

Center for American Progress



SPECIAL PRESENTATION

“LESS SAFE, LESS FREE: THE ‘PREVENTIVE PARADIGM’ AND THE WAR ON TERROR”

MODERATED BY:

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MR. MARK AGRAST: Good afternoon. My name is Mark Agrast. I'm a senior fellow here at the Center for American Progress and it is my pleasure to welcome you to this discussion of an important book just published by New Press, *Less Safe, Less Free: Why America is Losing the War on Terror*. Professor Cole, the coauthor of that book, is here and will be signing copies of the book following the program. For the benefit of everybody present and our C-SPAN audience, may I please ask you to turn off cell phones, pagers, intelligence gathering equipment, and so forth.

In this new book, Professor Cole and his coauthor, Jules Lobel, argue that the preventive paradigm adopted by the Bush administration not only has undermined our nation's character, but also has made us more vulnerable to terrorist attacks. The authors contend that this new paradigm has led directly to the detentions at Guantanamo, the use of coercive interrogation and torture, and the invasion of Iraq. They argue that there is virtually no evidence that the paradigm of prevention has thwarted actual terrorist plots or captured many terrorists, while there is substantial evidence that it has made us less safe. They offer an alternative preventive strategy that favors non-coercive measures, multilateral cooperation, and support for the rule of law.

This topic could hardly be more pressing or more timely. This morning, the Senate Judiciary Committee held a hearing to review the recent changes to the Foreign Intelligence Surveillance Act and to consider whether those changes should be made permanent when they expire early next year. Today's *New York Times* carries word of a decision by the new Court of Military Commission Review that authorizes the government to resume the trial of military commissions or by military commissions of Guantanamo detainees accused of war crimes.

Last week, the Senate narrowly failed to adopt a bipartisan amendment to restore the right of habeas corpus to Guantanamo detainees, a right which the last Congress eliminated. Meanwhile, the Supreme Court is preparing to hear the case of *Boumediene v. Bush*, which likely will decide whether the law which bars such petitions is constitutional.

With us to discuss these and other issues are two of the nation's most thoughtful experts on civil liberties and the war on terror. David Cole is professor at Georgetown University Law Center, a volunteer staff attorney for the Center for Constitutional Rights, the legal affairs correspondent for *The Nation*, a regular contributor to the *New York Review of Books*, and a commentator on National Public Radio's "All Things Considered." *New York Times* columnist Anthony Lewis has called Cole "one of the country's great legal voice for civil liberties today," and Nat Hentoff has called him "a one-man committee of correspondence in the tradition of patriot Sam Adams." He is the author of two previous books: *Enemy Aliens*, which received the American Book Award in 2004; and *No Equal Justice: Race and Class in the American Criminal Justice System*, which was named best nonfiction book of 1999 by the Boston Book Review and best

book on an issue of national policy in 1999 by the American Political Science Association. David also co-chairs the Liberty and Security Initiative at the Constitution Project.

Bradford Berenson is a litigator in the Washington, D.C., office of Sidley Austin LLP. From January, 2001 through January, 2003, he served as associate counsel to the president of the United States. In the White House, he worked on the USA PATRIOT Act, the military order authorizing the use of military commissions, detainee and anti-terrorism litigation, and the creation of the new Department of Homeland Security. Berenson has also provided commentary on legal matters in the mainstream media, publishing articles in the *Wall Street Journal*, the *Los Angeles Times*, and the *Washington Times* and making appearances on news and public affairs programming on ABC, NBC, CBS, PBS, NPR, CNN, and the Fox News Channel. He holds a B.A., summa cum laude, from Yale University, and a J.D., magna cum laude, from Harvard Law School, where he was Supreme Court editor of the Harvard Law Review. Following graduation, he clerked for Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia Circuit and Justice Anthony Kennedy at the U.S. Supreme Court.

Our speakers come from differing views, differing sides of the political spectrum. They are both patriots. Both are longtime friends of the Center and of mine, and we're delighted to have them both with us.

We'll begin with David who's going to give us a 10 to 15-minute summary of some of the main ideas in the book, then I'll ask Brad to offer his response. At that point, I'm going to pose a series of questions to both of our speakers, and then we're going to open it up to the audience for your questions.

David Cole.

MR. DAVID COLE: Thank you so much. I want to thank Mark and the Center for American Progress for hosting this event and in particular thank Brad for agreeing to come here and debate me on this topic. Brad is, I think, one of the most thoughtful and eloquent defenders of the administration and he's not afraid to go into the enemy's lair to defend his policies. I think the last time we debated was at the American-Arab Anti-Discrimination Committee's annual national convention, so this is an easy audience for Brad. It's also nice to see so many familiar faces here, and I used to assume that the unfamiliar faces were FBI agents, but I no longer because now I know that with the NSA's new capabilities, they don't need to send FBI agents here. But we're not supposed to talk about the NSA.

