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## Ten Years after 9/11: The Changing Terrorist Threat

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## TRANSCRIPT OF PROCEEDINGS:

**TEN YEARS AFTER 9/11: THE CHANGING  
TERRORIST THREAT**

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*On September 8, 2011, the American University National Security Law Brief and the Law and Government Program at American University's Washington College of Law hosted a candid discussion on the changes throughout the American legal system in the 10 years since the tragic September 11th attacks. The event featured a keynote address from Michael Leiter, Director of the National Counterterrorism Center from 2007-2011, followed by a panel discussion with John Carlin, Principal Deputy to the Assistant Attorney General of the Department of Justice's National Security Division; Ivan Fong, General Counsel at the Department of Homeland Security; Stephen Vladeck, Professor of Law at American University Washington College of Law; Ken Anderson, Professor of Law at American University Washington College of Law; and Dan Marcus, Professor of Law at American University Washington College of Law.*

**INTRODUCTION:**

PROFESSOR JAMIE RASKIN: Good Day, everybody. My name is Jamie Raskin. I'm the director of the Program on Law and Government and I'm delighted to welcome everybody here on behalf of the Program and also the National Security Law Brief, which is co-sponsoring this event with us.

I will turn this over to my distinguished colleague in the Program on Law and Government, a Fellow in Law and Government, Dan Marcus, who has a distinguished career in public life and was the Chief Counsel of the 9/11 Commission, which is perhaps the most relevant experience he's had to today's talks. So please welcome Dan Marcus.

PROFESSOR DANIEL MARCUS: Thank you Jamie. Today's program is co-sponsored by the National Security Law Brief, which is a young but vibrant publication on National Security Law here at the law school. The editor in chief of that publication who did a lot of work on today's program, can't be here today for a very good reason. He's starting an externship at the National Security Division at the Department of Justice and is currently in orientation there.

But I do want to recognize two other high-ranking officials of the National Security Law Brief who are here today. Sally Gnat, who did a lot of work on this program as well, and Vince DeFabo. Thank you both very much. I also want to say a word of thanks to the indispensable Melissa de Beer of the Office of Special Projects, who did everything under the sun to make today's event happen. One other thing I want to mention before introducing our keynote speaker, is that the law school is

going to have a brief memorial ceremony tomorrow morning at 10 am to honor and remember the victims of the 9/11 attacks in the courtyard in front of the law school.

9/11 is one of watershed events that has changed our view of the world. Some would say it's changed our view of the world too much, but it certainly has changed our view of the world. It has also changed the focus of our government and our politics in the United States. The President and senior government officials, including the Attorney General and other senior officials of the Justice Department, now spend a lot of time on national security and counterterrorism issues. We now have a completely reorganized and much larger intelligence community. We've got a new national security division in the Department of Justice, and we have a whole new Department of Homeland Security just down the street. And in law schools throughout the country, not just here at WCL, national security and counterterrorism law have become an integral part of the curriculum.

Now we're very fortunate to have as our keynote speaker today someone who is uniquely qualified to assess the terrorist threat 10 years after 9/11. Michael Leiter, as you can see from your speaker biographies, has a resume that's even better than mine. It's certainly more unusual. After he graduated from college he spent six or seven years as a Navy pilot, flying missions to police the No-Fly Zone in Iraq after the Gulf War. Then he went to law school, where he became president of the Harvard Law Review. Then he was a law clerk for Mike Boudin, an old friend of mine, Judge Boudin, on the First Circuit, and Justice Breyer. Then he became a government lawyer, an Assistant U.S. Attorney, in the eastern district of Virginia.

In 2004, he became the Deputy General Counsel of a commission. Not the 9/11 Commission. This is where I met Mike Leiter. I was General Counsel of 9/11 Commission, he was the chief lawyer for a commission with a really long name. It was sort of the "how we screwed up the intelligence on WMD in Iraq" commission. And then he became Deputy Chief of Staff to the Director of National Intelligence and also served in the important position as a guest speaker in my National Security Law class here. Then in 2007 he became the Acting Director of the National Counterterrorism Center (NCTC), which he'll probably tell you a little more about. And then in 2008 he was nominated by President Bush and confirmed to be the Director of the NCTC where he served until a couple of months ago. And he's one of the few Bush Administration appointees, presidential appointees, who was kept on by President Obama, who perhaps was impressed that he had been, that Mike had been president of Harvard Law Review. I'm sure there were other reasons.

Okay, so with that, Mike is now, as the former director of the NCTC, perhaps a little freer to say what he thinks about the terrorist threat to the United States than he was when he was in the government. And it's a real privilege to have you here, Michael.

**KEYNOTE ADDRESS:**

MR. MICHAEL LEITER: Thank you. Folks, it's a pleasure to be here and thank you Jamie and Dan for that introduction. Dan and I really do have a lot in common, probably more than he understands because people often ask me how I got into intelligence and national security. And I'd say, well I worked on this commission, and before I could even get out the name of the commission they'd say, oh you were on the 9/11 commission? And I'd say, no it was another one. And they'd always go, oh. So Dan, I've actually stopped and now I'm just lying and saying I was on the 9/11 Commission and taking credit for all of your work. And I will also note that although Dan's name for my commission is probably a catchier one, I think in legal terms that would be a bit like leading the witness on direct examination if the name was "how did we screw up the intel for the Iraq WMD?" That's where we came out in the end, Dan, but we couldn't quite start there.

It's a pleasure to be here. And this week, I've been speaking at a number of places but this is special for me because I've known Dan for so long. Dan helped me so much in breaking into this area. And also because it's my neighborhood. I live four or five blocks away, and I think for people who live in and around Washington, and for those who live in and around New York, two blocks from Ivan's headquarters at Homeland Security, so close to the Capitol and the White House, so close to the Pentagon - yesterday I was at NYU and so close to site of the World Trade Center - it is really impossible to recreate the sense of that day. And I can't try to recreate that for you but I ask that as we delve into some of the legal and policy issues that sprouted over the past 10 years, it is unbelievably important not to dwell and never get past those events, but keep those events somewhat central in our thinking. Because that emotional gut-level response, again, is not a perfect line from the decisions we make afterwards, but it does help inform or explain some of those decisions and I think it also helps us understand the ways in which government has to perform before an action in order to avoid the appropriate scorn of the public if the public is not protected.

And if you need another reminder, just this morning - I've obviously been watching some of the TV like everyone else - I'll tell you that there's a fabulous piece on the New York Times website. This is not a paid political announcement. There's a fabulous piece with a series of audiotapes that were recently release from various people involved with trying to track down the planes. Oh, maybe it was a paid political announcement because I see Eric Schmitt from the New York Times coming in right now. But it's a fabulous way to bring yourself back to that moment, much like the footage does to some extent. To bring yourself back to the level of confusion and the lack of understanding. And that confusion and fear and lack of understanding, of course, continued on after the day and again guided lots of our reaction.

People talk about 9/11 as a sort of awakening. I want to talk about three major topics today. One, I do want to talk about the threat. Second, I want to give you a sense, my perspective, and current officials like Ivan and John Carlin can give you their sense of what the government is do-

ing now, but I want to give you a sense of how I think we tackled terrorism over the past 10 years. And honestly I think that it's pretty - there's significant continuity in how we've done it over the two administrations. And three, I'm going to offer my own reflections that I hope then lead to a set of questions from people other than Eric Schmitt, from the students and the faculty and the members, so we can delve into some of the tough issues that are associated with terrorism today. So I've got about 25 minutes and then we've got as long as we have until Dan pulls me off.

Before I go too deep, though, let me just toss out a few numbers and statistics so we remember in some ways, in simple ways, in the ways that numbers can explain but they don't convey emotions, the costs of 9/11. That day, of course, almost 3,000 people killed, more than Pearl Harbor. Out of that, we launched two major land wars. Depending on which numbers you look at, certainly more than 100,000 Iraqis killed, certainly more than - I would guess - 200,000 civilians killed total in those two wars. Now, more than 6,000 American soldiers killed in those two wars. Hundreds of billions of dollars spent. And depending on how you slice the pie, we now spend more than \$100 billion a year on various aspects of counterterrorism in the United States.

In 2010, 10 years after 9/11, roughly 13,000 people across the globe were killed in terrorist incidents. About 70 percent of those, more than 7,000, were killed by Sunni extremists, generally organizations aligned with al-Qaeda. The five countries where they were killed most often, the most were killed I should say, Iraq, Afghanistan, Pakistan, Somalia, and India. A pretty big drop off from Somalia to India. And who is being killed by Sunni Islamic extremists? Other Muslims. Out of those 13,000 people who were killed by terrorists in 2010, about 340 were killed in the Western Hemisphere. 340 out of thirteen thousand. When I refreshed my recollection on that number it reminded me a little bit about our greatest generation, which obviously was a tremendous generation and we always talk about fighting on the Western Front in World War II, quickly forgetting that the Soviet Union lost 54 people to our every 1, and that the vast majority of fighting was on the Eastern Front. And although we as Americans, I think appropriately, focus on the cost of terrorism to us and to the Western Hemisphere, only 340 people out of 13,000 last year killed by terrorists were in the Western Hemisphere.

Since 9/11, a total of 14 people have been killed in the United States by al-Qaeda-associated terrorists, or al-Qaeda-inspired terrorists. Fourteen. In the course of this two-hour program, more Americans will be killed in car accidents than all the Americans killed by terrorists in the United States inspired by al-Qaeda in 10 years. Now I'm not trying to make pure equivalency there. But I think some of these numbers are very important to put in perspective the threats we face.

So, what is the threat? On 9/11 we faced a hierarchical organization centered in Afghanistan that obviously had not started in 2001; it had begun years before that with Osama Bin Laden declaring a Fatwa against the United States and the West. Al-Qaeda attacked us of course before 9/11. Attacked us in Kenya and Tanzania. Attacked us in Yemen. They at least claimed responsibility for

some actions in Somalia. But on 9/11 the picture clearly changed with the death of 3,000 Americans here. And at that point it changed both for us and frankly it changed for the organization that was al-Qaeda.

Although it was a hierarchical organization then, over the past 10 years, what launched those attacks in 2001 has, thanks to United States and Allied efforts, been not completely but at least in Pakistan significantly reduced and to some extent decimated. There's no better example of that, of the success that the United States had, then back on May 1st with the killing of Osama Bin Laden, the only person who ever led al-Qaeda. And in my view the only individual who stood out from the organization in a way that spoke to a population and to some extent got past the concrete horror of al-Qaeda. And still, to some extent, to some symbolized something good even if they weren't supporting his actions, but a man who was standing up against the West. Today, as I said, that al-Qaeda is decimated and that is a, in my view, a uniformly good thing. But of course, as we decimated al-Qaeda in Pakistan, al-Qaeda has gone on and has changed. And I keep referring to you, Eric, this is what happens when you show up for my speeches, if you want some great writing on that from people like Eric and Tom Shanker - 10 percent right Eric? - and many others, talking of the morphing of al-Qaeda. And it certainly has.

