes against Baghdad. We did an entire dog and pony show with lots of pictures, surveillance tapes, and everything to show that we had the evidence that they were behind that.

There was no such dog and pony show in this case. "What's going on?" the international community is asking.

Well, the impact has been growing international condemnation even from our closest allies. That effects our foreign policy goals. There is the possibility in the future, if there's an international criminal court, that such and act would subject our leaders to indictment before the court. We'll talk about that later this afternoon.

And there's the possibility of civil cases. The Pinochet precedent that comes out of the United Kingdom may suggest that there's no head of state or foreign sovereign immunity for such acts.

Option number three: assassination. Everybody knows about Executive Order 12,333 that was passed in 1975—and it has been repeatedly adopted by every president since—but most people don't realize that that Executive Order has been declared, officially, not to apply to cases of combatant leaders or cases of national security threats.

In fact, in the 1986 bombing of the Kaddafi residence, there was such a decision made. And in the August 20, 1998 air strike against Bin Laden's bases in Afghanistan, it was clear that that was an attempt to take him out. And that was not seen as a violation of the Executive Order.

The advantages of such action? You might eliminate the threat, and you don't have the problem of collateral damage.

The disadvantages are that the targeted individuals are frequently replaced with even worse individuals. It strengthens enemy moral. It creates a martyr. You've got the risk of retaliation. And, of course, you can have international condemnation.

The United States, for instance, had to use its veto when the Security Council tried to condemn it for the bombing of Libya and the General Assembly condemned the United States overwhelmingly.

Note, however, that there's been no criticism of the U.S. air strikes against Bin Laden in Afghanistan.

Option number four, the final option, domestic criminal proceedings. Bin Laden has been indicted for the embassy bombings, but he has not been indicted for the possession of the chemical weapons. Nor has Saddam Hussein ever been indicted in the United States.
There is a law, the 1996 anti-terrorism legislation which is 18, U.S.C. § 2332, which says “Any person without lawful authority shall be punished if they use, threaten, or attempt to use a chemical or biological weapon against a U.S. national outside the United States.”

The problem with this current law is that it doesn’t cover production or stockpiling; only actual use. And, it must be used against a U.S. national. Not only that, but the law exempts those who exercise “lawful authority.” So Bin Laden could be prosecuted but not Saddam Hussein.

Harvard University has a draft which would go along the lines of what Cecil was suggesting and create a “prosecute or extradite anti-terrorism” convention to close these gaps. It would turn the chemical weapons violators into the enemies of all mankind.

The advantages of the criminal approach is that it strengthens the norm against chemical and biological weapons. It can lead to deterrence. It avoids collective punishments. And, most importantly, it can isolate the offending leaders diplomatically and politically, and it can strengthen international resolve to take other actions.

Just imagine if every time Saddam Hussein’s name was listed in the news it would say “indicted chemical weapons terrorist”.

The disadvantages are that in criminal proceedings you have to divulge intelligence sources and methods. You are unlikely to get custody to try these people, and that may create a perceived impunity, or it may cause us to want to go out and apprehend them unilaterally, which we discussed this morning. It causes all sorts of other problems.

And the criminalization is not a panacea. I’m reminded of the Genocide Convention which was passed 40 years ago. Most countries in the world have adopted it, and since then there have been plenty of genocides. The existence of the treaty is not, in itself, sufficient.

So, in conclusion, there are a variety of enforcement options available to respond to the next Bin Laden or Saddam Hussein. Each has its pros and cons, and the decision as to which to pursue is very difficult; but ultimately, to retain vitality, the prohibition on chemical and biological weapons requires that there be an expectation of consequences to its violation. Only in this way can we reestablish what Richard Price says in his book is the biological and chemical weapons taboo.

Thank you.

PROFESSOR BARRY KELLMAN: Questions?

AUDIENCE MEMBER: I just wanted to point out there are laws governing biological weapons. There is the Biological Weapons Anti-Terrorist Act of 1989.
I drafted that. It was passed unanimously by both houses of Congress and signed into law by the President. It was recently strengthened by the Anti-Terrorism Effective Death Penalty Act.

Our primary concern as Cherif Bassiouni pointed out, we're not crazies out there in the Third World aiming at biological weapons. When we drafted that legislation, our primary concern when the people in—working in the private sector at universities, taking—(inaudible)—to develop, through the use of biological types of research, that could be put to both offensive and defensive uses.

At the time, the Reagan administration was putting as much in constant—(inaudible)—into an allegedly defensive research as Nixon was putting into research and development of offensive biological weapons before it was prohibited by the Biological Weapons Convention of 1972.

The Reagan administration fought this legislation tooth and nail to permit that type of research. They were putting hundreds of millions of dollars into investigating every type of potential biological warfare agent, with DNA genetic engineering uses that would enable—(inaudible).

When President Bush came into power and to his great credit, President Bush stopped—(inaudible)—and all the opposition to this legislation ended, and we got cooperation from the White House and the Department of Justice on this legislation.

So, I think my point here is that the United States government and the different agencies we're talking about, had better start paying attention to what their own contractors and their own agents and their own agencies are doing when it comes to biological weapons.

Thank you.

PROFESSOR BARRY KELLMAN: Any other questions?

MS. LISA GORDON-HAGERTY: I just had a couple comments, specifically regarding the comments from before.

I would first say that I agree with you wholeheartedly about the lack—in my opinion—the lack of proper legal relief in terms of those having or being in possession of chemical or biological materials, precursor agents or what have you. There is poor domestic law.

We have wonderful laws on the records right now, as you see for nuclear, for radioactive material, for weapons, and material that can be made into weapons.

Right now the law states specifically that the material, chemical or biological materials have to be weaponized in order to assure that you can go ahead and indict, if you will and again, I'm a physicist not a lawyer, so you'll have to forgive me.
So in that regard, I agree with you wholeheartedly. In fact, the Attorney General’s five-year plan as directed by Congress, that she submitted to Congress December 31st, there’s a section in there about providing additional legal remedies in this area.

And, if the Attorney General’s recommendation was that they were going to—the Department of Justice was going to study this matter, at the recommendation of the National Security Council. We (the NSC) push for that. It’s no longer going to be an issue that we need to study but we actually need to start looking at putting laws and regulations on the books before precisely that.

The second point I’d like to make is just to seek clarification, I was one of the co-authors of both PDDs 39 and 62. And with regard to your comment that the Department of State was always the responsible agency for combating terrorism, that is not quite the case.

The FBI has always been and continues to be the lead federal agency for domestic terrorism. The State Department has that lead federal agency responsibility overseas.

So I just wanted to make sure that there was no misunderstanding there. You suggested in 1998 you had turned over domestic responsibility to the FBI. They’ve always been the lead federal agency for combating terrorism or domestic acts of terrorism.

The third point I’d like to make is regarding the national coordinators. Since I do work in the office and I report directly to Mr. Clark I would suggest to you that its responsibilities are to coordinate the interagency coordination, and I think he’s done an exemplary job of doing that.

I would also further say to you that those of you that have been in federal government or currently are in federal government, would find it difficult to believe that the National Security Council would ever have the opportunity to be operationally responsible for any activity.

Jack Beard is shaking his head. I cannot—

MR. JACK BEARD: I agree.

AUDIENCE MEMBER: I will tell you, between the FBI, the Department of Justice, the Department of Defense, we’d get beaten regularly, if we would ever even consider ourselves being operational.

Having come from the operational community, recently, I would have to—I would never forgive the NSC for being operationally involved.

MR. JACK BEARD: But all the agencies love you.

MR. CECIL HUNT: I would like to jump on the first part of the comment and let the others—as the idea that there’s no law on the books
unless its dealing with the chemical weapons items—unless they have been weaponized.

With the passage three months ago of the implementing legislation, that’s no longer true. They’re on the books as a control scheme with—effectively with domestic application that extends to the precursors. There are no requirements that they be weaponized to be brought within this control scheme.

Now, does it go the next step and require all internal transfers, activities, transactions in these scheduled chemicals to be subject to a licensing regime? It does not. And I would maintain that it need not and should not, because you have—we’re dealing with matters of concern. You have the ability, again as I point out, with the weapons related activity, if you can establish the weapons nexus and then use your attempts and conspiracy and aiding and abetting provisions you can deal domestically and internationally with the—what you discover as to weapons related activity. You do not need, I would submit, to subject the internal industrial use of these dual use chemicals to a more pervasive licensing or more affirmative and intrusive control scheme.

PROFESSOR BARRY KELLMAN: Cecil, my copy of the statute must be missing a paragraph that yours has. I don’t see anything in the statute which makes it illegal to possess the chemicals that are listed on the chemical weapons schedules. What it does obligate and what it does make illegal is over-relevant concentrations and over-relevant quantities. There is an obligation to report, but that, again, goes to militarily significant quantities of weapons and really doesn’t begin to touch on this level. There is nothing, to my reading of that statute that makes it illegal to possess Schedule One chemicals.

Now, if I might return—the short answer to your third point, from my perspective, is I believe you. And assuming we have people of good will in the National Security Counsel, I’m with you completely. I don’t have a problem with it.

I think as a political matter there are very real constraints on abuses of authority by the National Security Council. And I wouldn’t argue that for a moment. I’m asserting that there are not legal constraints. And that if the people of good will are replaced by people of not such good will, then, a hyphenated word, Iran-Contra.

It has shown us that that body can abuse authority. Is it an abuse, is it wrong? Well, of course it is. I mean I’m not arguing that this could happen rightfully. I’m saying that I don’t know of any controls other
than the pressure of interagency process to protect us from it happening wrongfully.

MR. JACK BEARD: In defense of the NSC, I would like to say that Americans probably don’t appreciate that that huge building next to the White House, the old Executive Office Building, is the site of daily policy battles over everything we’re talking about here and what the “Inside-the-Beltway phenomena” calls an IWIG, an Interagency Working Group—IWIGs meet and meet and meet and meet to talk about all these things.

Certainly at this point in our government the NSC has a very important role, not an operational one, but one in making these things make sense as all the agencies get together and work hard to do the right thing as people of good will.

PROFESSOR BARRY KELLMAN: Further questions?

(No response.)

PROFESSOR BARRY KELLMAN: Shall we have lunch?

(Whereupon, at 12:45 p.m. the proceedings were adjourned to be reconvened at 2:30 p.m.)

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AFTERNOON SESSION

(Time noted: 2:35 p.m.)

PROSECUTING AND DEFENDING A FOREIGN CRIMINAL

MR. ROBERT PRECHT: My name is Rob Precht. I am currently Director of the Office of Public Service at the University of Michigan Law School. And before coming to the Law School about four years ago, one of my last cases was defending one of the suspects in the World Trade Center bombing trial in New York. I am delighted actually to have this opportunity to be reunited with my adversary, Gil Childers.

I got to know Gil several years before the Trade Center explosion in connection with work I did in defending an organized crime case in New York and really grew very fond of Gil during that early case. He introduced a measure of humor, calmness, and a certain self-effacing quality which was in marked contrast, in my view, with most of the U.S. Attorneys in the Southern District of New York.

Gil basically made an interesting career transition. Unlike many U.S. Attorneys in the Southern District who come up through the ranks of federal clerkships and fancy law firms, Gil really began in the trenches
working as a prosecutor in the Brooklyn District Attorney’s Office for a number of years. And he was, I believe, one of the few people who really made that successful transition.

My impression was that the Federal Prosecutor’s Office in the Southern District was rather snooty about taking into its ranks District Attorneys or former District Attorneys. But Gil was such a star in the Brooklyn office that they grabbed him, and I think it was a measure of the intelligence of the office that they selected Gil to be the lead prosecutor in the Trade Center case.

Obviously, we went head-to-head on a number of issues, but I always felt that Gil really represented one of the highest expressions of being a professional, being a prosecutor of an individual dedicated to the notion of doing justice in a case, not simply winning convictions.

Folks may not know that the Trade Center case is still continuing. Since his involvement in that case Gil has joined a law firm, but he has been designated a Special Assistant U.S. Attorney and actually he’s going to be participating next week in certain hearings that have evolved out of the World Trade Center trial.

Gil was tapped for his expertise during the Oklahoma City bombing case. He has also played a role in assisting prosecutors in the Bin Laden case, and it’s particularly gratifying to have this opportunity to be in the presence of this individual. I think we both went through a trial that changed us, and I’m very happy to introduce to you Gil Childers.

What we’re going to do today is Gil is going to open—and I hope he takes his time doing so—giving you a general background on that case. I then propose to be defense lawyer-like and bring my perspective to what was going on, and perhaps we’ll have a little give and take back and forth.

I’m really hoping that we’ll have some time for questions. If you have a question, if you would just come up to this microphone here, we’d love to entertain your questions. So, I’m delighted, once again, to introduce Gil Childers.

MR. GILMORE CHILDEERS: Thank you, Rob. Obviously, I’m a little bit embarrassed by that introduction. Although you were still wrong in most of the case.