So our book, *Less Safe, Less Free*, is essentially a critique of the Bush administration's strategy in confronting the very real threat of terrorism in the wake of 9/11. And that strategy was, I think, best labeled by John Ashcroft before he stepped down, as David Letterman said, so that he could spend more time spying on his family. He said that this is a paradigm of prevention and what he meant by that was – when you face an enemy who is willing to commit suicide in order to inflict mass innocent – mass casualties on innocent civilians, it's not enough to bring them to justice after the fact.

They're dead. Thousands of innocent people are dead. You want to prevent the next attack from occurring. And of course that's something I think we all agree with: we want to prevent the next attack from occurring.

But the paradigm of prevention as put in place by the Bush administration under the rubric of the war on terror in particular involves the claim that it is permissible to use the harshest coercive methods of the state – the power to detain, the power to inflict pain, the power to go to war not based on objective evidence of past recurrent wrongdoing, as is the case when you punish someone after a criminal trial or as is the case when you go to war in self-defense in response to an armed attack, but rather based on predictions – necessarily speculative – about the future.

And so sort of three features of this preventive paradigm that sort of illustrate point are preventive detention. The notion that you lock somebody up not because we're holding him responsible for what he did in the past, but because we are afraid that he might do something in the future, so let's lock him up to prevent him from doing that in the future.

Coercive interrogation and torture. Those who defend coercive interrogation and torture always do so in preventive terms. Nobody argues, not even the most adamant supporter of torture argues that it is permissible to punish somebody for past wrongdoing, no matter how heinous the past wrongdoing is. Nobody argues it's permissible even to investigate a past crime. The argument is always to prevent the ticking time bomb from going off. It is justifiable to inflict a little short-term pain on the suspect for that preventive end.

And then, of course, the most disastrous example of the preventive paradigm: preventive war, the notion put forth by the Bush administration in the run up to the war with Iraq that it no longer makes sense to abide by the international law regarding war, which is that a country can unilaterally attack another country only in response to an armed attack or in response to an imminent threat of attack. Nobody claimed that Iraq had attacked us or posed any imminent threat of attack, but the claim was, well, they have these weapons of mass destruction – and I'm told President Bush is still convinced they have these weapons, we're going to find them any day. Those weapons might be given to al Qaeda even though al Qaeda and Saddam Hussein were not the best of friends. Al Qaeda might then at some point in the future use them against us, and therefore it's justified for us, in the name of prevention, to go to war against a country which has not attacked us.

So those are three examples. To make it a little more concrete, I'll talk about one of my clients, Maher Arar. Some of you may have heard of Mr. Arar. He's a Canadian citizen who was returning from a trip with his family in Europe and was changing planes at JFK when he was pulled out of line by the Immigration Service, locked up for two weeks, denied his requests to see counsel. When his family hired an attorney for him because he didn't show up at the Toronto airport, the INS lied to the attorney about where he was, and then they order Mr. Arar deported on the basis of secret evidence which he had no opportunity to defend against and to which he said, "Well, I don't think I'm

deportable, but I wasn't really trying to come to the United States anyway. Here's my connecting flight coupon to Toronto," and they said, "No, you're not going to need your connecting flight coupon because we've chartered a federal jet for you." And the only problem was that the federal jet went not to Toronto but to Syria.

And you've got to ask yourself, why would the United States take a Canadian, forcibly redirect him to Syria except for the fact that Canada doesn't have a record of torturing its suspects and locking people up without charges. Syria does. Syria did. Mr. Arar was tortured. Mr. Arar was locked up for a year without charges, most of it in a cell of the size of a grave. At the end of the year released. Why? Because the Syrians found no evidence that he's engaged in any wrongdoing. Went back to Canada. Canadians investigated this whole affair at great length and great expense, fully exonerated Mr. Arar, and in fact awarded him \$10 million in damages for Canada's part in the way the United States mistreated him.

When we learned about that, my co-counsel, who works for a private firm – a corporate firm in New York sent an email saying "is that 10 million US or 10 million Canadian?" To me, it was a lot of money either way, but Mr. Arar was a victim of the preventive paradigm. We didn't have evidence that he'd engage in any wrongdoing. If we did, he'd be on trial in the United States; or if we had evidence that we didn't want to disclose he'd be in Guantanamo, but he is in neither place. He was sent to Syria because we didn't have that evidence, but we had some hunches and we thought well, maybe they can get information out of him that we weren't able to get out of him.

So the argument of our book is that when you move into this preventive paradigm, justifying harsh coercive methods based on predictions necessarily often inaccurate about future behavior, you necessarily compromise fundamental principles of the rule of law, number one.

Number two, that in fact this strategy, the preventive paradigm has not produced what it promised; namely, greater security for the United States. There's very little evidence that it has been very effective in terms of identifying actual terrorists, disrupting actual plots, and there's substantial evidence that it has had such a backlash effect that it has ultimately redounded to our detriment.

So let me – and then finally, the final part of our book is that this was tragically unnecessary – that there are ways within the rule of law to adopt a preventive strategy that does not have the negative consequences of the Bush administration's strategy and that had we adopted those measures, we wouldn't be living in a world where anti-Americanism has never been higher.