We still have a hierarchy but that hierarchy is now distributed and there are now hierarchies in places that there weren't on September 11th. The instability in Yemen has bred and helped foster an organization of al-Qaeda in the Arabian Peninsula which has attempted at least two attacks against the United States. My personal favorite, the Christmas Day bomber, followed by the attempt to blow up two cargo flights traveling to the United States. The organization known as Al Shabaab in Somalia that has attempted to associate itself with al-Qaeda, and although it's working rank-and-file probably does not have transnational views, its leadership certainly does. The organization al-Qaeda in North Africa that has attacked U.S. and Western interests and U.N. interest in Algeria and Mali and Mauritania. And of course, what is most troubling to many Americans, the specter of homegrown extremists in the United States. All again with that significant caveat that I've pointed out before, that in 10 years we have tragically lost 14 Americans in the Homeland to al-Qaeda-inspired terrorism; but it is still a real threat. And certainly in 2009–2010, the United States experienced an uptick in that threat of homegrown extremism, which has put many people on edge. Of course the failed Times Square bomber, Najibullah Zazi who was driving from Denver to New York City likely to attack the New York City subway system, and many others that you've read about in the news . . . or haven't read about in the news.

At the same time this is going on, there has been something else which has been happening, which I think in many ways is far more important than the trajectory of al-Qaeda, and that is what we saw beginning earlier this year in the Arab Awakening. And what we saw was regimes throughout the Middle East falling, not to al-Qaeda as it once aspired to do, but instead to, with differing levels of violence, relatively peaceful protest and the downfall of regimes that have governed this region

and these countries for decades. And in that Arab Awakening we, again, did not see a strong hand from al-Qaeda; we saw just the opposite. We saw a level of irrelevance to its ideology that, I think, has significantly undermined the idea that al-Qaeda's ideology has broad-based appeal.

Throughout all of this, the U.S. Government has changed constantly. And we can talk more about these threats in the questions. I don't want to dwell there because frankly I think that's where most people think every day. People generally read the paper and they have a sense of what that threat looks like. If you have more questions, I'm happy to field them. But what you're left with, an ongoing - you still have a fluid picture. You have a fluid picture where al-Qaeda's not getting Pakistan, poses a risk to our troops in Afghanistan, poses a transnational threat, a network in different places of the world. But ultimately al-Qaeda, in my view, is weaker. And what I mean by weaker, compared to 2001, is al-Qaeda is less able to inflict the type of damage it did in September 2001. Now that of course is part because of the enemy and it is part because of what the U.S. Government has done and that's what I'd like to move to now.

So, what have we done? And I say "us" as in all of you, because all of you have also been part of the steps that the U.S. Government and the state governments and the local governments have done to combat this threat. I will put our actions into four basic categories. Now, I know these aren't the perfect categories and I also know that they're not the categories espoused in the President's current strategy for counterterrorism, but I think they capture things in relatively clear ways that people, I hope, understand. First, there's an offense. Second there's a defense. Third, there's a long game. And fourth, well, there's kind of the wild card, areas and buckets that don't quite fit into my other three nice, neat categories.

What have we been doing on offense? Well, I think quite clearly, and again I'm not here to defend decisions made in prior administrations, but clearly to those who made the decision launching the wars certainly in Afghanistan and also in Iraq were designed to reduce the terrorist threat. But today, although certainly the fight continues in both countries, the U.S. presence in Iraq is rapidly diminishing and the U.S. presence in Afghanistan is slowly diminishing. And we are left with offense there. But that's not the only offense I'm talking about.

I'm also, without getting indicted, talking about the offense which occurs when there are explosions in places like Pakistan caused by U.S. strikes. I'm also talking about offense in the sense of domestically what the men and women of the Department of Homeland Security and the FBI do when they go out offensively to disrupt terrorists' plots and arrest people. Having lived through two administrations, I have to tell you - and this might meet with chagrin from both sides - but not much has changed. If anything - and President Obama, in my view, has been far more aggressive with the use of targeted U.S. force - I personally believe, although there are probably those in this room who would disagree, that it has been done in accordance with International Law, U.S. Constitutional Law, and traditions of warfare. And in doing so, the United States Government has taken



off the battlefield terrorists who cannot be defeated any other way. I'm fine with disquoting the phrase, the global war on terror. I think there are huge disadvantages to using that phrase. But what I'm not fine with, and I will fight vociferously for, is the idea that some of the people we are fighting will not be persuaded, will not be arrested, will only be stopped from harming Americans when they are killed. This does not, I think, make me bloodthirsty; it makes me somewhat pragmatic. And having spent the better part of half a decade now studying from as many perspectives as I can, those individuals who aspire to be in al-Qaeda or part of al-Qaeda, I think that the proof is in the pudding. There are individuals out there who cannot be persuaded. There are elements of this fight that require targeted violence, and that targeted violence, like many other uses of targeted violence for the United States in the past, is a good one.

Domestically that gets a little harder. And I think many of the current issues that we face today are involving the use of offensive tools domestically. And again, I want to stress when I say offensive tools domestically those are not the same tools. They are the use of law enforcement. They're the use of intelligence tools within the United States. And I think many of the opening questions we have in this society about what kind of security we want still rest in that query. But in my experience, and again probably to the chagrin to some in this room, the Bush Administration and the Obama Administration have not strayed significantly from one another in their domestic activities. There are very hard questions on the domestic front about when individuals who aspire to violence should be stopped. But largely, those decisions, Bush to Obama, those decisions were discussed in the same thoughtful way and pursued in the same thoughtful way. Some of the tools were not the same, but the decisions really did come out from roughly the same place.

So that's my short and dirty on offense. Now defense. And before I delve too deeply into defense, let me stress that all these do fit together; they do not work independently. Defensively, you all know the defense. Who here hates taking off their shoes when they go to the airport? Please pass my thanks to Janet Napolitano, Ivan, for telling me that I'm not going to have to do that in the future, and more importantly that some of the people around me will not have to do that in the future. Who here who gets so annoyed and thinks it's so stupid that everyone has to take their shoes off, remembers Richard Reid in 2001 attempting to blow up a transatlantic airliner with bombs in his shoes? Who here can't stand the fact that they can't get a big tube of toothpaste in their carry-on when they're traveling? Let's just remember in 2006 al-Qaeda tried to use liquid explosives hidden in sports drink bottles to kill potentially more than 3,000 people.

These defensive pieces have their drawbacks; they certainly have their annoyances and they have more than that in some cases. But I think as a general matter again, and I can only say this from the perspective of the Bush to the Obama administration, these defensive measures have been relatively constant. And I can also say with utmost confidence, these defensive measures have helped stop attacks. You know, they're not perfect, and again that's why all these pieces fit together. But they have made it more difficult for very innovative bad people to kill Americans and others. Let's use the ex-

ample of the underwear bomber. Everyone says it was a failure. There are certainly aspects of it that were a significant failure. But part of the reason that that bomb didn't work likely was that al-Qaeda had to construct a weapon that got past these very defensive measures that we had taken. None of these measures will stop terrorism. These measures in combination will help reduce the likelihood of a catastrophic attack. And that is ultimately what I believe the American people should demand of their government.

Now, for both offense and defense, I don't want to say that either of these don't have significant negative effects in other parts of our efforts. In particular, the long game. Now what I mean by the long game is battling the ideology that attracts recruits to al-Qaeda. Do I think that strikes in Pakistan do not, to some extent, alienate Pakistanis, anger members of the international community, and potentially drive some recruits to al-Qaeda? Of course I don't. Those are some of the negative repercussions of an offense. Do I think that when an individual who is trying to study in the United States to attain a law degree, an undergraduate degree, or to become an engineer who is coming from Saudi Arabia or Jordan, whose name happens to have Mohammad in it and is subject to extensive screening for their Visa; do I think that that might not anger people and alienate them and make them feel less supportive of what we consider American values? Of course I don't. Of course I know that these actions can have some of those negative repercussions.

The question is not whether they have negative repercussions; the question is how you carefully calibrate your offense and defense with these long-term goals. Because I wish that we didn't have to use strikes against terrorists. But if someone has a better way of stopping people who are plotting attacks against the United States when a host nation is unable to do so, please offer it up. I haven't heard it in two administrations. When people, if people really have a better way and a big bureaucracy to avoid any potential mistakes in screening Visas and the like, please tell me because I haven't heard it in two administrations. This is not to defend any of these systems and say they cannot be improved. But it is to say any actions we take will have some negative repercussions and we simply have to figure out how we carefully calibrate those and try to mitigate those negative effects while pursuing the effects we're trying to achieve with vehemence.

Which does lead me to the long game. And if you ask me now what has been weakest in the U.S. efforts over the past 10 years, it is the long game in combating al-Qaeda's ideology. I've got good news for you, though. Al-Qaeda has done really well combating its own ideology. If you look at the, you can look at a variety of polling numbers, but if you look at polling numbers from 2001, 2002, 2003, Osama Bin Laden was personally popular in a lot of countries in the world. And in many of these same countries, the populations were actually reasonably supportive of suicide attacks as a legitimate tactic to fight the United States. Then came people like Zarqawi in Iraq. Then came al-Qaeda in Aman, Jordan, killing innocent people at a Muslim wedding. As the stories of al-Qaeda and al-Qaeda violence spread and was not just targeting the United States, more and more people throughout the globe, and again this is clearly reflected in a variety of polling, al-Qaeda's ideology,

Bin Laden as a person, al-Qaeda's tactics have been increasingly rejected throughout the Muslim world. But that doesn't solve your problem. There are always going to be those few that embrace this ideology. But as a general matter, we're doing okay in the long game, not because of what we've done, but because of what al-Qaeda has done.

Our ability to shape that, again I apologize for the phrase but I still haven't come up with a better one, that battlefield of ideas is somewhat limited. The U.S.'s credibility, especially the government's credibility, is limited. How many people, I ask this all the time just because it's fun for me, I'm not sure it illustrates much, but how many people here have taken a class in Islam? Now raise your hand if you're, sorry to do this and you can refuse if you like, raise your hand if you're over 40 and you took a class in Islam. That's usually what happens. The United States Government, our leaders, our people, do not understand Islam. Here's another question for the crowd. What are the two things you're never supposed to discuss at a dinner party? Religion and politics. Try having an intelligent conversation about al-Qaeda. We're very uncomfortable talking about these things. We don't know the issues well. We don't understand most of the countries well where most of al-Qaeda adherents are coming from. How many people have been to Yemen in this room? I don't necessarily recommend it, especially right now.