(Laughter.)

MR. GILMORE CHILDEERS: So, don’t think you’re getting off easy by being kind.

I would like to express my gratitude to the Journal for inviting me. I truly feel it is a pleasure. I think if you look at the symposium agenda, yesterday was—well, the entire thing has been really a joy for me to attend, but yesterday was intentionally designed to be sort of a little bit
more academic and today is a little bit more hands-on. People like me that can barely spell Michigan get up here and talk.

So, I think what I want to do, at least in the beginning, is give you an idea of what we were up against in terms of trying to prosecute this case in February of 1993. Truthfully, long before a lot of the issues that have been talked about the past two days were confronted and before really almost all of the policies that have been spoken about the last two days were in effect.

It was this case that has variously been called a wake-up call or an alarm to the United States to take international terrorism seriously, at least with respect to it taking place on our own shores.

So, without further ado, let me just add the typical federal disclaimer, and that is that what you’re hearing today is the viewpoint of Gil Childers, not the United States government, not the United States Attorney's Office, and when Rob asks me difficult questions, I may conveniently beg out by saying there is still ongoing litigation, so I can’t talk about it, or we’d have to kill you. So, unfortunately, that only works on about half of this audience because most or at least half of the audience has the same security clearances that I do.

With respect to the case, obviously, most folks have heard at least a little bit about the bombing of the World Trade Center. The initial case involved four defendants. Each of the defendants—the proof against each of the defendants was very different.

Any time in a criminal trial, the jury is always instructed by the trial judge if it’s a multiple defendant case, that, in effect, you are to conduct and eventually will render verdicts on separate trials and separate charges, but specific as to each defendant.

This case, much more so than any of the other cases I’ve tried—and I had been Prosecutor at that time for about 13 years and then for a good time after that so, I had tried a good number of cases—a large number of multiple defendant cases—but I had never heard of, let alone been involved with, a case where the type of proof was so different as to each of the defendants who were at the defense table.

So, we had four defendants—well, let me back up just for a second—no, I’ll keep going. I’m sorry. We had four defendants, we had—before the end of the trial, we, the Government, would call approximately 207 witnesses. I say approximate because my paralegal, who ruled my life during this time, said it was 207. I thought it was 208. We had more than—we had about 1,200 numbered exhibits, but sometimes some of those exhibits carrying one number would be an entire trial cart, which is about four and a half feet long, full of
documents. So in terms of what a normal trial might call exhibits, in the several thousands of exhibits.

The trial itself was six months long almost to the day. Besides myself, I had three other Assistant United States Attorneys assisting me as a team. All of us participated very heavily. We had one other fellow who was fairly senior in the office and then two junior assistants.

As a matter of fact, one of the assistants had never been involved in a trial. He had only been in the office six months and put his first witness examination—in what has proven to be an excellent career in its own right—but the first time he examined a witness was in the World Trade Center trial.

My supervisors weren't so happy about that, that I had promised him that he could do that, but he had certainly earned it, and he ultimately ended up examining about 35 witnesses during the course of the trial.

I mentioned a little bit about the fact that the proof against each of the defendants was very different. It took very different forms sometimes. But the one thing that was—unfortunately for me—that was very common in each of the four cases against each of the defendants was that there was precious little direct evidence. It was very heavily a circumstantial evidence case. It really, if you stop and think about it, certainly wasn't a surprise to Rob, but the newspapers, after we gave our opening statements in the beginning of the trial, headlines read, you know, "Government admits, 'No one will see defendants ignite the bomb."

Now, anyone who might have been in a position to have seen anyone ignite the bomb, wouldn't be around to testify about it, but for some reason, they thought that was newsworthy. I bring that up just because the—as is often the case in criminal trials where conspiracy is involved, in fact the standard conspiracy charge the judge gives the jury includes language to the effect that criminal conspiracies are rarely done in open or in public where people can observe them. Not all criminals are completely stupid. And in a situation like this, a conspiracy like this, I think was extra secretive, if that makes sense at all.

So, there's really very, very little direct evidence. It was a heavily circumstantial; a case that had to be proved circumstantially and a case that—and I'm leading with my jaw a little bit here, but a case that relied heavily on experts. And I think I'll hear a little bit about that later from Rob.

But there were approximately 30 experts that the Government used to testify in this case on all sorts of areas that were truly bazaar. We had two people who were tire experts, one from Michelin and one from Bridgestone who testified to little pieces of tire that were recovered in
the Trade Center crater and actually were able to essentially reconstruct the tires that were on the van that contained the bomb that blew up the building.

We had the same type of expert from Ford in an attempt to more or less reconstruct the van that carried the bomb. We had Arabists and translators. We had thousands and thousands and thousands of pages of documents that were in Arabic that had to be translated.

We had experts in plastics. It was the Government's theory that at least some of the explosive material was contained in a plastic Rubbermaid trash can. And there was a piece of the—van and I'm sure Rob had some chuckles during a lot the trial, where we were chided for bringing in just unending pieces of twisted metal. But one of those little pieces of twisted metal had a little speck of blue plastic on it, and we brought in a plastics expert to talk about the fact that it was the same type of plastic. We certainly couldn't—it was nothing like DNA matching or fingerprint matching, but in saying it was the same type of plastic, and it was consistent with plastic that we knew was in one of the apartments.

There were experts—on part of the explosive device involved three tanks of hydrogen gas. And we brought in someone who was an expert on the construction of the tanks because among the pieces of twisted and deformed metal were some heavy pieces of metal which this gentleman could positively identify as pieces of a gas cylinder tank.

So we had just an enormous array of experts that we had to deal with. And quite frankly that was one of the large challenges. As anyone who has been a trial lawyer knows, dealing with an expert witness is always sort of a touchy subject. As a litigator you're asked to become conversant in an area that someone has spent his or her life gaining an expertise in and in this case, per expert, you know, we probably had a couple of days from when we, sort of, entered the field to when we had to sound reasonably intelligent in front of a jury.

Probably the biggest single challenge was, that I felt—again I didn't have—there were lots of other challenges I felt sort of along the way and a lot of challenges or a lot of challenging things I began to think about, but generally that thought process would end something along the lines of, "I don't have time to think about that. That's a really good issue. That's a really important issue, but we have other stuff we have to do. I'll think about this after the trial."

The bombing took place on February 26, 1993, because some outrageously unreasonable defense attorney demanded his right to a speedy trial. The judge set the trial for September. So, six months and a week after the event took place—not even after the first arrest, but just after the event took place—we started picking the jury.
The first defendant wasn’t arrested until six days after the event took place. So, in those ensuing five days from 12:18 when the bomb detonates until Thursday morning, I think somewhere around eleven o’clock when Mr. Salameh was arrested the following Thursday, all we had to look at was a still smoldering hole in the basement—five floors of the world’s largest office complex.

So that timeframe that was imposed upon us really set the tone and the framework and the constraints for everything that was to take place from the time of the event to the beginning of the trial and actually through the trial as well. I mean, that was sort of that black cloud hanging over in a real omnipresent fashion.

Among the other great challenges was the nature of the case, which I’ve already stated to be heavily circumstantial. Telling a circumstantial case in a long trial is a painful process. It’s certainly painful for the jury. If any of you looked back over the—hopefully none of you followed the trial that closely in the press because it was nonstop, “Geez, the Government put another 25 pieces of metal in today and we don’t know why.”

(Laughter.)

MR. GILMORE CHILDERS: And the other thing to remember is this is pre-O.J., so the concept of the media carefully following a trial was truly a foreign concept. I mean, probably in the Lindbergh kidnapping and maybe the Rosenberg case there were reporters there day after day after day. I’m not even so sure that was true in some of those trials.

I mean, I have tried some of the largest organized crime cases in the country, and you’d get a room full of press in the opening statements the first day or two. You’d get a room full of press when the big cooperators came in and testified and you’d get a room full of press on your days of summations. In the meantime, you know, the five months intervening the courtroom was empty.

That was not true in the Trade Center. There was an international media corp that was there every day for, essentially, six months. And they had never done that before. They didn’t realize that as we’d put in 25 pieces of twisted metal, we’re not allowed to say, “The reason these are going to be important is—” with an explanation. That obviously comes at the time of summation.

So, that was another great challenge, trying to orchestrate the trial in a way that made sense, that didn’t put people completely to sleep and try to maximize the use of jury addresses.

As a Federal Prosecutor at least, you get three jury addresses. You get your opening statement. You get your closing argument, and you get
a rebuttal summation to correct the jury and straighten them out after the outrageous stuff the defense has given them.

So—there should be more chuckles.

(MR. GILMORE CHILDERS: And, of course, I don’t feel that way any more, because now I’m a defense attorney. So, setting that stage with the opening statement was a tremendous challenge.

And, again, because of the timeframe, the investigation, very much, was still going on when we were picking the jury. The investigation—and I say this truthfully—was going on in—the last five or six witnesses we put on, we still weren’t sure if we were going to have additional witnesses. The investigation was still going on and in some respects, it is still going on today, but the investigation for the actual trial was not concluded until the evidence was closed. It was that much of a moving target.

So, in my opening statement, I took a lot of heat—and good-naturedly—from defense counsel, that already by that time we had developed some relationship with for being very amorphous and not putting much up on the scoreboard for them to shoot at. But, you know, it was no strategic piece of brilliance on my part. I wasn’t sure what my evidence was going to be. I certainly couldn’t promise the jury what I was going to deliver when I had no idea what it was yet.

So, those are sort of the challenges, the big challenges that I thought we faced. That—and again, I will lead with my jaw—and the other big challenge was the fact that when a bomb goes off, mostly because of television and movies, I guess, people expect whoever it is, but some sort of forensic chemist or explosives expert to descend on the scene and look around and find things and say, “Okay, this bomb was made of” whatever it was and “it was this size” and you know, boom, you get all the answers.

The Trade Center, for a number of assorted unique reasons, was absolutely void of any chemical residues of value in terms of trying to determine what the bomb was made of. And that was due to, as I said, a number of circumstances as it turns out. I mean, even to this day I can’t tell you and no one can, definitively, based on chemistry at least, what exploded in the basement of that Trade Center.

What I can tell you is that these people were involved in making a massive bomb of urea nitrate. And these same people rented—or at least one or another of these same people rented a van and bought hydrogen tanks and did other things. So, circumstantially, it comes together that that bomb that was constructed in Jersey City was the bomb that blew up in the Trade Center.
But urea nitrate is basically composed of two things. Urea, which is found in a variety of things, but in everyone of us in our urine and nitric acid. Urea is commercially available in pellet form, much like ammonium nitrate would be which was the base of the bomb used in the Oklahoma City bombing. But among the other things that happens in a 110-story office structure when a bomb explodes and rips the guts out of it, is all the sewage piping and all the water piping in the building ruptures. So, you now have five stories of basement filled with 110 stories full of sewage and water.

Obviously, the building was full at the time, and there’s going to be lots of urine down in the basement of that building now. So, one of your components of urea nitrate, you’re not going to be able to have any valuable chemistry coming from. Also, as it turns out, at the World Trade Center, the Port Authority—it was snowing that day—uses urea as a snow melter.

So, not only do we have the plumbing problem, but we also had the fact that there were good reasons why urea would have been on site. And we also had the problem that urea nitrate is incredibly unstable, and in 95% humidity, it breaks down naturally. It was snowing. It was humid, plus you’ve got literally hundreds and hundreds and hundreds of thousands of gallons of water.

So that was another big problem that we had, in terms of, sort of, having to deal, having to cope with the fact that we could not chemically, to any sort of degree of scientific certainty, through direct proof, tell the jury what it was that blew this building up.

I think I’ve given Rob enough to shoot at for awhile, so I’ll shut up, and then I’ll get a chance to come back at him.

MR. ROBERT PRECHT: Well, it’s very hard for me to be churlish around Gil, but since that’s what I was asked to do, I’m going to try.

From my standpoint, I was thinking, you know, what really can I offer to this conference of scholars and high government officials. And I finally decided that the added value, if any, I have to bring here is to simply try to give you a little of the texture of what it was like for me, a pretty typical public defender, to be thrown in the middle of this case quite by accident.

Basically, cases are assigned in the Federal Defenders Office by lottery. Lawyers are assigned two duty days a month, during which he or she accepts any case, any arrested person who has been brought into the jurisdiction that day. And I simply happened to be on duty when they brought in the first suspect in the Trade Center case, Muhammad Salameh.
And as I wended my way, for the next year, through the case, making plenty of missteps on my own, I tried as a defense lawyer to, in some sense, restore this person's visible humanity. He had been betrayed as an incarnation of evil, as a cartoon figure, and I felt that my duty was that if the jury was going to hear the evidence and finally convict a person accused of terrorism, I wanted them to convict a human being and not a monster.