So let me talk very briefly about the sacrifices and then spend most of my time on the results, because I think the sacrifices are fairly familiar, but I think it's important to sort of recall them. So one of the principal values of the rule of law is equality: everyone's equal before the law. Yet the preventive paradigm has been defended time and again by the administration with the argument that they – Arabs and Muslims, and especially foreign national Arabs and Muslims – don't deserve the same rights that we,

white American citizens deserve. And that has been the justification for everything from preventive detention of foreign nationals in the United States under pretextual immigration charges long after those immigration charges were resolved, to secret arrests and secret trials of many of those foreign nationals to the treatment of people at Guantanamo where the government argues they don't have any rights because they're foreign nationals outside of our borders; to I think the most reprehensible position in terms of a double standard, Alberto Gonzales' view that the international Human Rights Treaty prohibiting cruel, inhuman, and degrading treatment somehow didn't protect foreigners outside of our borders, only Americans outside of our borders. This is a human rights treaty. It's predicated on human dignity, signed by virtually every country in the world, and our position was it doesn't protect foreigners.

When Congress found out about that, of course it rejected it almost unanimously, but that was the double standard of the preventive paradigm. And the preventive paradigm pushes you towards that double standard because these measures would not be acceptable if they were applied equally across the board to all of us.

You also see compromises on transparency. We've had secret arrests, secret trials. We've even had the state secrets privilege where the government claims that its assertion of secrecy means that even claims that the government has acted criminally and unconstitutionally cannot be adjudicated in court. So in Mr. Arar's case, the government says, "Even if we did send him to Syria to be tortured, neither of that violates international human rights law and the Constitution, so what? It's a secret what we did to him, even though it's been in the newspaper and Canada's published 1,000 page report about it. It's a secret officially, and therefore the courts can't adjudicate the case."

Fair process, the notion that before the government uses the harshest coercive it has, it goes through a fair process where there is a possibility to defend oneself – not for enemy combatants who President Bush claimed – as long as he identified them as enemy combatant or as he put it "a bad guy," they could be locked up forever without any hearing, without any access to courts or lawyers.

Checks and balances, the way the rule of law operates is that various branches have incentives to check each other: not under the Bush administration's theory of the commander in chief power which they've said gives them the power to ignore and violate criminal statutes – the criminal statute prohibiting torture, the criminal statute prohibiting warrantless wiretapping – and they even argue that it would be unconstitutional for the Supreme Court to exercise review over the detentions of the enemy combatants at Guantanamo. The Supreme Court rejected that nine to nothing, but the Bush administration continues to have this expansive view of the commander-in-chief power.

And then finally, basic human rights, the sort of the cornerstone of the rule of law, and here all I have to do is invoke two images: Guantanamo and Abu Ghraib. Probably the United States today is known better or worse throughout the world for those images than for the Statue of Liberty.

Now, when I make these complaints to people like Brad – I don't think Brad will say this, but when I make these complaints to others I get a response inevitably along the lines of the one I got from my colleague Viet Dinh in an earlier debate where he said to me, "David, you're so September 10th." (Laughter.) And so the notion is – the notion is, look, yes we had to make some compromises, but we're doing it for your security. We are in a new era. We need to strike different balances.

So what about the success rate here? And let me just review – this is the bulk of our book, but let me just review a couple of statistics, I think, to give you a sense here. The State Department issued a report a couple of years ago saying "worldwide terrorist incidents had fallen for the first time in a significant period of time," and they said – Richard Armitage said, "see, the global war on terror is working," until two months later when Colin Powell had to come out and admit that actually they miscounted and that – and worldwide terrorist attacks had increased. In fact, worldwide terrorist attacks have increased markedly in both frequency and lethality every year since 2001.

We know that al Qaeda has reconstituted itself fully in the border of Pakistan, according to our own National Intelligence Estimate. And whole new groups have sprung up to attack us, like al Qaeda in Iraq, like these groups without names of individuals in countries like the UK and Germany and Madrid, who are willing to take terrorist actions against Western targets – even harder to identify and respond to than al Qaeda, as difficult as that is. But – but – there've been no terrorist attacks on the United States since 9/11, and whenever the Bush administration trots out that fact, which it does whenever it can, it calls to mind for me Tom Ridge's resignation speech, where he tried it out that fact and then said – and then knocked on the podium. And that night, John Stewart played that on the Daily Show, and he said, "Did I just see the leader of Homeland Security for the most powerful country in the world knocking on wood?" And indeed he did, and indeed Tom Ridge might as well have knocked on wood for what the record shows about what particularly the Homeland initiatives have to show for them.