A lack of understanding; a lack of comfort discussing these issues; the lack of credibility that the United States Government has; the ways in which the United States Government generally communicates - white guys like me standing up in a press conference versus tweeting and Facebook and YouTube - all of these factors, not to mention in my view the general lack of funding to the organizations in the United States Government who need to do this work as compared to the Department of Defense, mean that the U.S Government remains, I think, less well postured than we should be to help defeat al-Qaeda's ideology.

Last but not least on the how and then I'm going to go through the reflections quickly, and I actually will for once hit my 30-minute window I think. If I were a practicing lawyer I would go over since I get paid by the hour. Sorry, Dan. Those special areas that don't quite fit into the offense, don't quite fit into the defense, don't quite fit into the long game. Things like combating terrorist access to weapons of mass destruction. Enabling our partner nations to combat terrorism because we can't do it alone and they can do it better than we can. And finally the structural changes that we've had here domestically within our own system to make sure organizations like the National Counterterrorism Center that I led, the FBI and Department of Justice that John Carlin spent so much time with, Department of Homeland Security that Ivan is a huge part of, all of those pieces. And those pieces have gone actually remarkably well. I was with Graham Allison on Tuesday night and I mocked him incessantly because I think he's frankly wrong, his predictions have been wrong about terrorists, the likelihood of a terrorist WMD event. I think he's been a bit of an alarmist in this area. All that being said, nothing would change the game more than terrorists' effective use of biological or nuclear weapons. And this is a real and ongoing threat. And requires extensive resources both on

the offensive and defensive and intelligence sides.

Nothing that we do is more important than enabling partners. And enabling our foreign partners, not to mention state and local partners, but most importantly - enabling our state, local, tribal and foreign partners to do the things that the U.S. Government can't and shouldn't do, and enabling them in a way that they are still doing their terrorism work, consistent with American values. And that I will tell you can be a tough line to walk, both on the domestic and on the foreign side.

Now, looking back in three minutes, how do I reflect on all of this? How's it gone? Overall, I really do think with some notable exceptions, it's gone pretty well. Again, the numbers don't help tell the story, but if I had gotten this group together on September 12, 2001, and asked everyone how many more Americans will be killed in the United States in the next 10 years, I would put money on the fact that none of you would say 14. I would guess none of you would have said 140. I would guess most of you would've said something closer to 1,400. And that is a remarkable success. With the enormous caveat that we still have to think about all the other costs that have been associated with the fight that we're engaged in.

Second, I flatly reject the notion that American's civil liberties have been drastically infringed upon in the past 10 years. That is not to say, let me stress in the strongest possible terms, that things that I don't support and things that I wish haven't happened didn't happen. But I think if we look at the scale of the things that happened, and we get past the bumper stickers, and we get past the accusations and look at the facts, I believe that we have as a general matter pursued this fight consistent with American traditions, the best American traditions. And we have a structure within our government which has still imposed a significant level of oversight that avoids many of American's fears. Now it's really hard to convince people of that because they think a lot more is going on than there is and that's a good thing if you're a terrorist. I want the terrorists to think that. But if you all think that the government is listening to all your phone calls and reading all your e-mails, if only, our job would be a whole lot easier. Or I should say my former job would have been a whole lot easier. It simply isn't happening. And bombastic accusations don't help us have an intelligent conversation about those areas that are really open to sensible debate in my view.

We have lost a degree of global support in this fight over this past 10 years and that's really a problem. Now, some of that global support, more of that global support is there than people think. Because the ways in which intelligence organizations and security organizations continue to work together, even while elected officials in various countries say I will fight the United States, I will never let them do this, please come help us with this, is remarkable. And what is often forgotten, is the U.S. Government has done more, and I understand there's a flipside to this too, wars in Iraq and Afghanistan, but the U.S. Government had done more to help defend countries in Western Europe, in the Middle East, in South Asia from terrorism than any other country on Earth. And we continue to do that daily.

Three last quick reflections. If you didn't know it before, the world is a really, really, really small place. In 1994 after the Black Hawk Down incident, I think a lot of Americans kind of said, Somalia, let's get the hell out of there and let's not worry about it again. We don't have the luxury to do that. We don't have the luxury to treat Yemen as a punchline in a Friends episode that it was in the 90s. Places like Yemen and Somalia really do matter to the security of the United States.

In the same way, and potentially even more importantly, we don't have the luxury of making the lead, it's not even a luxury, we can't if we want to be secure even get remotely close, as I fear some have in some of the public debate over the past two, three years, get close to marginalizing the American Muslim community. The American Muslim community is the single most important part of helping avoid al-Qaeda's ideology from taking root in the United States. They have fought it vehemently since 9/11, they have continue to partner across faiths and within their own communities to fight al-Qaeda's ideology, and we cannot remotely let our society drift back into xenophobia and treating anyone of any race, ethnicity, or religion as somehow an outsider. It is abhorrent and I fear that it has made a comeback over the past couple of years.

Second to last. Technology's great. I love my Smartphone; I love my iPad, also not a paid political announcement. Technology can also bring terrible destruction. And technology is getting more and more accessible, and it will continue to get more and more accessible. As hard as it was for the United States to create an atomic bomb in 1945, it's gotten easier. More and more countries have it, the materials are more widely available, the expertise is more widely available. Similarly for biological weapons. This is not the most likely occurrence that we will face. And we have some ways to defend against it. But should a nuclear or biological weapon be used by terrorists, all of the niceties that we now talk about will go away very quickly.

Last but not least, this is a great time to reflect but it is not, in my view, the time to stop. It's a great time to address a lot of the hard questions that quite amazingly we haven't answered in 10 years. What does our long-term detention policy look like? What kind of domestic security presence do we want? And so on and so on and so on. But if people think that it's all over, it certainly isn't over globally. And let's just change a few things that the U.S. Government has done and reflect on how different this conversation would be had in 2006 even one of those planes had been blown out of the air. Let's change a few pieces of defensive work or failure on the operator's part and say Umar Farouk Abdulmutallab did blow up a plane over Detroit on Christmas 2009. Let's just imagine now that some of the work that the FBI had done and DHS did and the New York Police Department did hadn't worked and Faisal Shahzad had blown up that car in Times Square. That shouldn't drive all of our decisions. But it has to inform the discussions we have 10 years later because the evolution of terrorism has continued. It did not begin and end on 9/11 and it's not going to begin and end in 2011. I very much thank this group for listening and most of you staying awake, and I'm very happy to field as many questions as we can squeeze in.

DANIEL MARCUS: Thank you very much. I think we have time for just a few questions before going onto our panel discussion. I've got a couple but I'm going to cede my question opportunity to join, so does anyone have a question they'd like to ask. Step to the mike if you would. And if you could tell us who you are?

AUDIENCE MEMBER: What would you say is more important to our long-term efforts? Defeating al-Qaeda or separating the Taliban from the current Afghan administration?

MICHAEL LEITER: I actually think it's very important for us to distinguish the two. It doesn't mean that both are not enemies of the United States. But I think our goal, with respect to both, has to be quite different. I think our goal for al-Qaeda has to be defeat. We cannot live, we can live but we can't live happily and the way we should and Americans should expect us to live, with an ongoing transnational threat from al-Qaeda. They're not a group with whom we will negotiate.

Not being an expert on the Taliban, I think that the Taliban's interests, there's at least a good argument to be made, but the Taliban's interests are quite different from al-Qaeda's. It's not that the two are not related but is there a way to ensure that the Taliban does not support transnational terrorism? I'm am hopeful there is and if there is, then I think your approach to the Taliban immediately becomes different from al-Qaeda. Because the very definition of al-Qaeda is a global war of terrorism. Al-Qaeda, no matter what we do, will not back down in that effort. The Taliban, again, is linked, similarities and ideology, but I think their pursuits are not necessarily hand-in-hand, even though al-Qaeda's leadership, we have to remember, has of course pledged their own buy-out to Mullah Omar in the Taliban. And certainly if you're on the ground in Afghanistan, the Taliban is attempting to kill American soldiers. That's who we're fighting. But that is, to me, still different from an organization plotting, planning and trying to execute attacks against the Homeland or outside of the region. The fact is we've lived with the Taliban for a long time before 9/11.

AUDIENCE MEMBER: This kind of relates to what you said. Since I've learned that policies have changed, at least in my view drastically since 9/11, I wonder if it's gone up to a size that is simply unsustainable? I guess my question is, is there any way to make the intelligence community size more cost efficient but similarly more effective?

MICHAEL LEITER: We're going to find out aren't we? [Laughter] Is there any way to make the U.S. Government more efficient and smaller? The answer is yes. There's no way that after 10 years that there aren't inefficiencies. We've poured a lot of money into this. Take the most efficient - take Google. I guarantee there are inefficiencies at Google; there are inefficiencies everywhere when you get big organizations that have grown rapidly. The DNI, the Director of National Intelligence, is Jim Clapper now, and the Congress has enormous challenges in front of it. Which is, how do you find that inefficiency without doing what we did after the Cold War? Which was decimate the intelligence

community. We lost a complete generation of people, we lost huge capabilities and we didn't have the capacity to address a lot of global threats.

Doing that is not going to be easy. I think there is sufficient support on the Hill from my experience and in the administration. And I think in ongoing administrations that this won't be hollowed out but it is going to take some - you're probably going to hit the bone on some of the cuts. I think that can be done intelligently and the real issue is less how are we going to cut the budget, and what Americans and what the Congress and what the administration expects its government to do? How good do you want us to be? I'm sorry, how good do you want them to be? It's not us anymore. And it's going to take hard choices. Is one American killed by terrorists worth \$100 billion a year? Five? Ten? I don't want to turn this into an actuarial game but there are going to be hard choices about that because we're going to have to take increased risk. We're not going to cover all the same places. We're not going to address all the same domestic threats because we're not going to have the same people. And as long as the American people understand the risk that they're buying, and the Congress understands that risk, and then backs up the operators after the fact, let me hammer that, if Congress buys into it and supports the operators after the fact, then I think that we can get to a relatively good place. There are a lot of "ifs" in what I just said.

DANIEL MARCUS: Here's my last quick question and it may not be such a quick answer. You didn't say much in talking about offense and defense about the intelligence value of our program of interrogating detainees. And the - it's an area where I think - I wonder what you can say at this point about your view as to whether the value of that program outweighed the costs to the United States in terms of undermining our values and alienating world opinion? And how we're doing now, now that we don't seem to be capturing a lot of people. We're killing them instead. Are we missing out on a real intelligence opportunity? That's an easy one.