I could go on for a while talking about my role in the case, but I just want to now talk a little about three incidents that occurred in the case that I hope highlights some of the difficulties in using the criminal justice system to fight terrorism. We heard some discussions yesterday about the role of the FBI and other law enforcement arms.

One of the things that I really came away with after defending this case was the sense that due process, which I had somehow approached in a rather cavalier fashion as a Public Defender, believing that you simply follow rules and procedures, and that that equals due process, but that due process is actually a much more fragile concept, an entity than we would suppose.

It's not about following rules. It's about the attitude and the spirit we bring to those rules. And that particularly in a case where in New York—and I'm sure there are some of you in the audience who were in New York at the time of the explosion—there was a palpable sense of fear. New York had convinced itself over the years that we were pretty much immune from terrorism, and this was a shock to the conscience. And I can remember very well a day before I got the case, going through—walking through Grand Central terminal to get the subway to go downtown and feeling that there was a palpable sense among the scurrying commuters of anxiety. Because if the terrorists could strike the World Trade Center, they could strike any large public space. Certainly, Grand Central terminal, the subway system, there was fear and it's when a society feels fear that due process is really tested.

Gil was confronted with a number of challenges. I think there is a great danger, particularly in a terrorism case, that arises from the very close relationship between the FBI and the Prosecutor's Office. That relationship exists in most cases, but in a terrorism case, I think, the Prosecutor's Office is even more reliant on law enforcement agencies to develop evidence.

And I want to highlight three incidents that I hope will at least suggest some of the pressures that are on the criminal justice system and some of the dangers that exist when we hand over the prosecution of terrorism, to a large extent, to federal law enforcement agencies. Be-
cause, once again, they're not charged with doing justice, the way Gil and his colleagues are, they are charged with apprehending.

Okay, I want to set the scene for you. We are several weeks into the trial and Gil and his colleagues have put on a witness named Ashraf Moneeb to establish that he was a roommate of my client, Muhammed Salameh, and that he saw my client, Muhammed Salameh, associate with two or three of the other co-defendants. So, this was an important witness to testify that, in fact, "Yes, I was the roommate," and, "Yes, I associated with these individuals."

So basically, the Prosecutor, Henry DePippo, led the witness through the testimony, "Yes, in fact, I was a roommate. Yes, in fact, I saw my roommate, Muhammed Salameh, meet with some of these other fellows."

It's now cross-examination. And I want to read you a few passages of that cross-examination, because one of the struggles I had in that case was simply developing evidence. I hired an investigator from Atlanta to come up and to go through Jersey City where the defendants were said to have lived and to try to talk to witnesses, and he came back to me and said, "No one will talk to me. When I identify myself as being from the Legal Aid Society, they all clam up. They say that the FBI told us not to talk to you."

Okay.

So, I didn't know how to analyze it, but it was crystallized during a moment in this trial and the moment was this cross-examination of Ashraf Moneeb. The cross-examination is about how the FBI came to his house on March 7th, about seven days after the explosion—or two weeks after the explosion and interviewed this witness to try to get valuable information.

The cross-examination goes this way: by the defense lawyer, question, "What is your status? Are you an American citizen, Mr. Ashraf?"

Answer, "Yes."

Question, "In fact, when the FBI spoke to you on March 7th, your citizenship was supposed to come around at that time, am I correct?"

Answer, "Yes."

Question, "When they spoke to you in the apartment for an hour, you were alone?"

Answer, "Yes."

Question, "And you were afraid, I'm sure?"

Answer, "Yes."

Ashraf Moneeb is about in his twenties, doesn't speak English particularly well. He's a student.

By the defense attorney, question, "And one person was talking to you and the other people were searching the apartment, am I correct?"
Answer, "They pointed a gun to my face and they handcuffed me."
Question, "And once you got to the Newark FBI office, how long did you stay there?"
Answer, "About three hours."
Question, "And during that three-hour time, were you alone with other FBI agents?"
Answer, "Yes."
Question, "Did they talk to you about your status as a non-American citizen at that time?"
Answer, "They asked me whether I'm a citizen or not, and they took my green card."

Okay. On redirect, the Prosecutor, Henry DiPippo, tried to rehabilitate this witness and to erase any suggestion that this witness may have felt intimidated.

Henry goes, question, "Did anyone from the FBI, in March, when they spoke to you, pressure you to make things up?"
"No," said the witness.
Question, "Did you only tell the FBI what you knew back in March?"
Answer, "Yes."
Question, "Have you done the same thing here today?"
Answer, "Yes."
The defense lawyer sprang to his feet to do recross.
By defense attorney, question, "Prior to March 7th you had aspirations of becoming an United States citizen, am I correct?"
Answer, "Yes."
Question, "On March 7th the FBI took your green card, am I correct?"
Answer, "Yes."
Question, "That put pressure on you, didn’t it?"
Answer, "I was scared."
Question, "And you still haven’t gotten the citizenship you aspire for have you?"
Answer, "No."
Question, "Do you expect to get it after you finish testifying here to day?"
Answer, "I don’t know."
Question, "The FBI has your green card, am I correct?"
Answer, "Yes."
Question, "And they haven’t given it back to you yet, am I correct?"
Answer, "Yes."
Question, “When you finish testifying, you expect to go back and ask for your green card, right?”
Answer, “Yes.”

Question, “Because they told you that after you testified, then you can come back, and they’ll tell you whether or not they’ll give your green card back to you?”
Answer, “They said they will give it to me.”

The next vignette I want to discuss with you is an illustration of the dangers of relying on FBI expert testimony, especially in an atmosphere in which there are huge pressures on law enforcement and the prosecution to win convictions.

As Gil alluded to, one of the questions in this case was what was this bomb composed of. And five months into the Trade Center case there was still a major gap in the Government’s case. The investigators simply could not identify the type of the explosive.

The Government’s explosives witness was Fred Whitehurst, the senior chemist in the FBI’s renowned crime laboratory. I can see some people recognize the name. The day before his testimony, Gil handed me a letter which Whitehurst had addressed to his superiors. In it, Whitehurst accused the principal examiner in that case, David Williams, who was in charge of preparing the final scientific report on the case—Whitehurst, this chemist, accused this FBI agent of pressuring scientists within the chemistry lab to slant their results to favor the prosecution.

Now, not surprisingly, Gil, you chose not to go ahead with your plan to call Mr. Whitehurst and instead summoned Mr. Whitehurst’s junior colleague, a person named Steven Burmeister. Burmeister, the laboratory’s only other chemist, admitted it was impossible to determine the contents of the bomb, at least judging from this scrap of tire that had been analyzed, and his admission made headline news.

As unhelpful as his testimony was, Burmeister compounded it by revealing further evidence of Williams’ bias, the principal examiner. Burmeister, related how immediately after the explosion, Whitehurst and Burmeister, the only two qualified chemists in the lab, were summoned to New York. That left no chemists qualified to perform explosives analysis in Washington.

However, a tire fragment had been recovered and was sent to Washington. And that tire fragment was actually analyzed by non-experts. And they wrote in their report that this rare explosive, urea nitrate, had, in fact, been found on this tire fragment. Not urea, not nitric acid but evidence of the actual explosive. And this conclusion obviously was very helpful to the prosecution because it tends to establish that urea nitrate, this rare explosive, matched traces of this very rare explosive
that was found at various locations in New Jersey linked to the defendants.

So these non-experts then gave their report to Williams who summarized their findings, put it in the draft of the final report and forwarded the final report to the Court and defense counsel. But when Williams and Whitehurst got back from working at the Trade Center crater in New York and they got back to Washington and they saw that the non-experts had analyzed the data and concluded that there was urea nitrate, they were aghast because they realized immediately that the non-experts had misinterpreted the instrumental data and that, in fact, all that the instrumental data showed was that urea and nitric acid, very common substances, had been found.

Now, when they discovered this error, it was obvious to them. They went to David Williams, and they said, in effect, you know, "This is not correct. Your non-experts misinterpreted the data, and your report which you have transmitted to the court and to defense counsel saying that urea nitrate has been found, is incorrect. Only urea and nitric acid have been found."

But David Williams refused to change the report. And when Whitehurst and Burmeister—remember they’re the only two qualified chemists in the lab—went up to try to get the report changed they were rebuffed by laboratory managers.

Eventually, after much haggling, Whitehurst and Burmeister were allowed to perform a test on this tire fragment themselves. And they got, in terms of their readings, the predictable, urea and nitric acid. They gave the information to David Williams, and they told Williams that although those two substances were consistent with the existence of this rare explosive, these two substances were also consistent with harmless substances, and they wanted David Williams to include that in his report. But Williams still continued to resist that. And after he received these new findings, he grudgingly agreed to amend the earlier report, but he appealed to the chief over the chemists to remove this warning that innocent substances could have also produced this reading.

Finally, the management in the lab overruled Williams, and Williams had to amend the report including his caveat. And remember, all of this evidence came out in Whitehurst’s letter and in Burmeister’s testimony that there was a rotten egg in the crime lab named Dave Williams.

Now, Gil, you must have known that David Williams had a clear penchant for slanting the evidence and that he was possibly a biased witness. To this day, I’m still amazed, Gil, that you decided to call David Williams as your last witness. And not only did he call David Williams as the Government’s last witness, but this was a very important witness.
This was a witness who was going to summarize the Government’s physical evidence to draw in all the different reports.

And you know what, you should have been there because for this last witness Gil commissioned a beautiful looking, huge model of the Trade Center which he wheeled into the courtroom. And this model had blinking lights and all that jazz. And David Williams, you took him through his testimony and low and behold, I’ll tell you what happened.

David Williams—remember, after Burmeister, the only chemist in the lab—had testified that it was impossible to identify the contents of the bomb. David Williams, on cross-examination, contradicted that and said, “No, I can, based on my expertise and in viewing the distribution of the explosive evidence, I can conclude that, indeed, I can say what the contents of the bomb was and it was urea nitrate.”

Now, more than three years later, in April 1997, the Inspector General released its report into allegations of corruption within the FBI lab. And the Inspector General found that Gil’s last witness gave testimony which, at the very least, was false and misleading. According to the Inspector General’s report, basically Williams had determined that this was a urea nitrate bomb simply because urea nitrate had been discovered in New Jersey. The report concluded for Williams to identify the main charge as urea nitrate based on evidence that the defendants had or could make a compound, is comparable to a firearms expert identifying the caliber of a spent bullet based on the mere fact that a suspect had a handgun of a particular caliber.

Now, the wonder of that event is not that there are biased people within the FBI. What is curious to me is how even when a prosecutor and a prosecution team is as fine as the one in the World Trade Center case is on notice that its FBI expert is biased, is possibly a person responsible for slanting evidence—and this is from the words of people who worked with this expert—that prosecutors in the heat of prosecuting a terrorism case will still choose to call that witness as its last, penultimate and a very important witness. Why did that happen?

The final vignette I want to relate to you is a question of relying on FBI generated evidence. And this was an important witness. Let me again—bear with me just to set the stage briefly, and I’m going to be concluding quite shortly.

Even before the trial began, rumors circulated that someone could disprove my client Muhammed Salameh’s contention that the van used in the explosion had been stolen from him 14 hours before the bomb went off. Basically, the Government’s theory was that my client rented this van, and that he drove it to the World Trade Center. But early on, in
his interviews with the FBI, my client said that's not possible because
the van was stolen from me 14 hours before.

In fact, I thought that this was a good defense, and that I was going
to try to develop it, but early on, many months before trial, newspapers
reported that the Government had found a gas station attendant who said
he pumped gas for a yellow Ryder van driven by my client just a few
hours before the blast and well before—I'm sorry, and well after my cli-
ent said that this van was stolen from him. So, of course, if this witness
were produced and gave that testimony, that our defense would blow out
of the water.

So, you know, on a morning—I think it was December 7th wasn't it Gil?

MR. GILMORE CHILDER: Pearl Harbor Day. Yes. I remember
it well.

(Laughter.)

MR. ROBERT PRECHT: Gil handed the other defense lawyers
and me a report which summarized FBI interviews with this gas station
attendant, which were conducted about a week after the explosion. And
the gas station attendant's name was Willie Moosh.

And according to these reports—we looked at these reports, and our
hearts sank. According to the reports, the FBI showed Mr. Moosh sev-
eral sets of mug shots. In one set, he identified a photograph of my client
as one of the persons he pumped gas for in the early morning hours of
February 26th. And in the second set of photographs, he identified a de-
fendant named Abouhalima, one of the other defendants, a huge hulking
redhead guy, as one of the people who drove a Lincoln following the
van. So, we had this and our hearts sank. The evidence seemed abso-
lutely unassailable. Here is a witness who had identified my client from
photographs just a week after the explosion.

So, Gil, called Mr. Moosh to the stand, hoping that he would dis-
credit, obviously, my client's story. In a case, as Gil noted, that had very
few eye-witnesses, Gil was counting on Mr. Moosh to personally iden-
tify Abouhalima, the redhead and Salameh, my client, in court, as the
persons he saw that night.