So take the preventive detention of foreign nationals in the immediate aftermath of 9/11, the first two years after 9/11 over 5,000 foreign nationals were detained in preventive detention measures. Of those 5,000 not one today stands convicted of a terrorist offense. Take the 8,000 who were called in for FBI interviews because they were young Arab and Muslim foreign nationals: today not one stands convicted of a terrorist offense. Take the 80-plus thousand who were required to come in for special registration, fingerprinting, and photographing before INS on pain of deportation if they don't, again because they came from Arab and Muslim countries – the theory being we might find a terrorist, not one stands convicted of a terrorist offense. So in this, the most extensive campaign of ethnic profiling I think we've seen since World War II, the government's record is about zero for 95,000. Now, that can't account for the fact that there hasn't been a terrorist attack in the United States since 9/11. Rounding up 95,000 people who are Arab and Muslim, but don't have any connection to terrorism, doesn't actually do anything except alienate that community.

The government doesn't put that statistic on its various websites and reports about how it's winning the war on terror. You might look at www.lifeandliberty.gov for their

side and they say, “We’ve indicted over 400 people on terrorism related cases, and we’ve got over 200 convictions in those cases.” Well, except when you look at those, it turns out that the key word is related because most of these cases – the vast majority of these cases don’t have any terrorism charge in them whatsoever. They are minor charges like credit card fraud and lying to an FBI agent, or filling out a federal form falsely, not – I’m not defending those practices, but they’re not terrorism. And indeed the inspector general issued a report earlier this year criticizing the Justice Department for inflating those figure by calling cases terror related that had nothing to do with terrorism.

The *New York times* and the *Washington Post* looked at all these cases and they found there were only 39 that actually had a conviction on a terrorism charge – and we, for the book, we looked at those 39, and what you find is that virtually all of them are convictions under this extremely expansive statute called the Material Support for Terrorists Groups Statute, which allows the government to get a terrorism conviction – a terrorism conviction – without proving that the individual engaged in terrorism, planned to engage in terrorism, conspired to engage in terrorism, aided or abetted terrorism, conspire to aid or abet terrorism. All they have to show is that you gave some support in any fashion whatsoever to a group we’ve labeled as a terrorist group regardless of your intent, regardless of the nature of your support. So that doesn’t actually demonstrate actual terrorists that we have identified. About the only person convicted of an attempted terrorist act in the United States since 9/11 is Richard Reid, the shoe bomber, and he wasn’t captured by virtue of any brilliant preventive paradigm strategy, but because this alert airline attendant saw this strange looking guy trying to light his shoe.

There’ve been no al Qaeda cells identified in the United States in six years of intense focus on the Arab and Muslim community. At Guantanamo, we were told these people are the worst to the worst. We now know 435 of them – more than half – have been released, that the military’s own tribunals categorized only 8 percent of them as fighters for al Qaeda or the Taliban. And, of course, the preventive paradigm’s chief initiative, the war in Iraq, has turned Iraq into a terrorist magnet – the number one terror training ground in the world, and led to the loss of tens of thousands of American and Iraqi lives.

So that’s what we have to show for it, but it’s worst than that of course, and this is what I’ll close with. When a nation pursues a legitimate end – and seeking to protect ourselves from attacks like 9/11 is unquestionably legitimate, but when a nation seeks to pursue that legitimate end through illegitimate means, it sacrifices the legitimacy of the entire enterprise in the eyes of the world. And when you do that, you countermand your very purpose because people who study how democracies defeat terrorist groups, and they do – they do – say that the key strategy is to isolate the terrorist group. It tends to be a small group of people who are actually committed to killing innocent civilians. Isolate that group from the larger group of ideologically sympathetic people who are in the communities from which that group comes.

And if you don’t do that – if you don’t isolate the group from the community, then you are in a sort of never ending, self defeating project because if what you do is you alienate that community by, for example, treating them as presumptively suspect

because they're Arab or Muslim foreign nationals, by failing to distinguish between mainstream moderate Muslims and people who are actually committed to violence, then you drive that community to move closer to the center, to be less eager to work with us, to be more supportive of the terrorists. The UK found exactly this with respect to the IRA in Ireland when it initially responded by, as we did, internment – long-term preventive detention without charges – and coercive interrogation, and it found that these things only created sympathy and support for the IRA within the community and undermined its efforts.

So in the long run what we need to do is isolate the group from its community, and we don't do that by undertaking measures that are seen around the world as illegitimate precisely because they violate the most fundamental principles of the rule of law, and do so in particular and selectively against people in that community: Arab and Muslim foreign nationals.

So I'll close with one quotation, it's from Justice Aharon Barak who was the president of the Supreme Court of Israel, the court that has probably dealt the most with terrorism and the rule of law issues. And in a decision which the court barred the use of torture to interrogate Palestinian terror suspects, he wrote "A democracy must sometimes fight terror with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."

Our contention is that the Bush administration has weakened our spirit by failing to realize that the rule of law is an asset, not an obstacle, not something to be thrown aside in the struggle against terrorism.

Thank you. (Applause.)

MR. BRADFORD BERENSON: Thank you all for coming out today. Thanks to the Center for American Progress for hosting this event and thanks to David Cole for writing such a thoughtful and insightful book. I think David Cole may be the one subject on which I agree with Nat Hentoff and Anthony Lewis. It really is a very fine book with a lot in it that is food for good, careful thought, and there is much in the book that I agree with.