MICHAEL LEITER: Yes. Where to start? First, this is one of those areas where I think it is important to at least attempt, and again, not to decide any question, but bring ourselves back to 2001. 9/11 was a lightning bolt in a lot of ways. And one of the ways in which it was a lightning bolt is it illuminated a very murky landscape for a split second and then it went away. And I don't know how many people have ever been outside in a lightning storm and you kind of don't know your surroundings. And then a lightning comes up and you see lots of shapes. You're not really quite sure what you're seeing, but you saw some things over there and some things over here. It turns out that if you then were able to make it daytime and have perfect illumination, you'd see a really different picture. And I think immediately after 9/11, we didn't know what was out there.

And, not only did we not know what was out there in the form of al-Qaeda, but we weren't well positioned at that point to find out much about al-Qaeda. We didn't have the human sources that we have today in Pakistan and Yemen and elsewhere. We didn't have the Signals Intelligence infrastructure to collect some of their communications. We didn't know how they operated; we didn't know

their hierarchy; we didn't know their tools. And we couldn't simply turn on the light. What we were going to do was illuminate that with individual candle after individual candle after individual candle. And Dan, as you know, doing that takes a lot of time. It takes years to build up that base of understanding.

One of the pieces that was undoubtedly important in those early days to try to jump start, to at least get a flashlight, if not a spotlight, were in my view interrogations. Now, let's put that in a corner for a second and distinguish the basic idea of interrogating. We interrogate people all the time and it's just fine. FBI interrogates them, DHS interrogates them, state and local interrogates. Then you have the question of how you interrogate them. So we can't just dismiss the idea of interrogation being valuable. Of course interrogation is of value.

And then we have to cut out some things that are really independent of what the specialized interrogations of al-Qaeda senior level operatives were. Abu Ghraib was not that. No one in their right mind should defend anything about what happened in Abu Ghraib. And Abu Ghraib was not what was going on with senior al-Qaeda operatives in certain programs. Some of the abuses in Guantanamo were not that program.

Now, then you get to that tough question of the tools that were used in that specialized interrogation program. And the one, I have my personal views about whether or not they constitute torture based on my reading of various legal documents and my personal gut feeling, and the fact that I was waterboarded when I was in Seal school in the Navy. Didn't really enjoy it. In my view, the unfortunate, the most unfortunate piece about this was that our three branches of government did not come to a common understanding. Frankly in my view some elements of our branches of government stood back and let the executive branch do things that after the fact they felt awfully uncomfortable with when they were illuminated in the light of public discourse. And I think that's the unfortunate piece. That's not the only unfortunate piece. That's the systemic failure, that we have a system of checks and balances. And then the executive branch can think something but there were opportunities for other elements of the U.S. Government to weigh in before the fact and say, you know what? This one's making me queasy and I want to stop this. Would they have been successful? I don't know. But it certainly didn't happen to the extent I think in a well functioning system it should have.

At the time, interrogations were of significant value. As we learn more and use different tools, they became of significantly declining importance. Does our current structure make it more difficult to have people in custody and interrogate them than it was before? Yes. To me that's one of the open questions: what are our long-term detention plans? I don't think we have a clearly enunciated policy there.

So for me, there's value in interrogations. I don't have a sense, Dan - I really mean this - I don't



have a sense whether or not those techniques were the ones that got the good stuff. I think perfectly reasonable arguments can be made on both sides. I will tell you in my experience talking to experienced interrogators from different nations, and here in the United States, I think there is a perfectly good argument that some of that information if not all could've been obtained through alternative means.

DANIEL MARCUS: Okay. I think we'd better quit now, now that we gave you the easy one. Thank you again very much and please join me in thanking our keynote speaker, Michael Leiter.

### **PANEL DISCUSSION: COMBATING THE EVER-CHANGING TERRORIST THREAT**

DANIEL MARCUS: I'm going to briefly introduce our panelists whose biographies you have in your materials. And let me introduce first, even though he's not going to speak first, someone who is a surprise to most of you today. Lisa Monaco, who is the new Assistant Attorney General for the National Security Division at the Justice Department, got summoned to a White House meeting at the same time as this panel late yesterday and so, we have a terrific replacement for Lisa. Namely, her alter ego, John Carlin, who is the principal Deputy Assistant Attorney General for the National Security Division and the Chief of Staff for the National Security Division. He had a similar job until recently as Chief of Staff for Bob Mueller, the Director of the FBI, who I guess is going to continue as Director of the FBI for two more years in this unique twelve-year term. And I think, John, this new job should be pretty easy for you, because the National Security Division is much smaller than the FBI. So if you can run the FBI, you can run the National Security Division. John is a career lawyer at the Justice Department. He started out in the honors program at the tax division prosecuting tax cheats. Then moved on to be an Assistant U.S. Attorney, before going to the FBI.

Next to John is Ivan Fong, who was a colleague of mine in the Clinton/Reno Justice Department. It seems like ages ago. Ivan was a Deputy Associate Attorney General at the Justice Department when I was there. We have two presidents of law reviews here today. Ivan was the president of the Stanford Law Review and then was a law clerk for Judge Abner J. Mikva on the D. C. Circuit, and then for Justice O'Connor. Then he went to Covington and Burling, and then he went to the Justice Department. Then he went to G.E., where he was a senior lawyer and then was the chief legal officer at Cardinal Health, before coming back to Washington, where he belongs, to be the general counsel of the vast and sprawling Department of Homeland Security.

I won't spend much time on our other two panelists because they're very well known in this building. They are two of our distinguished professors, who teach and write prolifically in the national security law area. Ken Anderson. I guess I'm a late in life academic. Ken is a mid-career academic and Steve Vladeck is a young academic. Ken teaches international law and business law courses here and writes extensively on issues relating to the law of war and national security law.

He's a fellow at the Hoover Institution and at the Brookings Institution. So he's got both ends covered. Steve Vladeck teaches constitutional law, federal courts and national security law here. He was a law clerk for Judge Marsha S. Berzon on the 9th Circuit and Judge Rosemary Barkett on the 11th Circuit, and is also a prolific writer in these fields.

Okay, with that introduction, I think we're going to start with Ivan. We'll have time for questions when the panel is finished.

MR. IVAN FONG: Thank you very much Dan. If it's okay, I'll sit with the panel because I hope that this will be truly a panel and not a series of speeches and that we can have some dialogue among the panel and obviously with the audience. First I want to thank again Dan, but also the American University Washington College of Law for hosting this program. It's a real privilege to be here. Dan and I, as he indicated, have known each other for a long time and in fact, everyday when I walk into my office, I have a plaque that I got when I left the Department of Justice and Dan was the acting Associate Attorney General at the time. And so his name and his signature greets me every morning. I also want to thank the other panelists for being here. I think this is both a timely and an important topic for us to talk about, which is combating the ever-changing terrorist threat and its legal and policy issues.

What I thought I would say in my sort of ten minutes to start is really to set the stage in a way similar to the way Mike Leiter did. But I'm going to take a slightly different approach. I'll start first with my bottom line. Bottom line up front, which is that in terms of the changes that have occurred in the legal and policy realm in this area, I think a lot has changed. I think the United States has made significant progress in securing the homeland from terrorism since the 9/11 attacks. But that said, much work remains. The threats persist and continue to evolve. I think that's my jumping off point which is how do we as a country, how do our legal institutions, how do the people who are on the front lines and the policy makers, adapt to an evolving threat? And my basic proposition, and this is I think appropriate for a law school audience, is that it's not so much about changes in the law, per se. I think we all are familiar with things like the USA PATRIOT Act and the Intelligence Reform and Terrorism Prevention Act, which created the Director of National Intelligence and the NCTC. The Detainee Treatment Act, the Military Commissions Act. There have been a lot of laws, including the law that created the Department of Homeland Security. But to me, it's really the institutions and processes that have made the difference and that are the key to our continuing effort to adapt. So let me unpack a little bit what I mean by that. So, starting with institutions, I think the most significant change, and it's the one I'm the most familiar with, is the creation of an entirely new cabinet department.

Ten years ago the Department of Homeland Security did not exist. In 2003 it stood up, bringing together 22 different federal agencies. It is now formed around seven operating components. I always get asked what DHS does each day. I think to this day, there are still people who don't quite

understand or know how they all fit together, so if you remember nothing else, remember these seven agencies. So it's the three former immigration and naturalization service agencies. So, what was formerly INS. So, Immigration and Customs Enforcement (ICE), Customs and Border Protections (CPB), and Citizenship and Immigration Services (CIS). They do the immigration benefits, the visas, the asylum applications and the like. Plus, FEMA, Coast Guard, TSA and the Secret Service. So when you think about the breadth and the complexity of those agencies and the over-arching missions, and so just to recap again, DHS's missions, obviously, it's the preventing and combating of terrorism, which is the cornerstone mission. But also securing and administering the border; administering and enforcing our immigration laws; securing cyber space, which I'll talk a little bit more about later; and something that I think is a relatively new concept, but which I think is as important as the offense and defense and long game that Mike Leiter referred to, and that is to promote and insure resiliency in response to disasters of all kinds. And again, it's something that I'll come back to.

What about processes and procedures? To me the most significant changes have come in the area of information sharing. So you'll recall that one of the significant findings of the 9/11 Commission was the stove piped nature of the intelligence community, the law enforcement community, the first responder community, state and locals. We have made, I think, dramatic improvements in not just the actual sharing of information, but the culture in which those actors engage. To me, it's very significant for example that DHS has 72 fusion centers. These are centers where federal, state, local law enforcement come together to share intelligence information. The suspicious activity report initiative to standardize how state and local law enforcement collect and share information. The new national terrorism alert system. So you recall the old color-coded system has now been replaced by a much, we think, better system that is much more specific, more concrete in the form of what is the threat, what actions people can take and most importantly, has an automatic sunset provision, so that we are not constantly under some very high state of alert.

The Secretary of Homeland Security is fond of saying that homeland security begins with hometown security. And that means that in terms of information sharing, we all play a role. You've probably seen signs across Amtrak or elsewhere that talk about "if you see something, say something." If you look at the plots here in the U.S. that have been disrupted, most of them have involved some member of the public who alerted somebody in law enforcement. And I could go on. The international efforts at sharing information and formalizing those relationships have been significant as well. So to me, that is a huge change and a huge improvement.

A second area we're all familiar with, aviation security, I think a lot of the changes occur behind the scenes. A lot of them have to do with the screening of passenger identities before people board the plane. Establishing global aviation security standards. Increasing the security at our ports as well as surface transportation. Using risk based methods to do a better job of screen and identifying potential threats. Making better use watch lists and more intelligent use to avoid over extending in that area. You may have read about plans to increase the trusted traveler program. Which would again

be more risk based as opposed to one size fits all. The last thing I'll say before I identify the sort of handful of legal issues that I see down the road, has to do with cyber security. It's, I think, the area that I, one of the areas that I am most concerned about. In part because it is so new, it presents many difficult legal and policy issues, and because I think we are probably more vulnerable in this area than we should be.