Okay. Now, Mr Moosh a small, bespectacled man settled into the
witness chair and smiled broadly at the judge, and he nodded to defense
counsel in the courtroom. We were sitting down right there. And a
Spanish interpreter stood beside him, and Gil asked preliminary ques-
tions to set the stage for his in-court identification.

Moosh had worked as a gas station attendant at a Shell station in Jer-
seny City and had been on duty in the early morning hours of February
26th. Between 3:00 a.m. and 4:00 a.m., about eight hours before the
bomb exploded. A yellow Ryder van followed by a Lincoln sedan pulled into the station. Moosh related in his testimony that he pumped gas for the two vehicles.

Gil asked Moosh to describe the occupants of the vehicle. He testified that the van’s driver wore a closely cropped black beard and my heart sank because, of course, that matched my client’s description and there he was right in the courtroom. And Moosh said that the person driving the Lincoln was a husky guy and he had red hair, a description, obviously, that generally matched Abouhalima.

Then, having kind of established the preliminaries, came the crucial moment. Gil wanted to prove that it was Salameh and Abouhalima who Moosh saw that night. Because the witness had recognized their photographs in the FBI interview only a week after the bombing, Gil had very good reason to be optimistic.

He asked Moosh to look around the courtroom and see if he recognized the man who drove the Lincoln. So, Mr. Moosh kind of looked out into the courtroom and he asked to kind of come down into the well of the courtroom.

Do you remember that Gil?

MR. GILMORE CHILDERS: Vaguely.

(Laughter.)

MR. ROBERT PRECHT: So, Mr. Moosh stepped down into the well of the courtroom, and Gil asked Moosh to look around the courtroom to see if he recognized the man who drove the Lincoln.

And suddenly the atmosphere of the whole courtroom changed. As a reporter for the New York Times described it, the trial took on the air of a television quiz show when everyone in the audience knows the right answer and waits in suspense for the contestant to respond.

So, Moosh left the stand and ventured towards the defense table. He peered at the defendants. Then he looked beyond defense counsel to the back of the courtroom to where the reporters were and looked over the reporters covering the trial. Gil said, “Look all over.”

And one of the defense lawyers, the lawyer for Abouhalima, the redhead, screamed “Objection.” And, of course, Moosh spun his head in the direction of the objection and looked at the redheaded defendant again, Abouhalima. He looked at the defense table again, and then he glanced at the jury.

(Laughter.)

MR. ROBERT PRECHT: He looked at me once. He looked at the jury again and started slowly to advance closer and closer to the jury box.
His pace quickened, but resolute now, he strode right up to the left side of the box and stopped six feet from the startled jurors. He stared at juror number six, a man with blond hair sitting in the front row. He took one step towards him and at that moment another juror sitting right behind him started to wave frantically.

Moosh raised his arm to juror number six and said “It was a person such as this.”

The judge, not amused, said, “The record should reflect that he was pointing at juror number six.”

(Laughter.)

MR. ROBERT PRECHT: Now, Gil, being the pro he is—Gil, to this day, you showed remarkable composure—because he told Mr. Moosh to return to the stand and sit down.

And, Gil, you resumed questioning this guy as if nothing had happened. I’m really quite amazed. But now, Gil, you asked Mr. Moosh to identify the yellow van’s driver. And once again Mr. Moosh left the stand, repeated his movements of a few minutes ago. He looked at the defendants, he looked at me, he looked out at the spectators and then like a heat-seeking missile, he shot right back to the jury box. “It was a person like this one.”

The judge said, “indicating juror number five.”

(Laughter.)

MR. ROBERT PRECHT: At that moment, Gil asked for a side bar conference and the lawyers for both sides gathered around the judge. The defense, I mean we were flabbergasted, and we felt a miracle had happened. We argued, unsuccessfully that the damage Moosh’s identification had inflicted on the Government’s case warranted a mistrial. “It was devastating,” one of the defense lawyers said. And Gil replied, “I don’t think it’s devastating unless I plan to indict juror number six.”

(Laughter.)

MR. ROBERT PRECHT: Over defense objections, the prosecutor obtained the judge’s permission—Gil, you obtained the judge’s permission to show Mr. Moosh those photographs that the FBI had shown the witness and Mr. Moosh—there was testimony from Mr. Moosh that he recognized those photographs that he identified to the FBI.

Now, despite Mr. Moosh’s abundant and at times hilarious failures to correctly identify the defendants, Gil’s colleague, Henry DiPippo, argued in summation that his identification was still reliable, and that the jury should believe Mr. Moosh’s earlier photographic identification. And the case then went to the jury.

Two years later, a fugitive at the time, Ramzi Yousef, was arrested and he was tried in federal court on basically the same charges. But this
time the prosecutors—and Gil was not involved in this case—this time the prosecutors did not call Mr. Moosh to testify. And whereas—

MR. GILMORE CHILDER: Duh?

(Laughter.)

MR. ROBERT PRECHT: But whereas in the first Trade Center case it was the prosecution’s theory, which they argued to the summation, that my client drove the van to the Trade Center explosion and drove it—not only rented the van but drove it to the World Trade Center. Not only did they not call Mr. Moosh in the second trial, this time the Government claimed that someone other than my client drove the van to the Trade Center.

And I suggest to you that this episode really shows the power of how initial information from the FBI can color the Government’s whole view of a case. The prosecutors got their first information about Moosh’s identification from FBI agents who claimed that Moosh had picked out the defendants’ photographs.

That information, Gil, obviously anchored your judgment and kind of determined your view of Moosh’s reliability. If Moosh identified the defendants initially, Gil, the reasoning must have been, in your mind, that his subsequent in-court misidentifications were simply mistakes. And, in effect, your colleague, Henry, argued that.

In fact, Gil, Mr. Moosh’s initial identification was a mistake, because you argued in the second trial that a completely different person was in the van that night and drove it to the Trade Center.

So, I’ve spoken long enough. I hope that I’ve highlighted what I view are some dangers in a terrorism case where you have this very close relationship between FBI who may be intimidating witnesses, FBI experts who may be slanting evidence, and FBI who may be supplying prosecutors unreliable information. And I would suggest that these dangers are heightened in a terrorism trial.

MR. GILMORE CHILDER: Rob, you ignorant slut.

(Laughter.)

MR. GILMORE CHILDER: It’s no—obviously we’re having a lot of fun up here ourselves—it’s no wonder, no mystery that Rob found three of the more uncomfortable events that took place in that year of my life to discuss with you today.

However, let me tell you what really happened.

(Laughter.)

MR. GILMORE CHILDER: Actually, I’m not going to do that, other than to say a couple things about each of the three events.

First of all, in terms of Moosh. I wasn’t counting on him making an in-court ID. I was desperately hoping he would, but I certainly wasn’t
counting on it. He was a—I think Moosh was probably fifty-ish, give or take a couple of years. I don’t remember his exact age. He was a citizen of the Dominican Republic. He had been living in the States for a number of years, a little bit of English, he could understand English. His spoken English was not very great. He spoke through an interpreter. He had never been, as far as I could tell, in a court of law before in this country—it turns out later on he was, but not as a witness—and for all I know, as is the case in many countries, defendants do not have the privilege of sitting at counsel table, being in suits, looking as much like lawyers as the lawyers do, but often are either in stockades or in some pen or some other segregated area.

Mr. Moosh was obviously a very delicate witness, one that I knew I had to treat delicately in terms of preparing him because I did not want to supply him with his testimony. Whatever he was going to say, he was going to say. He was important in my mind mostly because of the fact that he had within a week of the events made photographic identifications from lineup cards.

I knew as the Federal Rules allow that I could get that identification in even if he failed to make an in-court ID. Having said that, Rob’s description of Abouhalima was fairly accurate. I mean, this guy was about 6’3”, about 230 pounds with pretty bright red hair; not the normal person you would associate with some act of Middle Eastern terrorism. I thought that he was going to be able to hit him, because he was the only redhead in the well of the courtroom.

Now, I was wrong. And in terms of Rob’s client, I still call him Salameh. I understand he prefers Salameh, but I had my cultures wrong. My language is wrong, I guess in terms of the pronunciation of his name. But, again, I thought well that one’s a little bit “iffier,” but that’s all right. We’ll take a shot.

I went back to the well a second time, because I’m a guy who can’t get enough of a good thing. But, what I had done, actually a day before or maybe two days before, I’m not sure, I sent a letter to Court and counsel saying that—not mentioning Moosh specifically but citing that specific rule allowing photographic identifications where in-court identifications are not made or for some reason are not available. It clearly is something I was hoping to happen. I thought there was a good chance it would happen, but I was not going to—you know, trial lawyers, especially prosecutors, are often thought of as gunslingers; you take chances. So, I was not going to let the collar of losing the World Trade Center case rest around my neck based on what Mr. Moosh might or might not do in the courtroom. So, I felt confident that I had that photo ID in my pocket, that I was going to get that in.
The other thing with Mr. Moosh, Mr. Abdella, who was one of defense counsel was a—I’ll use the word cantankerous. He was a lot of other things, but cantankerous in terms of his confrontational demeanor with witnesses. It was sort of the way he cross-examined them, and he was very effective at times. I knew that he would see in Moosh a guy that he would go after tooth and claw, and I was not about to over-prepare Moosh.

I spent a lot of time with Moosh, talking about things. I did not, as you might do with some other witnesses where it wouldn’t be so important, take him to the courtroom to show him the layout of the court room, did not discuss where the defendants might be sitting, did not do a lot of things that in other cases sometimes is sort of typical preparation for a witness. And obviously, I’m trying to put the best light on Mr. Moosh as I can because he’s near and dear to my heart.

When he was in the court room there, he did look—actually Abouhalima was, from the witness box, the furthest person in the well of the court room. He was kitty corner all the way over at the defense table, four defendants and eight or nine lawyers. So, it was too many people to have just one row right there. So, it made an “L” and Abouhalima was actually right on the far corner. He had his hair cut. His hair was significantly darker now than the first time I had seen him. I don’t think he was washing any gray out of it, but it was not sort of the large reddish mane that he had at the time. He was impeccably dressed, as were most of the defendants most of the time. And, again, to Mr. Moosh’s credit, I didn’t think there was another redhead in the court room, but the guy he picked had—it wasn’t red, red hair, but there was a strawberry highlight to his hair. And he was probably about 150 pounds lighter. I will concede that.

Conversely, when he picked out juror number five as the person who he attributed conduct to that we would later argue was Muhammed Salameh, he picked out a guy who was dark haired with a beard, exactly the type of person he was supposed to pick out. Now, of course, the juror he picked out, number five, Salameh, was 5’6 1/2”, 110 pounds dripping wet. The guy he picked out was, now I mentioned he was seated. But the guy he picked out was I believe he should have been 6’4”, about 240. But those beards are very deceiving.

In any event, the other thing I would point out just to keep the record straight was the—we didn’t call Moosh in the second trial, obviously. An entirely different case in terms of facts that were being proven among other bits of proof that we had was Ramzi used a statement that he made to an FBI agent being flown back from Pakistan where he was extradited. So, you know, no real reason to Moosh. But the theory that was argued was entirely consistent in the two trials, the driver that we
alleged in the second trial was the driver who actually drove the van into the Trade Center, someone we had attributed—that activity was not attributed to anyone. Moosh testified to someone at the wheel of the van about three or four in the morning and, in terms of driving the van into the Trade Center, was later that day about eight hours later or six hours later. So, that's Mr. Moosh.

Real quickly, Mr. Moneeb clearly was, I mentioned this to Rob, I wasn't—I wasn't sure, although I thought he might talk about Moneeb. That clearly was the—even with Moosh, because at least Moosh I was on my feet, and I thought I might be able to try and do something. I was wrong. But Moneeb was the most uncomfortable day I had in the trial. To hear him on the witness stand talk about a situation which was quite honestly the first time I was hearing it in that perspective. Not surprisingly, the FBI agents didn't tell me, and I'm not saying that Mr. Moneeb's version of things was more accurate than the FBI agents. Clearly what Mr. Moneeb was representing was his feelings which are terribly relevant towards his credibility in other things. But his perception of what was going on at the time when agents came in, as they certainly should in a situation like that, executing a warrant, with guns drawn, securing the premises, handcuffing everyone, making sure that the situation was under control. The guy was scared to death. There's no question about it. And that I'm used to hearing. That's normal. I was not used to hearing the implied pressure of the green card that was placed on him during that interview. This all came out on cross-examination that Rob read to you. I was looking to crawl under the table and hide at that stage of the game. Although I will point out that Henry DiPippo put on that witness and not me, as he did with David Williams.

MR. ROBERT PRECHT: Oh, I'm sorry.

MR. GILMORE CHILDER: No, no that's okay. That's okay. I was lead prosecutor and there's no reason anyone shouldn't take shots at me.