There was no question on the 11th of September, 2001, but that the Bush administration, or any administration of any party, in trying to respond to the unprecedented carnage that we suffered that day, was going to make mistakes. The Bush administration surely did, both at the policy level and at the implementation level. And I do believe, as I've said, that any other administration would have as well. Whether the Bush administration made more than its share is essentially an unanswerable question, but David and his coauthor are surely correct in their book that the case against torture and the use of torture or cruelty under any circumstances is compelling. I think likewise the case against preventive warfare is compelling. And in chapter nine of David's book where he suggests some alternative defensive strategies, things we ought to be doing or

assigning a higher priority in trying to protect ourselves, there are also many, many good ideas with which I agree.

The problem as I see it with the book, and I'm not – I'm not going to respond to David by trying to defend the administration's worst mistakes or worst excesses; rather, what I'd like to do this morning is try to offer a somewhat different overall perspective to explain where the administration is coming from generally, why it took the approach that it did, and to take issue at a general level with the overall critique of what David has referred to as the preventive paradigm.

I think the central problem with that critique is that it really goes too far. It ascribes everything bad that has happened to the administration and its embrace of that paradigm, and denies it credit for anything good that's happen, even to the point of denying it credit for the lack of any additional attacks inside this country since September 11th, 2001; denying it credit for Libya's decision to try to rejoin the family of respectable nations and renounce weapons of mass destruction programs; denies it credit for having helped to bring down the nuclear proliferation operation that was being run by A.Q. Khan out of Pakistan. In short, I think it explains too much and it's too one-sided.

Now, a critical thing to understand, I think, is that the criticism leveled at the preventive paradigm is not really in my view a criticism of the idea of prevention or of a preventive paradigm generally. David both in the book and here acknowledges that it is extremely important for a variety of reasons to try to prevent another attack, and not the least of those reasons is the preservation and protection of our civil liberties. If one imagines a world where the 9/11 attacks and the anthrax attacks had been followed shortly thereafter by another successful, spectacular attack that claimed thousands of American lives, it is not difficult to imagine responses by our government far more draconian than anything the Bush administration either contemplated or did. So the cause of civil liberties and the cause of our security are really bound up in prevention. It's a vital priority.

I think the theme that really runs through David's book and what really distinguishes what he approves of and disapproves of is offense versus defense. The book betokens a very strong version to the United States playing any sort of offense. David and his coauthor would be happy to see more money spent on first responders, to see better container security, to see Nunn-Lugar fully funded to try to get control of fissile materials – all good things, but when it comes to the United States actually trying to seek out, find, hunt down, and take out terrorists and dismantle cells proactively, that's where I think this book really gets off and parts ways with the administration. In particular, what underlies that disagreement over whether we should be on offense or whether we should be on defense is the difference between the traditional civilian law enforcement legal model and the law of war model.

One of the president's first reactions after 9/11 was to say and to believe that we are in fact at war, not a metaphorical war like the war on drugs or the war on poverty, but a real war where we have an adversary who absolutely has the will to destroy the nation and its form of government and its liberties and who is actively seeking to acquire the

means in a world where really for the first time in human history that really might be thinkable – might be possible.

The law of war model, I think, explains all of the differences between David's favored approach and what the administration has tried to do. The things that David described as features of what he thinks of as the rule of law – objective evidence of wrongdoing, acting only on objective evidence of wrongdoing rather than predictions about future intentions, punishing past wrongs, providing equal treatment, transparency, responding to individual culpability, due process before using coercive force, clear rules articulated in advance – those are all features of our familiar, civilian, peacetime justice system. They are all almost totally alien to the conduct of warfare in this or any other era, by this or any other country.

And if you take the argument seriously that we are at war – if you believe that, then what the United States has reached for are the tools of warfare. Some have been misapplied, there's no doubt about that, but as a theoretical matter those tools should be available. I think there's also a respectable argument that this war is different enough from some past conflicts that alterations and adjustments in those tools are appropriate and slowly our nation is groping its way toward developing some of those alterations and adjustments, which are reflected in things like the Military Commissions Act of 2006, dealing with these court access issues for detainees.

But think about it for a moment: anytime United States airplane drops a bomb in hostilities, it's violating all of the precepts that David sets forth. There's no fair notice. There's no opportunity to be heard. There's no due process whatsoever for the unfortunate people on the ground on whom that bomb lands. And those people on the ground may deserve what comes to them or they may not. They may be mistakenly targeted or they may be collateral damage – innocents caught in the blast zone contrary to the wishes of the pilot dropping that bomb. But that is warfare. It's dirty. It's difficult. It's dangerous. It often presents morally ambiguous situations, but it is unavoidable when a nation faces a mortal threat and needs as a last resort to defend itself through force of arms.