DHS has done a lot. We have rolled out a cyber intrusion detection system for the .gov domains. So DHS's role is to protect the government networks. We have stood up a national cyber security and communications integration center that integrates threat information and shares it and distributes it. We have entered into groundbreaking agreements with the defense department to share personnel information resources so that we can be truly partners in this effort. We have also established a cyber incident response plan. We have conducted exercises. So there are a lot of things that we are doing, but as I said, it's an area that remains a challenge for us in the government.

The issues, I'll start with the obvious, I think the over arching theme of the program, evolving threats. I mentioned cyber, I would add to that something that Mike Leiter mentioned, which is the issue of home grown violent extremists and how to address that threat. Soft targets and the use of improvised explosive devices. So, very small-scale attacks that require very little planning, don't provide much advance notice, and so to the extent that we have better intelligence, we have better capabilities, those really are directed towards the larger scale plots that take often years to develop. It's the smaller ones that can cause just as much psychological harm that I think is something that we need to continue to adapt too.

And that leads me to the point that I had mentioned earlier about resilience, and something that Mike Leiter mentioned, and that is the extent to which we have as a society had to be prepared, that we're not going to be perfect. That we cannot guarantee 100 percent security. And that given enough time, any system is going to have some failure and that we need to prepare ourselves for some kind of attack or incident. Not something we want, we will do everything possible to prevent, but we as a country need to be resilient, we need to bounce back, we need to go on, we need to continue to do the things we are doing, rather than let an incident really bring us down as a country. And so I think that's a long-term very important goal that requires a lot of work.

Other legal issues. I mentioned earlier a focus on prevention. And I think prevention is very different from our traditional law enforcement approach, which is a crime or some wrongdoing occurs and we have well-established procedures and capabilities for responding. Preventing is and can be more difficult and one aspect that DHS is part of and I'm sure we'll hear about others from the FBI and Department of Defense side, is the concept of pushing out our borders. That the physical borders actually ought to be a last line of defense, not a first line of defense. And so some of the work that we've done in cooperation with our foreign partners to insure better visa screening, to get more intelligence, all is about this concept of pushing our borders out. And that, of course, raises

legal questions about extraterritorial [ph] applicability, about the rights of non-U.S. citizens and U.S. citizens who are abroad, and the importance of partnership agreements.

The third major issue, of course, is privacy and civil rights and civil liberties. I think it is an area that not only we, the lawyers, but the Department as a whole, is deeply committed to protecting. We have a statutorily created dedicated office for privacy and separately for civil rights and civil liberties. Those individuals, as well as my office, are involved in all major decisions and we have very full, robust, frank conversations about how proposed courses of action may affect privacy and civil liberties and civil rights. And they're very much taken into account in the decision making process.

Last couple ones I'll mention. The role of the private sector, we haven't talked much about that so far. Much of our infrastructure is in the hands of the private sector. Certainly our cyber infrastructure, but also chemical facilities, the electric grid, the water supply, our financial institutions. And so we at DHS have as really one of our important missions, the outreach and the coordination with the private sector and in turn, our message to the private sector, which is that you have to be prepared. It has to be a core confidence that you respond, you prevent, just in the same way the government does today. So that is a significant change as well. It raises legal issues going forward about crisis responses plans, doing exercises and drills. It's elevated to the Chief Executive Officer, Chief Risk Officer, Board of Director level. So it is a significant issue for the private sector.

And then I'll close with a note that may be closer to home and that is to talk about the future and the way we adapt is by having great talent. And one of the things that I have talked, as I go around speaking on this topic, is the need for law students such as you, and law schools such as WCL, to really promote and invest in a homeland security law curriculum. It's something that can start with very basic courses in constitutional law, administrative law, international law and then building block courses in areas that are more specialized in homeland security such as maritime law, maybe even aviation security law, or cyber security law, national security law. And then I would envision a capstone course called homeland security law. And we actually piloted for our lawyers, our new lawyers, a course on homeland security law. And so every lawyer that comes to DHS, within their first year, year and half, will go through a week long session or seminar that will introduce them to all the different parts, not only of what DHS does, but some basic legal issue spotting sessions to help them see the integration of how the pieces fit together. So I would encourage you to think about that, to consider offering more sequence in this area. Maybe you do already. But that combining the academic study with an internship or a practical experience at DHS. So my closing pitch is to consider DHS as a place to work. We have an honors program. It's a great program and we need talent like yours. We need the best and the brightest to help us solve and help us address the emerging threat that we face.

DANIEL MARCUS: Thank you Ivan. John?

MR. JOHN CARLIN: I think Ivan's next job might be as the dean of a homeland security law program. I want to keep my remarks brief in part because others have already touched on them and also to encourage the dialogue among the panel. I thought the name of the topic for this discussion was interesting. The "Ever-Changing Terrorist Threat." I think in talking about an ever-changing terrorist threat, which is an apt description of what we are facing, it leads inevitably to the need for a flexible and nimble legal and policy structure that can respond as the threat changes. I want to reflect a little bit on some of the changes that have occurred since September 11th. Talk big picture about where we see the current threat and future threats down the line, but do so while keeping in mind the necessity for the changing threat picture to be mirrored by the government's ability to be equally flexible.

Since September 11th, I think there has been a sea change, and I agree with Ivan and Mike that the U.S. government, in a way that would have been impossible to anticipate really, as a young prosecutor starting out prior to 9/11, really brought all tools to bear. And that means traditional prosecutor law enforcement tools, diplomacy, the skill sets of the authorities, and the intelligence community and the military. And now, in a way that just in part takes the legal and authorities change, but in part takes time for cultural change to occur, there really is a unified, across the government effort on the terrorism front to prevent, disrupt and deter. In a way that I'm not sure all could have foreseen. And there have been, as a result, numerous successes and lives saved because of terrorist attacks that but for these changes would have occurred. In that sense, I think what Mike said towards the conclusion of his remarks is true. It would be hard to predict how few lives have been lost since 9/11, when you think about the climate that we're in right after 9/11.

Yesterday the national security division had an event commemorating, for those of us in the division, where we were since 9/11. We heard from the prosecutorial and FBI team that prosecuted the Moussaoui case. In listening to it, it really brought you back to that time and the sense of fear and uncertainty. The shock that it had occurred. In part they played clips from each of the victims and they had a visual graphic up of the 3,000 victims. And they talked about how when they were presenting the case, in the death penalty phase of the Moussaoui trial, they really tried and made a conscious decision, no matter the resources to go without a prosecutor and FBI agents and treat every single one of those victims as a victim of a homicide and give them the same type of process and discussion that they would if they had gotten each of those cases individually. And that is still ringing in my head as I talk to you today and reminds us of why it is that we made these changes, but also that we can't rest on the changes that we've made. We need to continue to analyze the threat and we need to continue to move and change and we can't be a situation again where we make the change after the fact, the threat.

I think the core al-Qaeda remains a capable organization that we treat with all seriousness and so there's been much talk about the degraded capability and I won't disagree with that assessment. But from most of us dealing day in and day out at the FBI, at the CIA, at the Department of Homeland

Security, core al-Qaeda is still at the front of the mind every day when you're in the morning briefings and hearing the threat picture for that day. The affiliates. What I think we are seeing is a change from where we were more focused, say five, six years ago, on long term core al-Qaeda plots that were complex along the lines of September 11th, now we're paying equal attention to affiliate groups like al-Qaeda in the Arabian Peninsula (AQAP), or Al Shabaab, who have declared their allegiance or partnerships with core al-Qaeda, and other groups who may not have entered into a formal partnership or declared allegiance, but have similar goals or aims and cross-fertilizes some of the core al-Qaeda groups. The multiplicity of those groups makes our job more complex, although the hopeful advantage is that we've disrupted that long term complex strategic planning from core al-Qaeda.

The other development that both Mike and Ivan touched on is the growth of home grown violent extremists. In part that's fueled by success in disrupting core al-Qaeda in causing this multiplicity of actors, but it's also fueled, no doubt, by the Internet and the unique role that it now plays in a way that messages that take place in a basement overseas in an international setting, are reaching our teenagers and our citizens here at home. And if you are inspired, it provides the stability for direct communication. That's very difficult to disrupt because it's occurring on the Internet. I think when you look at some of the plots that have either succeeded or we've disrupted, the Fort Hood, or disrupted plots to blow up a Christmas tree lighting ceremony in Portland, several plots to attack military recruitment centers inside the U.S. There's been an unprecedented level over the last couple of years of terrorism disruptions inside the U.S. and a large number of those disruptions are of home grown violent extremists. We're seeing the number of people in that category grow and I would expect, as we're looking ahead at future threats, that that's one that will continue to grow, we'll need to continue to monitor, and we'll need to continue to come up with new ways to disrupt.

I completely agree with Ivan as to the threat of cyber and that when it comes to the cyber threat, although there has been significant progress. I know the FBI has started this group, the National Cyber Investigative Joint Task Force, to bring together all the intel and law enforcement and military groups who are operational to focus each time there's an attack on attribution. With cyber, one of the great difficulties that our legal framework has not kept up with and we're working to do so, and similarly in our policy framework, is that at the outset of a cyber attack you don't know who the actor is. And so you really need to blend the resources and figure out, is this the teenage hacker acting in the basement? Is this an organized criminal group? Is this a foreign nation state? Is this a terrorist actor? Is this some type of hybrid? A terrorist group leveraging an organized criminal group or leveraging a group of social hackers? And quickly try to determine, after the attack has occurred, and this is more in Ivan's lane, but similarly, we haven't hardened our infrastructure in the cyber arena to a place where most of us in government would like. And it's an area where the threat will continue to grow, our reliance on those systems continues to grow and our ability to respond needs to keep pace.

I want to talk a little bit about structural changes that have occurred since 9/11. I think when it

comes to combating the terrorist threat, great strides have been made in part by changing the legal infrastructure. I won't go into long detail about the changes in the PATRIOT Act and FISA, but there has been success at tearing down the wall that existed between law enforcement and intelligence. I've seen that first hand both at the FBI and at the Department of Justice where the old construct that one needed to keep law enforcement investigations separate from intelligence that based part on legal interpretation and existing law, but also on policy determination, has really changed. And now the presumption is to share and groups are integrated and disrupting through the criminal justice system is one tool to prevent, disrupt and deter terrorist attacks. But that's what it is, a tool in the arsenal. The most important thing is the objective of disrupting the attack and sharing the intelligence so that you can bring other tools to bear as well. Whether they're diplomatic, or military, or immigration authorities through DHS.