Real quickly about David Williams, I'm only going to say a couple of words because that's one of the IGA's report, and the testimony of Williams is one of the issues that's going to be heard with some post-trial motion hearings next week and probably in the future. The conclusion that David gave of urea nitrate being the composition, the chemical composition of the bomb that exploded in the Trade center was never elicited on direct examination. That came out on cross-examination in answer to an open-ended question which David gave in sort of a totality of the circumstances response. And, in fact, was the—probably should not have given as an expert, but if a layperson were asked that question, the layperson probably would have come up with that answer. Certainly,
the jury did because it was the way the question was worded, it allowed him to incorporate the fact that he knew that a bomb had been constructed somewhere else, etcetera, all these other things. And that’s not to suggest that that’s the way ex-Government experts are supposed to testify. But it wasn’t, as I said, it was not elicited on direct testimony. Had a question like that not been asked, it never would have come from his mouth while he was on the witness stand.

Your turn.

MR. ROBERT PRECHT: I don’t have much more to say, but I would like—we want to give you a break, but if there are some questions, we can entertain them for about five minutes or so. Any questions?

Yes, sir.

AUDIENCE MEMBER: During the trial, were there any CIPA issues; the Confidential Information Protection Act?

MR. GILMORE CHILDERS: There were not. One of the decisions that I made relatively early on—you know, as I mentioned, this continuum was not very long—but that we made, and I reaffirmed two or three different times, was to avoid trying to utilize any classified information because the time frame (a) was so short and (b) it would, I feared, bog us down in too many things when we had to worry about really just the nuts and bolts of the case.

So, I made a decision to forego the possibility of gaining additional helpful evidence that would have been used through classified sources and going with what we had through conventional sources.

AUDIENCE MEMBER: Following up on that, did either one of you use or have to use any evidence that had to be obtained from outside the United States, and if so how did you do that?

MR. GILMORE CHILDERS: We did. We didn’t use any physical evidence of the type that will be used in the Kenya-Tanzania bombing trials. I mean, our crime scene was here in the United States, only a few blocks from the courthouse. We did have other evidence though, physical evidence. We had witnesses. We did have documentary evidence and things of that nature. We had flight records that had to be obtained from Saudi Arabia and from Jordan. We had other documentary evidence that had to be gotten from Egypt and from Pakistan.

So, it was not the type of evidence that presents the sort of classical evidentiary problems that my colleagues are going to be presented within the African Embassy bombing situation, in terms of chain of custody and collection methods. It was really just a matter of authenticating business documents and sometimes official records from other nations.
AUDIENCE MEMBER: More than in almost any other kind of case, this has sort of been—the FBI must feel enormous pressure to find suspects, particularly because New Yorkers were in a high state of unease. Are there risks in this context that the FBI will engage in tactics and techniques that in the end either lead to picking the wrong people or to contaminating the case and that these sorts of cases need a very, very special kind of investigation?

MR. GILMORE CHILDER: I think there's no question that that possibility or that fear is present and rightfully so. I think that during the Trade Center, the advantage we have today as I mentioned in the beginning, a lot of the issues that have been talked about these past two days were completely novel on February 26th. Not that they hadn't ever been thought of, but they were never thought of in concrete terms before, you know, the afternoon of February 26th, 1993.

Since then, a lot has happened. A lot of thinking has taken place. I think, as is always the case, but even more so in these cases, the system is dependent, no question about it, on what my Criminal Procedure professor in law school entitled, "enlightened prosecution," and the fact that prosecutors are hopefully doing the right things for the right reasons. And that has—you know, that's our traditional check and balance on the first level; obviously, judicial scrutiny later on.

But there's no question about it, these cases do create that additional pressure. They create some additional concerns that, you know, had we more time, we could talk about that. I know it bothered Rob and the other defense lawyers in terms of the pervasive feeling of fear. The fact that the courthouse was turned essentially into an armed camp for security purposes.

You're dealing with situations where there are threats on prosecutors, on judges, on the courthouse, on national leaders, and it's impossible to erase these things from people's minds, both the participants and the jurors and the public, and it's certainly an imperfect system. And in that case we tried to deal with it as best we could in, sort of, a virgin environment.

I think each successive trial like this—that unfortunately we've had to go through in Oklahoma City, the Manila air bombing to a lesser extent, simply because that activity took place overseas and not in the U.S. But again, the African Embassy bombing trials when they come to trial in New York—I think we've gotten better each time.

And discussions like this are incredibly valuable, because this is where the rubber meets the road with everything that's been discussed these past two days. And talks about whether we revamp the American
criminal justice system to deal with cases that are really more than what the system was originally designed to deal with come into play there.

I mean, that was one of those questions I often thought to myself. Are we even equipped to try these people as normal criminals, as we would a guy who snatches a purse on the subway in this country using essentially the exact same set of criminal procedure laws? And as I said, I never got the answer to that until after the trial. But, you know, that's why I am truly grateful for the existence of this symposium and honored to be a part of it.

MR. ROBERT PRECHT: And on that note, that provocative question, I want to thank Gil Childers and thank the organizers for giving us this opportunity.

MR. GILMORE CHILDERS: Thank you, Rob.

(Applause.)

(A brief recess)

INTERNATIONAL CRIMINAL COURT

PROFESSOR JOSE ALVAREZ: Welcome to the last panel. I have told all of the panelists they will have 15 minutes each. I will very briefly introduce them.

First is Henry King. He is a graduate of Yale College and Yale Law School. He is a former U.S. Prosecutor at the Nuremberg trials, a former General Counsel of the U.S. Foreign Economic Aid Program, as well as the former Chair of the Section on International Practice of the American Bar Association.

He has been the Director of the Canada/U.S. Law Institute and Professor of Law at Case Western Reserve, and he's Of Counsel to the law firm of Squire, Sanders, and Demsey. He served as a member of the Task Force on War Crimes for the former Yugoslavia, and he's just recently finished a book on Albert Speer, one of the Nuremberg defendants.

Next up will be Michael Scharf. He is now in academics, but was formerly in the Office of the Legal Advisor in the U.S. State Department. While there, he served as counsel to the Counter-Terrorism Bureau and also is the Attorney Advisor for Law Enforcement and Intelligence, Attorney Advisor for U.N. Affairs, and was a member of the United States delegation to the General Assembly and to the Human Rights Commission. He has also served on the same task force as Professor King.
He left the State Department in August, 1993 and is on the faculty at the New England School of Law, and thanks to a grant from the Soros Foundation, has an enviable contract for his students to help the prosecutor in the Balkan War Crimes Tribunal.

And last up will be Mark Zaid, a solo practitioner in Washington D.C., who specializes in litigation and lobbying in matters related to international transactions; torts; crimes; national security; foreign, sovereign, and diplomatic immunity; defamation; and the Freedom of Information Act.

Mr. Zaid has been well-known to some of you. I think we’ve all seen you on CNN on occasion. His clients have been whistleblowers, others have had grievances against the entire alphabet soup of federal agencies represented here and inside the beltway. He has also served on the task force, but this time the task force on the proposed protocol rules of evidence and procedure for the war crimes tribunals.

All of them have agreed to talk about the International Criminal Court. And just to provide background, this is an area that most of you know a little bit about, but ironically it’s an area that has, as you’ll hear from the talk, does not really touch on many of the crimes discussed in this room on the past panels. That is, ironically, the International War Crimes Tribunals, the two established now for Rwanda and the former Yugoslavia and the one established—and hopefully it will be established, in fact, not just in treaty—the permanent International Criminal Court, for the crimes of genocide, war crimes and crimes against humanity. And most recently these have been committed primarily inside the territories of states.

So, we are in the ironic position of having international criminal tribunals, but primarily adjudicating crimes committed inside states, not the transnational forms of crime that have been the subject of much of our discussion today.

We will start with a reflection from Nuremberg by Professor King.

PROFESSOR HENRY KING: Thank you Professor Alvarez. I’m happy to be at this symposium and I’ll be here until the end.

One question you might ask me is how I got over to Nuremberg. Well, the answer is I married into it. I got married on October 16, 1943 and was admitted to the Connecticut Bar at the same time. I went through the law school in two years instead of three.

I went down to New York with the Millbank firm and I worked so long that my wife arranged dinner meetings at six o’clock at Schrafft’s on Fifth Avenue. At one dinner meeting that we had, which was the primary time we saw each other during that period, I asked her what she did. And she said, “Well, I can’t tell you what I do. It’s top secret.”
She said, "Well, what do you do?" I said, "Well, what I do is I go down to the Chase Bank, I look at corporate trust agreements, I amend them, I change them, I revise them."

All of a sudden in mid-sentence, she interrupted, "My God, there's a world out there. We ought to be part of it."

And it wasn't long thereafter, about two weeks after, that a colleague of mine from Yale Law School came out for dinner. He announced to us that he was joining the U.S. Prosecution staff at Nuremberg.

Well, I should have yielded at that time because I knew where I was going. My wife wouldn't let me go any other place. And so she pushed me on that boat for Nuremberg, and I caught the spirit of it when I saw the devastation, and it's been with me ever since. It's a personal mission.

My views on the International Criminal Court are set out in the article that's outside. They'll be in the Case Western Reserve International Law Journal, 31 (Case W. Res. J. Int'l L.) 47. It's a massive article.

But to start off, Nuremberg was the first International Criminal Court dealing with crimes against the peace of the world and was largely Robert Jackson's creation. One thing I knew—I worked on Jackson's closing statement in July of 1946 at Nuremberg. I worked long hours. I prepared beautiful prose, but he threw it all out. He used his own winged words. Jackson followed Rudyard Kipling's motto, "He travels furthest who travels alone."

Now, dating from his speech before the American Society of International Law on April 16, 1945, through the London negotiations in the summer of 1945, for a charter for the first International Criminal Court and finally its implementation at Nuremberg, Jackson led the way on this unique enterprise which bore no parallel in the history of the world. Jackson played a key role, not only in the London Charter of August 8, 1945, which provided the legal framework for Nuremberg, but also in the location of the trial at Nuremberg and in the selection of the defendants.

Robert Jackson's Nuremberg covered three sets of crimes together with conspiracy charges. These were crimes against peace, aggressive war, a charge which was unique at that time. War crimes, more traditional set of crimes, crimes against the laws of war, primarily as set forth in the Hague Convention of 1899 and 1907 and Geneva Convention of 1928 dealing with this subject. And finally crimes against humanity covering crimes such as the final solution against individuals for racial, religious and political reasons.

One thing that you should keep in mind is that Nuremberg was fair. Jackson said he wouldn't be a party to anything unless there was balance
in the proceedings. And the esteemed British judge made sure that that was true. Judge Geoffrey Lawrence was a model of judicial propriety.

The important thing here was that you had three defendants who were acquitted. In my case, the case against the German General Staff and high command, the court found that they were not a cohesive group. So, in a sense, I lost my case together with others. Of course, we later tried them as individuals.

Two things stand out in connection with the trial. First, I always remember Albert Speer’s closing statement at Nuremberg where he expressed concern that the destructive effects of technology would outrun man’s ability to relate to his fellow man. What he meant was that you had to have a legal framework, starting at Nuremberg, to deal with destructive technology, which we’ve seen a lot of here today.

The other thing I saw were the effects of what happens when you don’t have a structured place to deal with conflict. And the important thing here was that Nuremberg was a devastated city. Holtz had held until the very last. It had been destroyed, in part, in a British raid in 1944.

So, we had ourselves a mission. I was on my own after Nuremberg. I didn’t need any prodding. And after Nuremberg, those on Jackson’s staff such as Thomas Dodd, as well as Nuremberg alumni such as myself, were hopeful that Nuremberg could be institutionalized through a stronger U.N.. And we, therefore, joined the United World Federalists which favored a tight knit U.N. But the time was not right for it, because of the Cold War. Public interest in the permanent implementation of Nuremberg waned. The world was not, at that time, ready for concessions on sovereignty which would save lives.

Now, over 50 years after Nuremberg and with the end of the Cold War, Nuremberg has become a beacon light of history. And there’s world renewed interest in implementing it. We now have in place tribunals at the Hague and in Rwanda dealing basically with Nuremberg-type crimes.

Moreover, we have a Rome Statute which would establish an International Criminal Court when ratified by 60 nations. The heart of the crimes covered by the Rome Statute are Nuremberg-type crimes. We are fortunate to have the statute in place today for ratification. And it’s through the efforts of the non-governmental organizations Phillip Kirsch and Cherif Bassiouni, as well as the peace-loving nations of the world that exist today.

The important thing here is that aggression has to be covered by definition that hasn’t been defined, but the Nuremberg prosecutors pressed hard for the inclusion. I’m sure it will be eventually.
Now the question is presented as to whether the court could cover, in addition to Jackson's Nuremberg-type crimes, crimes of terrorism and drug traffic. I think this would present an additional dimension to the work of the court. The next step would be fraught with complexity.