The same thing is true of preventive detention. The idea of grabbing someone and locking them up and not giving them a lawyer and not giving them notice of charges and the ability to rebut it in a trial-type proceeding is utterly offensive when we think of non wartime contexts, for all the reasons that David so eloquently describes. It is absolutely the norm in warfare. The situation of a prisoner of war is an unfortunate situation. We can certainly sympathize with people who find themselves in that situation on a human level, but the risk of being locked up for the duration of the conflict is one of the risks that one assumes, along with others that are in many ways even worse, when one takes up arms against a sovereign nation.

During World War II, we held hundreds of thousands of prisoners that we believed to be affiliated with the armed forces of Germany and Japan. Many of them had plausible claims that they were not in fact affiliated with the forces of Germany and Japan, that they loved the United States and hated Germany and Japan. There were

Eastern European forced labor battalions that the Nazis had dragooned. All of those people would have liked an opportunity to prove that claim and get out, but the exigencies of warfare made it unthinkable. It wasn't done then or ever. And so if we really are in a wartime legal framework, preventive detention of enemy combatants is the norm, again understanding that there may be differences between this conflict and other conflicts that justify somewhat more generous procedures. I think in fact there are.

The fact is that after 9/11, when I was working in the White House, all of a sudden the work that I had been doing prior to that seemed almost like a joke or a fantasy. The level of seriousness escalated so much. A few days before 9/11, indeed the morning of 9/11, I was worried about judicial nominations, and within a few days of 9/11 I had to confront literally casualty estimates from various forms of smallpox attack and release on this country, or to examine the rings of the different blast zones and levels of damage and destruction that would be caused by a suitcase nuclear weapon. You ask yourself what would had it been worth to prevent 9/11? I think all of us in this room would have to agree would have been worth a lot, and yet these other scenarios – smallpox, suitcase nukes – would cause damage and destruction and misery to the citizens of this nation orders of magnitude greater than what happened on 9/11.

I think in that context, it is perfectly understandable that the administration felt that it had to do everything within its power and everything permitted by a law of war model to try to protect this country. And I think very few presidents of either party would have felt differently about that. The truth is that when you are in the Oval Office, when you are controlling the executive branch, when the tools of our nation are in your hands alone to help protect the citizenry, these issues look and feel a lot different than they do six years later after there has been no further attack.

And to some extent, the plea for a different approach I think misunderstands the history of this nation at war. It takes a somewhat antiseptic view of what is possible in defending oneself against a military, violent, mortal threat.

If we focus just on the administration of Abraham Lincoln alone, we have him unilaterally abrogating the right of habeas corpus, which almost no one thinks the president can do as opposed to Congress. We have him locking up thousands of Southern sympathizers with no charges whatsoever. When the chief justice of the United States issued an order directing him to release one, he simply didn't. He refused. And we could go through similar examples from World War II and Franklin Roosevelt, similar examples from the Revolutionary War. By the standards of our history, the administration's approach, whatever you think its faults may have been, has been quite moderate and quite responsible. And that isn't to say that it's been calibrated perfectly. It surely hasn't, but the genius of this nation at war is not that we get things perfectly right the first time. It's that through exercises like this and books like David's we can take stock of where we've done right and where we've done wrong, and make the necessary changes.

We have elections where these issues can be thrashed out and hopefully in the end we find our way toward a better balance between the competing values that we're trying to serve.

Let me close with a quick point about the argument that we are less safe cumulatively as a result of what the administration has done. The genuine force of that argument, and there is some genuine force to it, I think comes more from Iraq and from Abu Ghraib than anything else. The other examples of the infringements on civil liberties from the perspective of people who believe them to be infringements, whether or not justified by the laws of war, I think the cumulative impact of all of that is far, far less than the impact of the war and Abu Ghraib, but I would argue that the war and Abu Ghraib are a categorically different problem. And we can have a debate about the wisdom of invading Iraq without necessarily indicting the whole effort to use the tools of warfare to prevent another attack against the United States.

At the heart of the argument that we are less safe today than we were before is the suggestion that international antipathy toward us, rather than sympathy through a variety of manifestations is what has made us less safe. In fact, in the book David says, and I'm quoting at least loosely here, "anti-Americanism poses the greatest threat to our national security as we go forward." And David makes the point that we had the world's sympathy on 9/11.

It's undoubtedly true that we have to pay attention to the opinions in the rest of the world and particularly in certain segments of the rest of the world from which these threats arise. I don't discount that entirely, but it is also quite possible to assign that too much weight in the hierarchy of values, and I think David does that. Yes, the world loved us on 9/11. The world seems to love us and extend its sympathy to us anytime we're on our knees and bleeding, but let us get up and start to hit back and because we're so powerful, because we are the one hyper-power, immediately the world's opinion changes. Remember that the world's opinion of us was extremely low, particularly in Europe, in the 1980s as well. Ronald Reagan was a cowboy. Less safe, less free would have been a moniker directed at him, and probably was, throughout much of the '80s.

Anytime America is acting aggressively to defend its own interests, a lot of the rest of the world gets scared and considers the world overall less safe and less free. And yet we know that through Reagan strength and go on offense in the 1980s, a terrible tyranny was brought down and millions and millions and millions of people today are living freer than they were.