In addition to the legal change, there have been structural changes. My new position, in the Department of Justice's National Security Division, only came into existence in 2006 as a result of a recommendation from the WMD commission. And what it was really designed to do is to take advantage of the changes in the law and to place together the prosecutorial experience so that the former counterterrorism and counterintelligence prosecutors that had worked within the Department of Justice with the intelligence professionals, who are not in the criminal division under the old structure of the Department of Defense; and put them together in the same division and have the focus be on the goal rather than the authorities that you're using to achieve that goal. That structural change, and other structural changes, like the creation of the NCTC and the Department of Homeland Security, they also helped, I think, to accomplish the cultural change. Where individuals who used to work apart grew used to working together and to bringing the different - and it's important because all of us are operating under the rule of law. But it's a different set of legal authorities and administrative authorities and you become expert in your way of looking at how to analyze a problem based on the legal authorities that you have and the resources that you can bring to bear. And until these structural changes occurred and then the concomitant changes in the culture, it was difficult to bring those different viewpoints together to solve the problem that we face, which was preventing the attack.

I want to talk a little bit about outreach because while you're doing this, many of the terrorist threats for the past ten years, the violent extremist threats that you're facing, are threats that affect the Muslim and Arab communities inside the United States and other related communities. And so an important part, I think, while this transition was occurring, in maintaining a goal of preventing the attack, is doing outreach to these communities. As part of that, within the Department of Defense, the civil rights division as brought nearly 800 cases since September 11th against individuals who sought to violate the civil rights of members of the Arab and Muslim communities. It is important to maintain that dialogue and that vigorous enforcement. In terms of privacy and civil rights, I know it's a mark of pride for the national security division at the Department of Defense and for the FBI, that the 911 commission, in it's findings, one of the reasons they chose, or recom-



mended, to keep the domestic intelligence function within the Department of Defense was a recognition of the department's long standing adherence to the rule of law and its record of oversight in that regard. We bear that as both a mark of pride and also part of our day-to-day responsibilities in executing our authorities and in helping the other members of the intelligence community and our partners exercise their authorities.

In short conclusion, although we can reflect and take pride in the progress that we've made, we need to remain focused on the forward threat and we need to remain critical of the efforts that we're taking in case they need further reform.

DANIEL MARCUS: Okay, we'll turn to the academics now and Professor Anderson.

PROFESSOR KEN ANDERSON: Well thank you and I'm delighted to take part in this. I'm going to be very brief in part because Michael Leiter has already given the background to much of what it is that I'm focused on here. And second, the other presentations have gone to parts that I am simply not going to address, particularly the domestic part, the homeland security, these elements. So, with an understanding that this is deliberately a very narrow part of all of this, I'd like to talk for just a minute or two about the question of the use of force outside the United States. So what is the role of the U.S. using force in wars and other kinds of things - but on an outside of the United States basis.

Let me start this by going back to something again that Mike Leiter framed, which is speaking as a business law professor, and somebody that teaches corporate finance, there are moments where the right question is framed around what does the additional dollar of spending get me in terms of being able to sell one more unit of iPods? One more iPhone? One more iPad? There are also, similarly, points at which it makes sense to ask how much does this additional dollar of spending purchase in terms of security or American lives saved or other people's lives saved or any of these questions. And that is that there are moments in which it makes sense to be speaking purely on the margin. That is sort of smoothly rising or smoothly falling curves by which an additional unit results in some other additional unit. There are limits to that however, which is that the nature of many risks is that they are not smooth. They're not continuous and there isn't any relation between the additional units spent and what you actually gain in the margin. And that has very important bearing on the question of security and the use of force abroad, because most of the use of force abroad is not really about that kind of marginal - we spend one more increment, we get this additional increment of something else. Most of it is actually premised on the idea that it's a huge, huge mistake, in terms of the long game that Mike Leiter, to wind up thinking about your activities from a relentlessly tactical serial standpoint.

One of the lessons I took after 9/11 was that the American people were not saying to the leadership that they should calculate how much additional spending we have to have in order to save an

American life and tell me whether that's greater than the amount that's necessary in order to save them from being struck by lightning. That, I don't think, was the question or the demand or the desire of the American people at that point. It was a strategic expectation that in some way or other the game would be changed in some much more fundamental way. And I believe that the American administrations heard that and went out and pursued the use of force abroad on exactly that kind of expectation. So what was described as two land wars in Asia, plus part of that and also separate from that, a massive counter-terrorism effort that apart from the land wars themselves, are all part of an effort to get beyond the idea of what is on the one hand, a crucial function of government, to wake up every morning and say how do I ensure that there is not going to be an attack at the airport? How do I ensure that the plane is not going to come down? How do I ensure all of these things on a serial day by day by day basis? But that cannot win at the strategic level if the expectation is that people don't want to live that way, where that's the primary focus of their lives.

In that regard, then the question becomes what are the larger strategic elements? And which I'm only focused on the question of use of force, I'm leaving aside larger questions of ideology and lots of other things. What I think ten years on that we have learned from a strategic standpoint is that regime change turns out to be very very important if you're talking about a regime that as a regime winds up harboring non-state terrorists, actor groups, al-Qaeda and related forces. Regime change in failing states turns out to be marvelously easy because there's not a lot of regime to change. And at that point, then the question of use of force in a land war becomes, what do you do afterwards? So as we've seen in Afghanistan, are effort there became counter-insurgency. On the ground fighting over the very long term. And then a very large strategic question about what do we need to do in order to achieve our overall aim that I think is really to change the nature of the security equation from the standpoint of the United States.

We have told ourselves at various points that that requires that we establish democracy, the rule of law, other sorts of institutional changes in Afghanistan. I believe that at some level. I also don't think that it's achievable at another level. And I think that that's the basic strategic encounter that the Obama administration had to deal with as it came in and made it's review of America's wars. And I believed that it's reached something like that same conclusion. Desirable things are not always achievable things and that one has got to separate the question about what would be good in Afghanistan from the question of what is minimally achievable that will be within the U.S. strategic interest as far as counter-terrorism goes?

Now at this point I'm sounding almost exactly like Vice President Biden. And I think that that probably is a fair description of the strategic posture regarding Afghanistan of the Obama administration and it's one that I think is probably right. Namely that we're not going to fix Afghanistan much beyond what it is now. That we are going to wind up withdrawing from counter-insurgency and that we are going to focus on counter-terrorism. And that the focus on Afghanistan will become the question of how do we wind up preventing Afghanistan from becoming a safe haven once again

for al-Qaeda or for other groups that might succeed it? And whether that requires a stable government, I think, is probably an open question in the minds of much of the leadership, because I'm not sure that that can actually be achieved.

The question then becomes what happens in Pakistan and I will set that aside because I don't know the answer and I don't think that anyone else does either. What we do see, however, is the fragmentation and the proliferation, the movement of groups as they both seek new safe havens in other places. Nigeria is next on the list. So in other words, as they move out further into other places, then the question is what groups should be pursued and in what means? And again, leaving aside all other possibilities let me end this by saying one thing about use of force. We have decided that the primary tools of our projection of force are going to be at the level of special operations, are going to be at the level of the use of drones, of JSOC, of counter-terrorism teams, of CIA and what we can roughly describe as intelligence driven uses of force. I believe that that is actually right, given where we are today and there will be a big question about where those things are used, what their relationships to other kinds of tools of the projection of national power. Lots of questions like that that I won't attempt to answer.

But I do think that we're going to see, at least as far as the use of force, that those are going to be the tools that are the thin tip of the spear. The emphasis there has to be on intelligence driven, meaning that one has to have the intelligence in order to be able to use the new technological marvels that we are coming up with. One of the things that I think is vastly not understood about the nature of the drone campaign that goes on in Pakistan and in Afghanistan today is the extent to which that depends upon having created, over a number of years, a genuinely serious intelligence effort on the ground that is able to feed targeting information directly to who is it that you are identifying to target. That's a very long process in which the drone strike is the last kinetic moment of a very very long intelligence build up before that. If we're going to wind up using those kinds of uses of force in other places, we're going to have to contemplate the intelligence efforts necessary to make those work.

Let me say one last thing about this which is I believe that we are, from a legal standpoint, in the position of having to develop new rules at both the domestic level and to integrate them with what our understanding of international law is on the question of what I have here described as intelligence driven uses of force. I don't think that our legal rules at the domestic level and the way that we've defined covert action and the way that we've defined accountability for it oversight reporting those things truly fit the picture of what it looks like today. Which is not most of the time genuinely covert, but merely deniable. And in a world in which our uses of these kinds of force are really only deniable at a political level for purely fictional purposes then the discussion of what went on, how we inform about that, the nature of accountability and oversight has actually got to be re-examined.

And then finally, the question of the increasing integration of military and CIA operations in

this, I believe, will also require some further re-examination of the legal rules for those things. Dan, I'll leave it there.

DANIEL MARCUS: Thank you Ken. Steve?

PROFESSOR STEPHEN VLADECK: Thanks. So I have the lucky or unfortunate privilege of going last. Which means I get the smallest audience, but also the chance to reflect on everybody else. I'm going to try to be brief so we can get to Q & A. I really just have three quick points to make. Well, I hope they're quick. And I'm sort of provoked by something that Michael Leiter said. I think I wrote this down right. I think he said, "civil liberties have not been drastically infringed upon over the past decade." And since I'm the crazy leftie up here, I think it's probably worth asking what he meant by civil liberties and whose civil liberties he was referring to. The reason why I want to start here is because even though our topic today is the changing nature of the terrorist threat, I think it's important to realize that whereas we've spent much of the last hour and a half talking about mistakes that have been bureaucratic, and diplomatic, and from a political standpoint, and how things have been fixed and improved, and institutions rearranged and whole departments stood up from non-existence, there are other mistakes that we've made over the past ten years. Mistakes that are not about which department is responsible for which action, but mistakes that are about individual civil liberties. And I think as we're considering the changing nature of the terrorist threat, we also have to consider the changing nature of that threat as it relates to individual rights and accountability. And I think that's been what, at least in my mind, we haven't spent a lot of time on so far today. So forgive me, I'm going to spend a few minutes on it.

So let me sort of start with the proposition that civil liberties have not been drastically infringed upon over the past decade. So first, I think of course, that depends on whose civil liberties we're talking about. For non-citizen, well let me put it more bluntly, for twenty to thirty-nine year old Muslim men who are non-citizens legally in the United States from countries in the middle east, I think their lives have changed a lot over the last ten years. I think the odds that they are on various government watch-lists, the odds that their neighbors look at them differently, the odds that for various reasons, their records are perused more frequently by random public and private officials, have all increased. Now this may be hard to prove, it may not offend most of us, but I think it is still true. And I think it's worth reflecting on that.