It should be noted, in this connection, that Jackson's Nuremberg-type crimes have been in public focus for over 50 years, and that the basic definitions of these crimes have, with a few exceptions, remained the same. Moreover, they have been the subject of trials and are trial tested.

The same cannot be said about terrorism and drug traffic. There's been no unanimity on the definitions of the crime of terrorism. In the case of terrorism, one country's terrorism may be another peoples' heroism. One helpful note, there's a network of treaties between countries to cover certain acts of terrorism, but they provide no international punishment, and there's been little or no progress in establishing an International Court which would deal with terrorism on a universal scale and punish it.

In the case of drug trafficking, efforts have been made to establish an International Court to deal with that. But some nations have resisted this because they feel that the establishment of the court would hamper their efforts to deal with this scourge. They feel progress is being made on a national level, and that once an international court is established, it would interfere with such efforts. The techniques for dealing with drug trafficking are confidential, and they don't want them publicly known.

All this may depend on the question of sovereignty of what the nations of the world are willing to give up in order to create a better world. Do they, in the case of terrorism and drug traffic, wish to create a better world by defining these crimes and trying to control punishment, or do they want to continue to preserve their sovereignty and resist efforts to create an effective international mechanism to deal with it?

I'm taking a more conservative gradualist approach at this time. It's also in the best interest of the court. To try to tackle overly complex and unsettled issues at this point would both stifle the growth of the court and jeopardize its long-term viability.

Only after the world establishes a better and ratifiable consensus on these issues should a world court attempt to take them into its confidence. Now, one point that I did want to say that I had proposed with Louis Sohn, to the Section of International Law, a proposed statute where you'd cover certain crimes such as genocide, crimes against humanity, war crimes, and aggression, and then you would add, with the agreement of 30 or 40 other countries, after a while, other crimes such as drug trafficking and terrorism. So that countries that want to deal with those crimes could accede to that particular section of the statute. There
isn't any chance for that immediately now because you only have the possibility of amending it in seven years. But this is one idea that I think would respond to Professor Bassiouni's comments last night.

Now, through Robert Jackson's efforts, mankind crossed the Rubicon at Nuremberg in internationalizing certain crimes and in dealing with them. At Rome, the U.S. turned its back on Jackson's vision and was joined by Iraq and Libya in opposing an International Criminal Court. But most law-abiding nations believing in a rule of law in the world today, supported Jackson's vision, and the Rome statute was agreed upon.

It seems that if the world is to progress further in dealing with international criminal problems, such as terrorism and drug traffic, there must be grass roots level support for such an initiative to blunt the thrust of assertions of national sovereignty.

And here I think our students who must live and work in the world of tomorrow can play a key role. And I encourage all of you here today who are students to make it a part of your personal agenda to do so.

Closing thoughts. Individuals do make a difference. Just as Jackson was assigned to handle the task of trying the major war criminals on May 8, 1945, on November 21, 1945, the largest and most important trial in history was underway. At Rome, Phillip Kirsch and Cherif Bassiouni made a difference, and so did the members of the NGOs who were present at Rome and those who supported them.

We must build permanent institutions to insure a rule of law in the world. The International Criminal Court would be such an institution. Ad hoc institutions such as war crimes tribunals for Bosnia and Rwanda are not enough. They're here today and gone tomorrow. A permanent International Criminal Court, viable and in place, can be the greatest dissuader from International Criminal Court to conduct.

Almost everyone is for a rule of law in the world. It's like motherhood. But the establishment of a true rule of law in the world involves giving up some sovereignty. The U.S. has not been willing to do this. Other nations have. This is the basic difference between the U.S. and other states on the International Criminal Court. The Europeans found that by giving up some sovereignty, they achieved security. Hopefully, the U.S. will discover this truth some day as Robert Jackson did some 51 years ago.

Finally, we have to stop the killing. We can do so by insuring that Robert Jackson's vision as implemented at Nuremberg becomes a reality, not only for the rest of the world but also for the U.S. The U.S. should not be on the sidelines as others create a more secure world under rule of law. We should be in there fighting for the rights. You, here
today, by getting personally involved can help. The non-governmental organizations who worked so hard in Rome to make the Rome Treaty a reality are waiting for you to join their continuing efforts.

As Edward Wilkinson at Great International said some years ago, "History teaches that without ideals, there can be no progress, only change. The stars that guide you may never touch with your hand, but following them you'll reach your destiny."

I'm an idealist. I keep my eyes on the stars. Take it from me, it makes life more worth living. My advice to the students here and everybody else is to follow the stars.

Thank you.

PROFESSOR MICHAEL SCHARF: Listening to Henry's discussion of Nuremberg, I'm reminded of what the motto of Nuremberg was, "Never again."

The idea was that never again would the international community sit by while an entire ethnic religious or national group was slaughtered in genocide. And the hope was that there would be a permanent International Criminal Court. In fact, when the U.N. was created a year after Nuremberg, the first project of the United Nations was to create a permanent International Criminal Court. Fifty years later, they're still plugging away at that.

Now, it was because of the Cold War paralysis that there wasn't any permanent Nuremberg. And during that time, Professor Rudy Rummel wrote a book that I advise everybody to read because it's so startling, called *Death by Government*. He documents that 170 million civilians have been killed by their own governments in war crimes, in genocide, and crimes against humanity since Nuremberg.

We've seen genocide in Cambodia. We've seen it in Uganda. We've seen it in the Soviet Union. We've seen it in East Timor. And yet the world did nothing. And by doing nothing, it encouraged leaders like Milosevic and Karadzic and the Hutus in Rwanda to think that they too could get away with genocide, and that they wouldn't have to pay the price.

And that's why it was so amazing that when the Cold War finally ended in the 1990's, the world actually created a new International Criminal Court for the former Yugoslavia. Two years later, they created one for Rwanda, and it was hoped that there would be International Criminal Courts created for all sorts of situations all around the world. And these courts actually have started to work, because, while at first they were thought of just papering over the international community's failures, they now have large numbers of high level defendants in cus-
tody. In Yugoslavia there is, I believe, 31 out of 65 indictees. And for Rwanda, there are 25 out of 31 indictees.

Unfortunately, something called “tribunal fatigue” set in the Security Counsel. The political nature of creating these courts, appropriating money, appointing and approving prosecutors, electing judges, coming up with rules of procedure became so politically exhausting that the members of the Security Counsel said we’re not going to do this any more. We need a permanent institution. And the U.S. Government, the Executive Branch, and the Congress, and the American Bar Association, and the National Judicial Conference all endorsed the concept of a permanent International Criminal Court going into Rome. There was all sorts of optimism that Rome would actually achieve this 50-year old goal.

Now, what happened at Rome is that the United States embraced a concept which is—I’m going to use a word that we’ve heard before, but in a sort of new context, and maybe I’m going to coin it in this context from now on—“American Exceptionalism.” The idea is that America is special. We’re exceptional. We are the one country that has the most responsibility, because of our military and economic might, to go all around the world and put out all the brush fires and solve all the humanitarian crises. And because we’re on the line, we have more exposure. And because we have more exposure, there should be an exception to us. Therefore, exceptionalism with both meanings.

Because of this, the United States at the end, voted against the Rome Treaty because it did not have an iron clad exception that would prevent or shield U.S. servicemen and U.S. officials from ever being indicted by the Tribunal. And the United States ends up being one of seven countries—other than Israel, they are the seven worse countries—or the five other worse countries in the world that you can possibly want to keep company with. It’s Iraq and China. It’s the Sudan, which we’ve been talking about today and Libya and Yemen and just all of the rogue regimes we’ve been talking about this weekend. That’s who the United States joined in voting against. Now, the members of the Security Council, they end up voting in favor of this court because the United States delegation achieved a great deal of protections that they thought were sufficient.

A week after the Rome conference ended and the United States left in what has to be described as a huge diplomatic failure, at least that’s how they’ve self-described it, Jesse Helms decided to have hearings at the U.S. Senate, and I was called in. And I was totally sandbagged. It was David Scheffer who was opposed to the Court. It was John Bolton who was opposed to the Court. It was Lee Casey who was opposed to
the Court. And Diane Feinstein calls me in and says, “Say nice things about the court.”

Well, Helms starts out this hearing and let me do a Helms imitation. I spent seven years in North Carolina, so I’ve perfected this over the years. He says, “This court is the worst thing to emerge in 200 years. We need to kill the court. I propose a four-point plan. Point number one, we will tell any country that ratifies the ICC statute that we will withdraw American troops. Point number two, we will pledge to use the Security Council veto to make sure that the Security Council sends no cases to the court. Point number three, we will block any funding from the United Nations to go to this court. Point number four, we will revise our status of forces agreements so no American servicemen will ever be surrendered to the court. If we follow this recipe we will ensure that the ICC is dead on arrival.” And that was his goal.

Now, David Scheffer was very noncommittal about this four-point plan, but what he did do is he downplayed significantly the U.S. success at Rome. And what happened—and I believe this is what has happened, looking into a black box, and no one will really know because no one’s admitting the case—but I think that the Justice Department felt that everything they went to try to get, they achieved.

The State Department felt that they got most of what they wanted to achieve and it was enough. And the Defense Department headed by Republican, Bill Cohen, who’s friendly with Jesse Helms, put his foot down and said, “Without a veto against having U.S. troops, we vote no.”

And Bill Clinton is not the President who can stand up to the Pentagon. He is the President who has been accused of draft-dodging, who started his office with the gays in the military initiative, and he is weak on military issues and he was not going to take on Bill Cohen.

And so the stars and constellations unfortunately lined up against the ICC. So, Scheffer doesn’t want anybody to know that the ICC has all these wonderful protections that will make sure that the worst case scenarios that he keeps preaching won’t actually happen.

For instance, Article 15 of the ICC Statute reduces the possibility of an international “Ken Starr” problem; that is, a rogue prosecutor who’s just out to get the United States. It requires that before an indictment can be brought, the prosecutor has to get the approval of two of three judges in a pretrial chamber. And that is appealable.

Secondly, Article 8 of the ICC Statute reduces the concern that U.S. personnel in peace-keeping operations or in a situation like the USS Vincennes that was discussed earlier today, would ever be brought to this court. Because it says that the only kind of war crimes that are within the court’s jurisdiction are, quote, “serious war crimes that represent a plan...
or policy.” That does not mean the random acts of peace-keepers are a mistake by service people on the *Vincennes*.

Article 18 is this concept of complementarity, and they added teeth to it, so that if the U.S. investigates a situation in good faith, that shuts down the jurisdiction of the International Criminal Court automatically for six months.

And the only way the court can then proceed thereafter is if the prosecutor convinces two of three judges that the U.S. decision was done in bad faith. And all the U.S. has to do is show the evidence, show that it had a process, show that it had independent judges and it shields that decision. And if the U.S. does not like what the two of three judges conclude, that is appealable to the full en banc court.

Article 16 of the ICC Statute says that the Security Council can vote affirmatively to make the court shut off any proceedings. And if the U.S. President, for instance, was ever indicted by the court, you could get the other four members of the Security Counsel to agree this is not in our interest. Next time it will be you and they’re going to vote together to make sure that the court isn’t used for a politicized process.

Now, the other thing that David Scheffer has tried to do in all his speeches, and I’ve been on five panels now since July where he and I have debated. Unfortunately, it’s not here, but I’ll tell you his side, and then I’ll tell you my rebuttal. I’ll even give you his rebuttal for fairness.

He’s attempting to marginalize the court and say it is an irrelevancy to the United States. By coming up with a novel argument that I think is so bad that history is going to look back at it as the same kind of nonsense as the reinterpretation of the ABM Treaty.

This is his argument. He says that the International Criminal Court is a treaty-based court. Under international law, a treaty cannot subject the nationals of non-parties to its jurisdiction. On its face, it makes sense. It sounds reasonable.

Here are the problems with that argument. First of all the crimes in the International Criminal Court Statute are crimes that are subject to universal jurisdiction. That’s genocide, grave breaches of the Geneva Convention and crimes against humanity. Those people are treated like pirates used to be treated years and years ago as hostis humanis generis, enemies of all human kind. Any country that obtains custody over one of these people has the right to try them. But this isn’t really a court based on universal jurisdiction. It’s much narrower than that. The court can only operate when one of two countries gives it approval. Either the country where the act occurred, i.e. the territorial country or the country of the perpetrator, the nationality country.
Now, it has long been held that when a U.S. citizen goes to another country and commits a crime abroad they are subjected to that country’s jurisdiction, whether or not the U.S. has a crime that relates to that. There’s nothing special about this. If U.S. service people are committing crimes in the territory of countries that are party to the court statute, of course, they themselves could prosecute. And there’s even a precedent where the United States has prosecuted based on treaty for crimes that were committed by nationals whose countries were not party to the treaty.