So let me on that note close with a quotation of my own. This is from the English commentator Walter Bagehot from the late 19th century. He said, "History is strewn with the wrecks of nations which have gained a little progressiveness at the cost of a great deal of hard manliness, and have thus prepared themselves for destruction as soon as the movements of the world gave a chance for it." We have to be very careful that in our effort to be progressive and in our effort to be sophisticated we don't deny ourselves the ability to confront an enemy that is as illiberal, as unprogressive and unsophisticated, and as ruthless and dangerous as any we've ever faced.

Thank you. (Applause.)

MR. AGRAS: Thank you both. The battle is joined. Let me ask a couple of questions of both of our panelists just to try to illuminate a few of the areas of difference and perhaps of agreement, and then we will go to our audience for their questions.

First of all to David, and David again has defined the preventive paradigm as a form of anticipatory state violence, undertaken before any wrongdoing has actually occurred and often without good evidence for believing that any wrongdoing will in fact occur. Brad has countered by saying that that is a good description of a law enforcement paradigm that is appropriate for various domestic purposes, but inappropriate in a war on terrorism, which requires what he calls “a law of war model.” And he’s argued that the traditional law enforcement model is not an effective means of preventing future attacks.

David, you’ve argued in the book that the traditional law enforcement model actually is rather good at doing this, particularly when the FBI has the information it needs to get the job done. But isn’t it possible, as Brad suggests, that any number of terrorist attacks may have been prevented through the use of non-traditional, non-law enforcement tactics?

MR. COLE: That’s a good question and it gives me an opportunity to respond also to Brad’s principal point. I think, first of all, anything is possible. It’s difficult to know – one of the paradoxes of prevention is that if you’re successful in preventing something, nothing happens, and so it’s difficult to really assess what would have happened had you not taken measure X or measure Y. We’re all speculating to a certain extent. But my sense is this: that if you have disrupted an actual plot, if you had disrupted an actual plot, you would expect to see someone held accountable for that plot. So for example in New York we disrupted before 9/11 a plot to blow up bridges and tunnels around Manhattan, but we didn’t just claim that we disrupted a plot. We brought charges against the Blind Sheik and his accomplices, and we achieved convictions, and they are spending the rest of their lives in solitary confinement in federal maximum-security prisons keeping us safe from any future plots they had.

President Bush made a speech a year or so ago, identifying 10 plots that the United States or its allies had disrupted. And apart from a plot in the UK that the UK had disrupted, there wasn’t a single person who had been identified and brought to justice for any one of these alleged disruptive plots, and there were many national security experts who raised serious questions about the reality of many of these plots that the president asserted had been disrupted. So I think it’s hard to say, but I think you can look at certain kinds of objective evidence and you can say certain things about it. So when you have zero for 95,000 in terms of our ethnic profiling campaign, you can say rounding up 95,000 who have nothing to do with terrorism does not disrupt terrorism – does not disrupt terrorist plots.

Let me – let me talk just for a second about this war versus civilian, offense versus defense point because it’s a good point, I think, and an effective rejoinder, but as

Brad says of my book, it goes too far and explains too much, and it does that for two reasons. First, much of what the administration has done since 9/11 has not been within the confines of war. It's been in the domestic civilian setting. So we locked up over 5,000 foreign nationals in the first two years after 9/11 in preventive detention. None of them turned out to be terrorists. They weren't accused of being al Qaeda enemy combatants. They weren't accused of being part of some war effort against us. They were Arab or Muslim and they were residents of our country and there was no evidence that they'd engaged in any wrongdoing, any terrorist wrongdoing. So you can't invoke war for those kinds of measures. The PATRIOT Act puts in place a whole range of different authorities, less checks and balances, less judicial review, broader surveillance authorities, not limited to wartime, not limited to a surveillance of the enemy, but civilian changes in the law. So there's a lot that's been done. In the domestic context I don't think you can use the label war to defend it.

Secondly, as to war, we acknowledged that war is an available option in responding to terrorism. There's a serious policy question about whether it's effective, whether it gives too much renown to the enemy that they want to be called warriors. In Europe this is the principal criticism of the United States' response. You never should have called it a war. You play into al Qaeda's hands by calling it a war. It gives them a kind of rallying cry. It gives them a kind of status that, for example, the UK never gave to the IRA, even though the IRA continually wanted to call it a war. So there is that policy question, but we take the position in the book that it's legal to respond to an attack like 9/11 with an attack, and we did in Afghanistan. And I think that it wasn't just that the world had sympathy for us when we were bleeding. I think the world had sympathy for us with respect to the response in Afghanistan. The UN said it was an armed attack justifying self-defense. NATO said it was an armed attack justifying self-defense. A hundred and twenty nations signed on to that response. And I think that response actually can take credit for significant amount of the hampering of al Qaeda's ability to do a follow on attack. We knocked out their training camps, their center of operations. We captured or killed many of their people. We got laptops and other data that allowed us to find other people.