Second. Even if we worry about just we comfortable middle and upper middle class lawyers, I think there are relevant ways to worry about how that's also changed over the past ten years. For example, before September 11th, it was against the law, there was a federal statute that made it a crime, it was in Title 18 of the United States Code, to wiretap an individual without a court order. It was in 18 U.S.C. § 2511, you can go look it up. It was also a violation of the federal telecommunications act for telecom providers to provide information about their callers and about their activities to the government without a court order. That was the law. And that is no longer the law thanks to the

FISA Amendments Act of 2008. In the process of immunizing the telecom companies for whatever role they played in the wiretapping program, Congress also changed the law going forward, so that that would no longer be the case.

Two other quick examples. Material witness detention. Before September 11th, there was one outlier example of a case where the government had used the federal material witness statute to detain an individual in conjunction with an ongoing grand jury, as opposed to petty jury, proceeding. Since 9/11, there have been dozens of reported examples, I can only imagine how many unreported examples there have been. And indeed, when a U.S. citizen who was held, in his view, pretextually under the material witness statute, sued to challenge it, the Supreme Court said, no, it's fine, because pretext doesn't matter. I think that's a change in the law since what was true before 9/11.

Subway searches. I have a hard time believing that before September 11th, the U.S. Court of Appeals for the 2nd Circuit would have no problem whatsoever saying that random suspicionless searches of passengers entering the New York City subway system does not violate the 4th Amendment. Now, we all may be okay with the 2nd Circuit's 2006 holding in *MacWade vs. Kelly*, 2006 U.S. App. Lexis 20587 (2nd Cir. 2006), that those searches are in fact permissible and they are in fact constitutional. That's fine. My point is just that the law has changed and so we should actually take seriously the very real ways in which the law has changed as it relates to individual rights.

All right. So that's the sort of past. What has been going forward? How does this relate to a conversation about the changing nature of the terrorist threat? Well, one thought about a body that is in a particularly good position to balance the need for new tools and for new authorities with individual rights, is congress. And I think if we spent a lot of time talking about congress' track record in this regard over the past decade, it would be a very one sided conversation. So I mentioned already the FISA Amendments Act. But let's also talk about the actual scope of the war on terrorism. Congress, in the authorization for the use of military force passed on September 18th, actually gave a relatively understandable scope to the conflict it was authorizing. It says the presence authorized to use all necessary and appropriate force against those persons, organizations or nations, I think, who are responsible for 9/11. There was a tie to 9/11. Now that things are getting a little bit more differentiated, now that we're talking about affiliated groups and co-belligerent groups and even tangentially affiliated groups. There's a hard question about whether they too are encompassed within the original scope.

Congress' response is not to hold detailed hearings on how we think about the AUMF and how should we expand it and what authority does the administration need. Congress' response is to tuck a very, very tiny provision into the National Defense Authorization Act, hold no hearings on it, and then just assume that no one is going to notice that by expanding the detention authority to include any group the president says is affiliated with al-Qaeda, it is actually extending the scope of the conflict. Right? I think that's a pretty important thing. Congress relaxing pre-September 11th barri-

ers. It's generally true that the Constitution does not actually provide much in the way of protection when it comes to privacy. In fact, before 9/11, most of the key privacy protections, the laws that prevented businesses from talking to government, were statutory. Congress has relaxed those. Could congress reinstitute them? Sure. Will they? Well, I leave that to you.

The Lone Wolf Provision. In the USA PATRIOT Act in 2001, Congress, at the Bush administration's request, included authority to conduct certain kinds of wiretaps and surveillance on lone wolves. So these are terrorism suspects who are not at least clearly affiliated with any particular terrorist organization. This was a critical power the Bush administration argued. When it expired, the Obama administration also said this a really important authority; we really need it. And Congress agreed and re-upped it again. Does any one know how many times the Lone Wolf Provision has been used since 2001? If it's less than one, you've won your prize. Zero, that's right. So my point is just that if we're going to have this long term conversation about the changing nature of the terrorist threat, we should also be thinking about the other side of the coin, which is that if we're going to have these new authorities, if we're going to have these new prerogatives, we should also think about whether we should be also designing ways of insuring accountability.

Now, before I sort of shut up and get yelled at by everybody else, let me just say, I don't in any way mean to demean anyone who works on these issues from the executive branch position. I think it is entirely understandable. And I think it was entirely understandable, even during the Bush administration, that executive branch officials will push the envelope. That they will take whatever authority they have and use it to the best of their ability to protect individuals and the country at large. And I think that is right. What we have to appreciate is that that's going to be true and that even though, as a policy matter, certain administrations may come out looking better, the law still counts. And we still need legal restraints that are going to be enforced not just by the executive branch against themselves. So as the threat evolves over the next ten years, between now and September 11, 2021, I think we also have to worry about how our statutory protections or civil liberties are also going to evolve. Because otherwise, well, that's a one-way ratchet. Thank you.

DANIEL MARCUS: Thank you Steve. Maybe we ought to start by giving our government officials here an opportunity to respond to Professor Vladeck.

STEVE VLADECK: But not Professor Anderson? [Laughter]

IVAN FONG: Well, I'll do both. So just a comment or two in response, really, on Professor Anderson, not so much on the use of force outside the U.S., but the very good and important question you raise about costs and benefits that additional dollars spent on something that may counter terrorism or some other event versus the benefit that we obtain as a society. That is a question that we think about a lot. We have a duty to be faithful stewards of American taxpayer money; we are accountable to Congress. We are subject to significant oversight by a number of bodies, and so if for

nothing else, I think we don't want to be wasting money, we don't want to be cost inefficient. The challenge, and I've actually tried to promote some interdisciplinary conversation here, is that as you framed it, it's difficult to specify or articulate the thing that we are buying and so let me propose sort of a thought, and unfortunately I'm not an expert in this area, so maybe those of you who are can take this farther. I have consulted with insurance law experts, because it seems to me that the analogous area is spending money on insurance. You could argue that that's wasted, because you never get the benefit of it. There's an important distinction though. Insurance kicks in after some negative event occurs, and doesn't count on what I call prevention costs. And so we all have our own - I mean the hurricane is a great example. How much did you spend to mitigate the potential harm to or fortify whatever, your windows or whatever. All of those costs also we go through in our own minds a bit of cost benefit. And often we may say, well after the event, if it didn't happen, that was a waste. But ex ante really you can't say that. And it's afterwards when there's been some terrible thing, and people say, well you should have spent more, you could have done more. And those are very, in my view, unfair sorts of perspectives because hindsight doesn't take into account the risk that you perceived before hand.

So the thought experiment that I try to invoke in these decisions is really spending money to buy down risk. We face a risk landscape. Our job is to evaluate and assess the highest risk. And we should be spending money in a cost effective way, buy down the highest risks and where it's most cost effective. A dollar spent to reduce this risk from 10 units to 2 units is worth a lot more than spending of the same dollar to reduce another risk from .3 to .299. Yet, those comparisons are easy to say in the abstract. In reality, should we spend more to prevent a nuclear WMD incident, a chemical attack, a biological attack, a cyber attack? Those are very difficult and I challenged our friends at the Office of Management and Budget (OMB) who also ask these questions to say, that for you economists in the room, there is a Nobel Prize in economics for the person who comes up with a theoretical framework for solving that kind of equation. So, I just want to say, it is a good question, it is one we struggle with. It is one that I think conceptually we can understand in terms of how we spend our money, but it's very hard ex ante as opposed to ex-post to make those assessments.

With respect to civil liberties, you know I, of course, take very seriously, and we do at DHS, our mission not only to help secure the homeland, but also to protect the rule of law, privacy and civil rights. And I know you appreciate that there are a lot of people who are doing that. The point about Muslim Americans and the Muslim community, it is a significant effort and subject of outreach because those relationships are important. I would just distinguish between the impression you may get, which is I don't believe there are the sort of random suspicionless method of sort of perusing through files as opposed to intelligence driven; sort of we have a piece of intelligence about a particular operative who may be traveling to the U.S. on a plane and the extent to which we can identify people who fit the specific profile. And then not really do anything other than subject them to greater secondary screening is, I think, a way to balance what I think is an important and prudent approach of being risk driven and intelligence driven with the sort of broad brush. Everybody who

looks a certain way, I think we are very clear in our guidance and in the training that we give to state and local officials, that it's very important not to stereotype or engage in racial profiling.

The wiretap point you make, my familiarity with it actually isn't that that the law has gone away, but it's been amended to allow the Attorney General to personally, or require a personal certification before certain sharing of information takes place. And so I think the answer isn't so much that it's a black and white prohibition, but that there are procedural safeguards in place.

And then the last point, I will violently agree with you on the role of Congress. [Laughter]. I think it has been, in my position now for a little over two years, the mainstay of a lot of what I do is deal with Congress and it is a very difficult situation. Particularly given the number some of you may have seen, over a hundred congressional committees and subcommittees have oversight jurisdiction over the Department of Homeland Security. And it makes it very difficult, to say the least, to not only be responsive, but to have clear guidance as to what priorities Congress wants.

I'll add one more piece, which I think is an important part, which is the third branch. The judiciary has played a significant role. We all know that the law that comes down from court cases tends to lag. And so to some extent, of course, they're playing catch up and it makes it very hard when thinking about prevention and trying to lean forward in what we are doing. But the good news, or depending on our perspective I think, the news is that in general the government has been very successful in the litigation in which things like the advanced imaging technology at the airports has been challenged on 4th Amendment grounds. An issue that we have had a bit of discussion internally, is searches of electronic media at the border. So when you bring a laptop in, you get a confluence of the government's very clear and broad authority to search at the border versus what I think people view as a laptop being very different from a file cabinet. You know, if you were wheeling a big notebook or file cabinet across the border, there would be no question that the federal government could seize, without suspicion, inspect and seize your file cabinet. But a memory stick or a laptop may be sufficiently different in kind that the courts will come down differently. But that's the kind of question that I think ultimately the executive branch, Congress, and the courts need to come to some consensus on in order for all of these issues to be sorted out.

DANIEL MARCUS: John, do you want to add anything?