I’ll give you an example of this. Fawaz Younis, a case I worked on when I was at the State Department, he hijacks a Lebanese aircraft, he’s a citizen of Jordan. It turns out there are two Americans on the aircraft. We lure him into international waters, we arrest him, we bring them to the United States.

We prosecute him under the Hijacking Convention, a treaty that gives us jurisdiction to do so. He says, “My country, Jordan, wasn’t a party to the treaty. You can’t do that.”

If David Scheffer’s statements on the record of the Senate and before the U.N. had been on the record back then, we may have lost that case because he would have tried to have the United States estopped from arguing differently. Instead, we won the case because the court recognized—and this has been reaffirmed just last year in another terrorist hijacking involving an Egyptian airliner—that the United States can exercise jurisdiction even over citizens of a country who is not party to the treaty.

And that’s all that this International Criminal Court is purporting to do. Now, David’s response to this was that is national courts trying cases. This is different. This is an international tribunal. And I haven’t yet rebutted Dave on this, but what I will tell him is you’ve got to read the Nuremberg judgment. Because what the Nuremberg judgment—and I was just rereading it the other day—says is that the four countries that occupied Germany were delegating their sovereign right to prosecute themselves to an international tribunal. That’s the precedent from over fifty years ago, a precedent that the United States is proud of, a precedent that suggests that David Scheffer’s argument is hogwash. It’s not only a bad argument, but I think it can undermine our law enforcement interests with regard to terrorists.

And what this shows is that the U.S. is so desperate to try to marginalize this court, to say that this court is not going to have an effect on the United States if it’s not a party to it, that it’s grasping for straws and coming up with very troubling arguments. If the U.S. admits that U.S. personnel and officials could still be indicted by the ICC, then the U.S.
has to admit that it obtains very little from remaining outside the treaty regime.

Thank you.

MR. MARK ZAID: I’m going to come at it from a little bit different angle, one that’s somewhat more narrow. I’ve worked on aspects of the court, primarily from the NGO perspective and the academic perspective even though I’m a practitioner, on issues of terrorism. I entered into that field because of something very close to me, representing Pan Am 103 families for six or seven years now in cases against the government of Libya.

And so I’m taking it very personal in trying to get the crime of terrorism or a specific crimes of terrorism within the jurisdiction of the ICC. And that’s been a battle much akin to what Henry King was saying with aggression that was being, in many ways lauded by the international community, but aggressively opposed by the United States government in particular and some of the other major powers.

Now, to me what the ICC represents is a political court. And I say that in the sense that it’s a political court designed to depoliticize and/or desensitize certain cases. Cases that could not, for a variety of reasons, and I might touch on some, could not or should not be brought in national jurisdictions.

One example, and we had a panel a few years ago at the ILA that, in fact, Jose, Michael, and I were on, right before the Tadic decision came down. And we discussed after all the months that Tadic had been brought to trial was: is Tadic the type of individual that we want before an ICC.

I don’t remember what the others said, but I know I said, and it was put into a Law Review article, that, no, Tadic is not the person that we want seen. ICC, or in that case, the Yugoslavian Tribunal was designed for individuals of much higher level; that Tadic could have been tried before Germany where he was first taken into custody, and you needed a court that could handle politically sensitive crimes, and the act of terrorism in many ways is that type of crime.

Now, it depends on the specific context, of course. I missed the panel on defining terrorism, but we’ve all had to deal with that in our terrorism cases. Terrorism cannot really be defined. I always used to quote, I think it was Justice Powell who said in a pornography case, “I can’t define it. I know it when I see it.” And so when we were working on terrorism legislation on the Hill with respect to sovereign immunity issues, when Senator Spector tried to push forth this bill discussing this definition of terrorism; ‘Terrorism is etcetera, etcetera, etcetera.’ We said, no way. We cannot push that through. This is what we need to do.
We’re going to specifically define it by convention. Professor King mentioned that.

The Montreal Convention, if you commit an act of aircraft sabotage or the Hague Convention, you commit an act of aircraft hijacking you could be brought before the subject matter jurisdiction of the court. That is a very simple aspect of “when I see it, I can see that a violation of that particular act.”

And when we’re talking about international terrorism cases, the sensitivity of those expands way beyond just the one national jurisdiction. And we’ve seen how many problems come up in various terrorism cases.

When I was in law school, I worked on, as my Law Review article, “Suing Terrorists.” That was one of the reasons how I got into the 103 case as a practitioner. My focus was on the Achille Lauro hijacking. And if you remember what happened when Leon Klinghoffer was killed, and the United States forced down the airline to an American Airforce Base, I believe it was, in Italy. And then proceeded to be surrounded by Italian troops who refused to allow the hijackers to be taken into U.S. custody.

Now, the pledge was, by the Italians, that in exchange for the U.S. backing off, the Italians would prosecute the individuals. They did. They convicted them. They incarcerated them and they let them go, secretly, at least half way through their sentence. And sure enough, obviously you can look at what the reaction of the United States Government and certainly the Klinghoffer family was.

We had another case, I believe the individual was Rashid, where an airline was hijacked and taken to Malta. And Rashid was prosecuted and sentenced to 20 plus years in prison. There were Americans on board. And he was released in an amnesty after about seven years. And Malta would not extradite him to the United States because of sensitive political pressures within the Government of Malta. So, a deal had to be worked out where Rashid was taken to Africa, on the way to wherever he was going and we worked out a deal with third countries in order to finally grab him and bring him back to the United States and he was prosecuted in Washington, D.C.

Mir Amil Kasi was another case where we weren’t able to get custody over him for several years because of the sensitive political situation in Pakistan. Whereas, different from Ramzi Yousef, who if I recall, was not a Pakistani citizen. So Pakistan felt less pressure in surrendering him. Kasi was and it took enormous pressure to get him back in the United States.

Now, what this shows for these cases that national jurisdiction certainly can work. And the notion of complimentarity was mentioned. And in the statutes as they had been provided or pushed up and to the Rome
Statute where treaty-based crimes, certain crimes were included, the notion was always that, if possible, the national courts would be able to exercise jurisdiction just as it has been in all of these cases. It would only be in certain situations that the ICC would have to take jurisdiction, or at least would be sort of conceded jurisdiction to prosecute these crimes.

And from my perspective, what I’ve always argued is that Pan Am 103, if any case, is the type of case that demands a world court attention, because of the overwhelming problems that have been encountered between the governments of the United States, United Kingdom, and Libya, and to a lesser extent some other countries too. Well, you can even you look at France and Germany and Italy having problems because of that. All because of political pressures—Italy for buying its oil from Libya, Germany buying its oil from Libya—and not wanting to increase sanctions.

Libya, not being able to turn over these two individuals to a U.S. or U.K. court, because of internal pressures, legitimate pressures to Kaddafi that I think, if he did, it would be most likely susceptible or subject to a coup attempt. And it is because of tribal issues involved with the court, as well as saving face for Kaddafi, that he is in no way going to turn over these individuals to his dreaded enemies.

Now, the Montreal Convention became a problem. And I know you heard earlier about it. I missed that panel, unfortunately, as well about the ICJ case involving the United States, the United Kingdom, and Britain. Now, the draftsmen of the Montreal Convention never, as far as I’m aware, came up with the thought that, “Well one day when we have this extradite or prosecute theme, that the country, with whom extradition is sought from or surrender in this case because there’s no extradition treaties with Libya by the U.S. and the U.K., was actually the state alleged to have complicity in the act, which gives it even a greater reason why it would not want to necessarily extradite these individuals. And Libya has said all along in this case, that we’d be very willing to prosecute them, but U.S. and U.K., you have to give us the evidence. You can imagine what the U.S. and the U.K. position is on that.

The crime of terrorism, in relation to an ICC, has been around for a long time. When the ICC really started to pick up, after World War I, terrorism was just as strong an issue back then as well. A multitude of conventions have proposed the ICC in the ‘20s, the ‘30s, the ‘40s; all made reference to terrorists crimes.

And then as Michael has said, it became bogged down in the Cold War, and the issue pretty much died until it was revived in 1989 by, I think it was Trinidad and Tobago, as I recall and then really picked up
steam in '93 with Yugoslavia. And originally, what was at issue for jurisdiction were the three core crimes that everyone always agreed on as well as aggression and then treaty-based crimes. And there was a whole list. They just referred to an annex. Unfortunately, they basically listed every treaty that ever existed in the world, including these treaties that probably most of you have never heard of, some of which have probably never been enforced, but yet this crime would be brought before an ICC. And as the treaties started and the discussions started to take stronger shape, people started to focus much more on the treaty-based crimes, and whether or not they should be included.

Problems started to arise. And you saw a disparity between countries as to whether or not treaty-based crimes should be put in. And one of the strongest voices of opposition or the substance of it was that by including treaty-based crimes you’re going to trivialize the court.

And Bassiouni would always site the example of you’d be trying someone of genocidal proportion like Pol Pot in one court, in Courtroom A and in Courtroom B, you would have somebody who had shipped drugs from one country to the next. And there would be this disparity. And without a doubt there are some legitimate concerns. In fact, Trinidad and Tobago had first put it forth because of drug issues. There were legitimate concerns as within our own domestic system of getting overwhelmed by drug cases or even minor terrorism cases, like actually Fawaz Younis is.

I represent the primary witness against Fawaz Younis, actually. There were many reasons why Fawaz Younis was brought back to the United States, even though his crime had nothing to do with the United States except for there happened to be, I think there was a father and son on board the plane, in the back. It had to do with other considerations.

But for awhile the U.S. didn’t take a position on terrorist crimes. We weren’t quite sure where it was going to go. And then in '95, when we were going through the ad hoc committees, they finally spoke out. And the reason for not including terrorist crimes came down to countries don’t have the resources to engage in large-scale intelligence gathering. We don’t want to share our intelligence to an ICC. Meaning let’s say there’s a Brazilian prosecutor, we’re not going to open up our intelligence files to some foreign prosecutor to rummage through and decide what’s what and how is it obtained, etcetera, etcetera.

Also resources, investigation, all of these things that the police part of the court would not be able to do. Now, looking in a narrow sense, some of that makes sense. Looking at a broader context, at least for myself, I have a lot of trouble distinguishing those rationales from prosecuting anyone convicted or accused of genocide. I don’t see how
the United States feels that putting together a charge for committing genocide and what intelligence gathering is involved with that, what resources are involved with that, what investigation is involved with that, etcetera, etcetera, has anything different.

And much of what it comes down to, I think, is turf wars. The United States—and it’s not just in the U.S., it’s some of the other western powers too, but it’s primarily the United States—does not want to relinquish its ability—and this was mentioned a little bit in the panel before—to go after and prosecute someone who might have targeted the United States citizens specifically for the fact that they’re U.S. citizens, that the policy issues are so far greater than for instance allowing a Milosevic to go before an ICC on a genocide charge when it has nothing to do with the United States.

And on drug issues, one of the things that actually has been stated was that some of the individual states in the United States and federal government didn’t want to necessarily give up the money that could be recouped by going after the drug dealers in forfeiture proceedings.

As that started to push forward, terrorism and treaty-based crimes started to fall off even more so, and it became much more difficult despite the strength of the NGOs to push for these crimes to be included. Even though as everything went along, the Libya case was demonstrating the necessity of having an ICC. So, when we were working for Bassiouni in Italy, and we were pushing issues at the prep-coms and the ad hoc committees, two things that we came up with in order to push this to allow an ICC to have jurisdiction would be for one, terrorism crimes would only go before the court in very particular, specialized situations where some of the countries involved would actually cede jurisdiction over; the Pan Am 103 case, Libya has continually said, send it over to an ICC or a version thereof. It was the U.S. and the U.K. that had refused only until this past August.

So, when you have a situation of such political magnitude where the countries are presumably, at least now, all willing to let an International Court take care of it, let it take care of it. Another possibility, in answer to the U.S. concern of sharing—a legitimate concern—of sharing intelligence information was allow a state prosecutor to step in in an ICC setting, a special prosecutor. So that when you have, if you can demonstrate legitimate security-related concerns, you actually have an individual from that government who has those concerns act as the special prosecutor in that sense. And in many of the early conventions, in the ‘20s, ‘30s and ‘40s, that spoke about terrorist International Courts, all made procedural provisions for that very regard. And, in fact, the
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U.S. suggested it in '95. And then somehow it just disappeared when we got closer to the actual convention.

And that would have allowed, in fact, all of these—many of these cases to go forward. And what, in fact—well, I never understood what the problems from the U.S. perspective were and any of the others, because of course, the prosecutor is never supposed to be—while they’re searching for the truth, they are a biased individual when it comes down to it. They are searching for the truth in order to secure a conviction, whereas, so long as the court maintains its impartiality, that is what should be the key provision.

What we’ve seen, and I’ll end up here, was as mentioned before, terrorist-based crimes, treaty-based crimes fell out, and it became a seven-year delay position to be reviewed in seven years. I would dare say in seven years we’ll probably still be talking about whether we prosecute these two alleged Libyans. And maybe then we can figure out if it would have been a smarter idea to have terrorist crimes, certain terrorist crimes, within the ICC.

PROFESSOR HENRY KING: I just wanted to add one point. At Nuremberg, the U.S. led the way. In other words, Jackson tried to create a whole new world which would be coming into reality, as Michael Scharf pointed out. At Rome the U.S. fought to the last ditch to halt progress in a better world.

I think what we need to do is have the people speak. The NGOs are our voice, and the NGOs, Non-Governmental Organizations, listed in the handout that I left at the desk are our vehicle. We have to be involved. We can’t rely on the government to do our bidding in this area. And it’s a tribute to Bill Pace who coordinated the NGOs in Rome that we have the result in the way of a treaty, a statute at Rome.

So the people have to speak, and everybody has to get involved so that we all share in the effort and we’ll also share in the fruits.

PROFESSOR MARCELLA DAVID: I have a question for Professor Scharf. At least in one circumstance, I wonder whether or not the complimentarity will work with regard to the United States. And I’m thinking in terms of the—notwithstanding the federal judiciary—I’m thinking of the application of the political question doctrine with regard to charges of aggression.

And the way that would work is that if a charge is raised that the United States policy involving some country was inappropriate, then the court would state, “This is a political question, a military decision that we really don’t have the power to question.” And so I’m wondering if, at least in that regard, Khartoum or Afghanistan or some other instances
where we have taken military action in support of our national interests, might in fact, leave us open to charges before an international court?

And that, I think, is what Jesse Helms is really afraid of. It's not an easy issue—

**PROFESSOR MICHAEL SCHARF:** It's not though, and I'll tell you why. What you have to know is that the ICC statute that was approved in Rome only has the core crimes of war crimes, genocide, and crimes against humanity. Aggression is not in the statute. What they agreed to do with aggression is decide the issue in seven years, and it would require a seven-eighths vote of the Assembly of State Parties to add aggression. Unfortunately, because I understand how much Henry King wants aggression to be in there, the odds are very unlikely, I think, that it will ever be part of the ICC statute, partly because of the concerns you're expressing here.

Now, even if it is part of the ICC statute, the provision on aggression that was drafted would have required the Security Council, the permanent five and four others, to agree that a case constitutes aggression before it would fall into the jurisdiction of the court. So, at least for the United States, we would always have a veto over that crime. This cannot be what Jesse Helms was really worried about.

**PROFESSOR HENRY KING:** Right. What I wanted to point out was that aggression, inclusion of aggression, would enable us to get at Saddam Hussein and Pol Pot and other people like that. We'd have some control over the Security Council because of their role in the United Nations charter on aggression.

So, I hope you're wrong, Michael. And I think you might be wrong.

**PROFESSOR MICHAEL SCHARF:** But in any event, aggression cannot be one of the concerns that are legitimately before—

**PROFESSOR JOSE ALVAREZ:** But I think Professor David may be thinking of that Article 8(v), “Attacking or bombarding by whatever means towns, villages, dwellings or buildings which are undefended and which are not military objectives.”

**PROFESSOR MICHAEL SCHARF:** Now, we're talking about just a generic war crime. The political question doctrine does not apply to war crimes. Both our federal courts under the War Crimes Act of '96 and our court-martials have long had jurisdiction over war crimes. And those are issues that the courts can't decide.

**PROFESSOR MARCELLA DAVID:** I don’t think that our jurisdiction—I was actually speaking of aggression, although this is a separate problem. And I’ll have to go back and look at the three optional definitions of aggression that were proposed. And I don’t see the
limitation that you see, but that’s—beside the terms of the Security Council veto necessarily panning out—but that’s beside the point.

In terms of that question, yes, we have aggressively pursued individuals who have been told by—and we know how many times it’s happened—who have either gone renegade and have gone out and purposely bombarded villages or have, you know, in the circumstance that some general said, “Okay, here’s my plan. We’re going to insure the Kurds in Northern Iraq, and I want you, twelve planes, to go out and carpet bomb them.”

Yes, then I imagine—but would we hit, necessarily, the subtle types of purposeful planning which it is suggested might be a war crime?

PROFESSOR MICHAEL SCHARF: I mean, the only thing we can really be talking about is let’s say the President of the United States says, “Let’s go bomb the El Sheifah chemical weapons plant.” And it turns out that they had no evidence at all, that civilians were killed, that this was a classic war crime, and that the U.S. President himself, determined that it should be done. So, we’re not talking about some rogue operator. The question then is would the court indict the President, and would all these protections come into play. And ultimately, I think, we would have to rely, in that case, on the Article 16 Security Council, when it gets up to the President.

PROFESSOR MARCELLA DAVID: Well, I guess I’m wondering though—that’s not my question. My question is would our court actually go after that decision to make that bombing?

And I think even if it were a government plan, there are some serious questions of—

PROFESSOR MICHAEL SCHARF: Right, that was my point. Our court would not indict the President.

PROFESSOR MARCELLA DAVID: Okay. So, then—

PROFESSOR MICHAEL SCHARF: Right. And then we couldn’t shield ourselves under complimentarity. Therefore, we would have to rely on the other Article which allows the Security Council countries to turn off the court. And I believe when it comes down to the President of the United States acting—

PROFESSOR MARCELLA DAVID: Because you think that would be appropriate?

PROFESSOR MICHAEL SCHARF: Do I think it would be appropriate?

PROFESSOR MARCELLA DAVID: I’m not sure what you’re saying. We would have to rely on the Security Council?
PROFESSOR MICHAEL SCHARF: That would be our—you see, there are five protections built in, and that’s our last protection. And that would be the one that would apply in the case of the President.

PROFESSOR MARCELLA DAVID: Okay.

PROFESSOR MICHAEL SCHARF: Now, you’re saying that’s a bad protection. The rest of the world shouldn’t—

PROFESSOR MARCELLA DAVID: Well, I guess I’m wondering because you said you would have to rely on that to save us or something like that. I’m—never mind. Thank you.

PROFESSOR MICHAEL SCHARF: Okay. Thank you.

PROFESSOR JOSE ALVAREZ: Elizabeth?

MS. ELIZABETH RINDSKOPF: I think this is a fascinating discussion because, Michael, I think that’s our case. There will be many people who will argue, not without support, that, clearly, the President had to approve the decision, ultimately, to bomb the facility in Sudan, and there’s mounting evidence that there was insufficient support for that decision. And so he’s made a mistake, but under the possibility of being before the Court, it’s not a situation that, I think, Jesse Helms and any number of other senators would want to put us in.

PROFESSOR MICHAEL SCHARF: Okay. But you know the bottom line is the Court can indict the President whether or not we’re party to the statute. So, I mean, it doesn’t really change—and we’re not going to when it comes down to the President, even if we are party. We’re not going to cooperate with the Court. So, what difference does it ultimately make whether we’re out or not.

And one of the points I was going to make that I didn’t in my speech, and that is that there are real benefits to being in the Court. For instance, if we’re outside the Court, we do not get to pick the prosecutor and the judges. And with the Yugoslavian court we have sent all of these U.S. government officials to be the staff of the court. And we’ve really co-opted the court. We’ve turned it into a majority Americanized court. We could do that with the permanent International Criminal Court.

If we were worried about politicization, the worst thing we can do is stay out, because it’s a self-fulfilling prophecy. You stay out, then you have no control over who’s going to be the prosecutor and who’s going to be the judges.

PROFESSOR HENRY KING: And I think that there also would be a dissuasive factor if you had something like that in place. They would be more careful and I think that’s important.

MS. ELIZABETH RINDSKOPF: Well, the point I was going to make, and I’m not a student of this area, as my question will clearly indicate, but it seems to me there’s a major distinction that none of you
commented on between the Nuremberg situation and this particular proposal. And that is that the United States does not control the territory that we're concerned about.

And I think that territorial control aspect, which was present in Nuremberg, as the result of the Second World War and is not present in a situation such as the international—and that, I guess, is why I found the suggestion of a G-8 tribunal for certain types of criminal activity of a slightly more traditional nature, if you will, interesting. Because there, I think, you don't have the asymmetry in interests and the concern about territorial control is also not present.

**PROFESSOR MICHAEL SCHARF:** Two points. The first is the territorial country that's important is the territory where the acts are occurring. So, if our service people are out in Somalia, and they're raping people like the Canadians were accused of, the Somalians would have every right to prosecute them themselves, to create their own little tribunal to prosecute them, or if they are a party to the International Criminal Court to send the case to the court for the court to have an indictment. And that is perfectly consistent with hundreds of years of international law, especially with Nuremberg. I'll leave it at that.

**MR. MARK ZAID:** Those our easier situations. It becomes more trickier when we're sending cruise missiles away from 500 miles and then—

**PROFESSOR MICHAEL SCHARF:** Oh, so the question is where was the crime committed?

**PROFESSOR HENRY KING:** Yeah.

**PROFESSOR MICHAEL SCHARF:** And then you say that's how the crime was committed in Washington because he gave the order in Washington?

Well, the—

**PROFESSOR JOSE ALVAREZ:** One other wrinkle, Michael, can I just add. Under Article 8, the court has jurisdiction when committed as part of a plan or a policy. I don't think that necessarily means you have to indict the President. You can indict the person, the pilot, who has shot at the village.

If you approve the plan or policy, you can get the pilot. So, that's the issue. It's not just the President who is safely ensconced in the White House, it's all our service personnel.

**AUDIENCE MEMBER:** Yes. I gather that no respectable argument can be made, with regional accent or not, in favor of the U.S.'s position. Ramsey Clark, at one time with the Justice Department, has been a member of a self-appointed group, which on two different occasions has designated themselves as international war crime tribunals. They have
conducted elaborate proceedings in which they had concluded and convicted President Johnson and General Westmoreland for war crimes in connection with Vietnam. And they have convicted President Bush for war crimes in connection with the Gulf War.

Now, if Ramsey Clark were the President of the United States, would we rely on him to invoke the various Security Council provisions that would protect charges brought against past persons involved in the proceedings like that?

And I might suggest anyone who’s interested in being connected with a private group should read the volumes, those two volumes that are published and available in every good law library of the proceedings of those two self-appointed, private group, war crime tribunal proceedings.

PROFESSOR HENRY KING: Well there were other war crimes tribunals; Bertram Russell’s tribunals too. But I don’t know, that’s a pretty—I don’t know what legitimacy these tribunals have. I don’t think they have any legitimacy. What we’re trying to do is build the foundation where there are controls and there are justifications for taking action and where there’s enforcement procedures. They have no enforcement procedures.

PROFESSOR MICHAEL SCHARF: Let me just add one thing. Robinson Everitt, who used to be the Chief Judge of the U.S. Court of Military Appeals, and he’s a Professor at Duke Law School, recently sent me a wonderful draft article that I just looked at.

And his article says that all of the kinds of concerns that you guys are addressing today are the same exact things that were said when the United States was first considering whether to have the NATO Status of Forces Agreement. And the reason was because we were concerned that if we had a treaty that had concurrent jurisdiction in which another country could prosecute our people, unless we chose to prosecute them, that that would cause all the same kinds of problems we’re talking about.

I call this the uniqueness problem with the ICC. The kinds of concerns we’re expressing are not unique to the ICC. We’ve dealt with them before. I think a lot of these arguments came up in the debates for 40 years about the genocide convention. We finally got over that.

I was reading recently—I teach a class on International Human Rights. I was reading for about 20 years why the U.S. opposed the Covenant on Civil Political Rights; same arguments. It just amazes me that, you know, time after time we say the same things. We get stuck in the same arguments and I’m not sure what it’s going to take to shake us loose. It took 40 years for the genocide convention. It may take us that long for the ICC.
MR. MARK ZAID: Actually, interestingly, about two or three months ago the Libyan government indicted the pilots, and I think McNamara and others who were responsible for the '86 bombing in Tripoli. It depends, I guess, on who’s doing the accusing.

PROFESSOR MICHAEL SCHARF: And in fact the Pinochet case changes all the politics here as well. Because Pinochet seems to indicate that now—it’s pending on how the new case will come out, but let’s assume it comes out the same way as the last judgment from the United Kingdom House of Lords—it seems to indicate that countries are going to start indicting our President. It could happen. So, now maybe the ICC is a much better forum, a much safer forum in these situations. It sort of changes the whole way you look at the ICC.

PROFESSOR JOSE ALVAREZ: One last question?

(No response.)

PROFESSOR JOSE ALVAREZ: Well, on that note, we end the conference. Thank you for your participation.

(Appause.)

PROFESSOR JOSE ALVAREZ: One last word of thanks to Josh Levy for putting this all together as well as Eric Feiler and Catherine Jones.

(Appause.)

(Whereupon, at 5:10 p.m., the symposium was concluded.)

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