JOHN CARLIN: As a law student, you tend to think abstractly about the legal framework and less about what goes into the day-to-day decision-making. I know from my time when I was at the FBI, it was a shock at how limited the resources were. And when you think about the entire budget of the FBI, the yearly budget is somewhere in the order of \$8 billion dollars. There are roughly 30,000 employees. That's a big growth since 9/11. But when you consider the size of the United States, and then the number of FBI agents is roughly in the order of 14,000. So it doesn't compare that well in some ways to large municipal police departments when you consider the scope of the



responsibilities, not just in the counterterrorism or foreign intelligence realm, but civil rights and public corruption, violent crime and gangs, drug offenses, and bank robberies. The scope of activity where the American public turns to the FBI and expects a solution is enormous compared to the resources. So what does that do to the day to day? That means every day you make a decision, or an agent makes a decision, on a particular case, or now that it's Intelligence driven, that you analyze the threats in a particular domain or area of the United States. You have to decide, where am I going to apply those extraordinarily scarce resources given the scope of the population and the threats that we face?

And in that sense, the resource constraints, there's a happy marriage between the resource constraints and those of us looking at the civil rights and civil liberties concerns. Because it would be a terrible use of those resources to randomly check large communities or attempt to randomly look at a U.S. person. Even if you were allowed to do it, and you had the legal structure in place and authorities, which you do not, it would be a terrible use of resources and instead, I think the day-to-day challenge is the opposite. It's figuring out how we triage the articulable threats that we're receiving day in and day out, and decide of this vast volume of threats from the threat matrix of terrible acts that we're hearing chatter about, which one of these are the ones that are most likely to become operational and where we should apply our scarce resources? And that is a decision that is extraordinarily difficult to get right and is one that I think has been key and really the cornerstone of the FBI's transformation over the last ten years. Which is, we have these intelligence analysts, we share the intelligence, we receive the intelligence, now how do we make those decisions on the application of resources to disrupt. It goes to the risk analysis that Ivan was discussing.

Just on one - the Lone Wolf Provision. It's one that has garnered a lot of attention, perhaps because of the name. It's ironic to me a little bit that it's used as an example of a violation of civil rights and civil liberties since, as the professor stated, it's never been used. So in that sense, we can breathe a sigh of relief that you have not been targeted. But it is an authority that if it were used, it really goes to whether or not you could plead out that an individual was linked to a particular identifiable terrorist group. So the concern is you'll have an incident where you can make the showing, and it does require a showing, to Article III judges in court, in the Foreign Intelligence Surveillance Court, that you could make the showing that an individual falls within your foreign intelligence authorities. But you couldn't show that they were linked to a particular group. It's called the Moussaoui problem and thankfully it's not one that's been confronted, but the thought was it was good to have the authority. If we did use it, it's one where the - it also goes from the FBI to the National Security Division, the application would have to be approved. It then goes to the court, the court would have to approve it, and then after it was used, you'd have to report its use back to Congress.

So I think there are areas where receiving additional guidance or clarity from Congress would be appreciated. I'm not sure if Lone Wolf is, although it's important I think to plan for that possible eventuality, I think it's probably received too much attention.

STEVE VLADECK: Although in that sense, right, it might just be that it's a metaphor? And that the metaphor is - I mean this is after the point I was trying to make and I think both of your responses helpfully illustrates it. Which is that from the perspective of the executive branch, the position rightly is we haven't used these authorities and therefore there is nothing to worry about. We have been faithful, we have not crossed these lines, we are not doing random stuff because of resource constraints or other reasons. And from my crazy academic perspective, that's wonderful, but it's a political constraint, not a legal one. It's a constraint that is only as good as the circumstances that allow it to exist.

As the threat evolves over time, and as things change and as there are new crises, the fact that these authorities are out there, whether or not they've been used, is what gives me pause and is what I think we should be addressing. To paraphrase Justice Jackson, it's the loaded weapon. Responsible executive branch officers will only shoot the loaded weapon when they have to, but my concern is about making sure we understand when the weapon is there.

IVAN FONG: If I could also just reply. I think you may underestimate the power of the statement by the senior legal officials in the department that something is unlawful. So if your point is that, do we prosecute people or do we not indemnify them when they cross the line? That I will leave to others, but I can tell you from personal experience, that I wouldn't even call it pressure, I think there is a sense of shared mission. That people come to these agencies because they are dedicated to the mission. When I do recruiting or when I meet the lawyers, I often ask them, why did you come to work for DHS? And maybe I shouldn't be surprised, but at least in the beginning I was very surprised that a very common answer, maybe in more than half the occasions, people would say, "9/11 affected me in ways that I can't describe and I resolved to myself that I wanted to do something about it and I'm a lawyer, so I applied for a job at DHS, and here I am."

Everyday when we respond to various crisis and people work late into the evening, overnight, over the weekends to respond to hurricanes, earthquakes, I see that everyday. And the point is really not that we're so blinded by the mission that we ignore the rule of law. But that people do take seriously, and I can't go into the internal deliberations, but there are many - it is the rule, not the exception, that the lawyers will say, I'm sorry you're about to cross the line or if you were to go there, it would raise significant litigation risk. And if we explain to them what that risk is and why, we will help them find a much better path to accomplish what they want to do. So you may call it political, I view it as the shadow of the law. I mean this is what happens everyday in the executive branch where lawyers are giving advice and people who are policy makers or operators actually follow the advice. It's the very rare occasion, and sometimes you do hear about when people go above or behind or beside the lawyers and they're the ones that get in trouble. And we are very fond of pointing that out to people.

STEVE VLADECK: So we're going to have the Libya conversation next week? [Laughter]

DANIEL MARCUS: The problem sometimes of course is that the legal advice, as we saw arguably some years ago with respect to torture, may not have been the correct advice. But I agree with Ivan that there is great effort to preserve the rule of law within the executive branch, but of course the legal advice has to be the right advice.

We've run out of time. I would like to - and everyone should feel free to leave - do you have to leave? You have about five minutes? All right. I would like to give an opportunity for people to ask questions, and I sure have a couple.

AUDIENCE MEMBER: Over the past ten years it seems that the U.S. has looked to certain events in its foreign capacity only as to how they relate to its foreign policies, i.e. the United States has seemed to really look at how the death of Bin Laden will change what our Afghanistan policy should be without changing our Iraq policy. I don't see any evidence that the domestic agencies have done the same kind of analysis about the real scope of this threat and that instead you have a kind of rhetorical conversation between the World Trade Center, 9/11 and the threat of home grown extremists. They don't seem equivalent to me, in any respect, and, which is not to say that they're not, that it's not serious, but they're not equivalent. The 9/11 Commission recommendations were about what could we have done and what wasn't done to prevent the next kind of massive attack from overseas? And you've done a lot of things that we've asked, but now, you're talking about something internally, and it seems to me that the government has failed to do the same. For instance, in having 72 Fusion Centers when I think the likelihood of a massive terrorist attack, I hope, is pretty low. The costs in terms of an increase in government power and authority, which is there to be used when times get tough and the next administration is tempted to use it and the costs, of course, in terms of money, when we have - I mean every dollar is not only a question of which FBI agent is going to what, but which food stamp program is going to get cut because the security apparatus is so large? And lastly, it is not clear to me that there has really been an analysis of the effectiveness of the changes in domestic counterterrorism landscape in preventing domestic incidents. And it's reassuring that there have been so few, but it doesn't prove that what you've been doing is correct. And that analysis simply hasn't been done.

DANIEL MARCUS: Who wants to take that on? [Laughter]

JOHN CARLIN: In terms of the threat posed by home grown violent extremists and how seriously it should be taken by the FBI, the Department of Justice, and Department of Homeland Security, I do think this is an area where you look to the executive branches accountable ultimately to the people. Listen carefully to our oversight from the hill, and I throw it back a little bit on what are the expectations and what is the task? So currently I think it's very clear that the number one priority is to prevent terrorist attacks, regardless of the perpetrator, inside the United States. That is also the

number one priority of the Department of Justice. Clearly, and that includes both international terrorists and domestic terrorists and it certainly includes homegrown violent extremists. I think many of us remember Oklahoma City and the type of damage that was caused in that case by a violent extremist who was a domestic terrorist. And I think if we've seen some of the domestic response to a couple of events over the past two years. The tragic loss of life at Fort Hood and the failed attempt to blow up an airliner by Abdulmutallab. And the reaction and response that we received in my former seat at the FBI, indicated expectations were high. That it was unacceptable to come that near to a success in the case of Abdulmutallab. I think similar criticism in Times Square. And in Fort Hood it was unacceptable that any attack had occurred at all. There was an extensive investigation by multiple congressional committees. there was a White House driven interagency extensive investigation as to what had gone wrong and what could be fixed. And the message was clear that although it may be impossible to assure 100 percent safety from a terrorist attack, that that is and should remain our goal. And that every day we should be doing everything we can within our existing authorities, ever mindful of our obligation to the rule of law and civil liberties to prevent those attacks from occurring.

It is not up, I don't think, to the - it's important for the executive branch agencies such as the FBI and the Department of Justice and DHS, to attempt to execute according to their authorities and the expectations until told otherwise. And so, that will remain our number one goal. I won't give my personal opinion as to whether we should attempt to stop home grown violent extremists from committing terrorist attacks inside the United States ranging from shooting up pedestrian malls or along the line of what we saw in Mumbai, or using improvised explosive devices, but I will say that currently, that's our goal and our drive each day, is to prevent that from occurring and I certainly don't think that's outside the bounds of what we should be doing.

DANIEL MARCUS: You want to add anything quickly?

IVAN FONG: I want to add a couple of points. I wanted to mention or respond to this point about countering violent extremism and this distinction between home grown and foreign. I think those concepts are elusive. I think there are important differences to be sure, but we are increasingly seeing an evolution of the threat so that the border is making less of a difference. I think John alluded to the frequency with which we see the Internet being a medium for communication and that the transnational nature of some of the operations. So I would hesitate to say that they are completely different, not am I saying that they are identical. I think they share some similarities and that I think it's important to treat it as spectrum as opposed to two distinct categories.

I also want to say that the increase in authorities I think does result from the evolving threat. That as the threat evolves, as the landscape changes, the folks that are tasked everyday to prevent and to deter, need to have different authorities. We engage in that very public debate, for example, in the cyber security arena, where because of the evolving threat, I think you have seen both the

administration and others propose legislation to clarify some of the authorities.

The last point to respond to, this very important question that's been a bit of a theme, has it been worth it? I saw a statistic the other day. The DHS budget is about 3.5 percent of the overall federal budget. I leave it to you to decide whether that's too much, too little, you know, enough, not enough. But I think we sometimes have this impression that we are spending an inordinate amount of money. We are spending a lot of money, don't get me wrong, but we are also spending money in lots of other very important priorities that this country has and to me, I'll interject my own personal view. 3.5 percent doesn't strike me as being unduly high.

DANIEL MARCUS: Okay. I think, while I know there are more questions, and I have some questions, I think we really have run out of time and people have to leave. So I'm going to call it quits. Thank you everyone for coming and please join me in thanking our exceptional panel.

[Applause]