But the critical thing about that is that was not the preventive paradigm. That was a traditional self-defense response. That's permissible, and in the context of that it's also permissible to lock people up without bringing charges against them. That's what you do in a military conflict, but you've got to abide by three basic principles. Even in wartime, law has its rules. One is you give them a hearing to make sure you're not locking up someone who's innocent and got picked up by a bounty hunter. Two is you treat them humanely. And three is you can only hold them for the duration of that particular conflict. Had we done that – had we abided by those three principles, Guantanamo wouldn't be a blot on our nation's image around the world. People don't think it's outrageous for a country to hold the enemy during a military conflict. But we didn't give them any hearings. We said we don't have to give them any hearing because we know they're all the worst to the worst, even though we've now released 435 of them. We didn't treat them humanely. Instead we did things like strip them naked, attack them with dogs, make them wear women's underwear, injecting them with IV fluids until they urinate on themselves, and the like in order to try to get them to talk. And we asserted

the power to hold them not for the duration of the conflict with al Qaeda, but for the duration of this concept called the war on terror, which is, I think, metaphorical or must – I hope it’s metaphorical because otherwise it’s a completely unwinnable war. President Bush said it’s a war on all terrorist organizations of potentially global reach. Well, that’s not a war you can ever win. That’s not a war that will ever end. And so then you’re asserting the power to hold people without hearings while treat them inhumanely forever, and that’s what makes Guantanamo the disaster.

So even if wartime – we don’t say you only – you have to be on defense, but you have to be on offense within the constraints – much significantly less constraints, but still constraints of the rule of law.

MR. AGRAS: And Brad would you like to respond to that?

MR. BERENSON: Sure. The question about whether the traditions tools of law enforcement or the civilian system are adequate to the task, which you started with, Mark, I think is an important one, and may be the central one. And the answer to that is that although those tools can play some part in keeping us safe and preventing attacks, they are not adequate to the entire task. We can’t rely on them alone.

I think that David’s invocation of the zero for 95,000 because we haven’t in most of these prosecutions or in the immigration – the roundups of people who had violated their immigration status and were in fact breaking the law at the time they were rounded up didn’t yield up terrorist plots, I think is using a mistaken measure of success in these kinds of operations. Because Al Capone was convicted on tax charges doesn’t mean that that was not an organized crime related prosecution.

The measure of success isn’t the number of terrorism related prosecutions or convictions, the measure of success is actually something that is much, much, much harder to know, which is sleeper cells and terrorists and plots that were disrupted by these actions. The administration rounded folks up pursuant to harsher enforcement of the immigration laws in the hope – and I don’t think we know either of us today whether the hope was realized or not or in what degree – in the hope that caught up in that would be some people, if there were sleeper cells here in the U.S. operating, if there was a second wave of attacks planned, and through more aggressive enforcement of the immigration laws, you could pick some of the people who were part of those cells and planning those attacks, whether or not you ever knew it you might keep the country safe. You might protect American lives.

Richard Reid, which is cited in the book as an example of a successful use of the traditional tools in criminal justice system for dealing with this threat, I think, is an illustration of exactly the opposite. We have to find and catch Richard Reid long before he lights a match and puts it to his shoe 35,000 feet over the Atlantic Ocean. The lives of those passengers were fortunately spared by the alertness of that flight attendant and the people who were willing to act quickly when they perceived what was going on. But if he had merely stepped into the lavatory before lighting his shoe, that story could have had a very different ending. And so it’s not sufficient to wait until there is an attempt at a

mass casualty attack like that. We've got to try to find these people while they're planning, get them off the streets and whether we know they're planning or not, anything we can do to disrupt their activities and their ability to be secure in operating is going to be helpful to our efforts.

Andy McCarthy and our new nominee for attorney general, Judge Michael Mukasey, have both participated on different sides of the bench in the prosecution of the 1993 World Trade Center bombing. Both of them have seen up close exactly what the trade offs are when one uses the traditional tools against this kind of a problem, and both of them are passionate advocates for the proposition that law enforcement, while it has a role, is not equal to the overall task.

MR. AGRAS: Brad, let me push you a little bit on that point. One of the points that David makes in his book is that the use of roundups and what he calls "questionable assumptions, stereotypes, and preconceptions" detaining large numbers of people in dragnet situations creates a high number of what he calls false positives from detainees who were actually innocent to the people who are wiretapped for what turns out to be no good reason. One could perhaps include nonexistent weapons of mass destruction. And he argues that that result is not only unacceptable from the civil liberties perspective, but actually undermines our ability to prevent terrorist attacks by getting us on the wrong track. Do you disagree with that?

MR. BERENSON: I do disagree with that. It is certainly important to focus on the false positives, on the error rate in that direction, and we have to do everything we can to keep the error rate down consistent with taking the actions necessary to protect ourselves. And I'm also willing to conceive that in this kind of war where our adversaries deliberately disguise themselves as civilians, try to make themselves difficult to identify and difficult to separate from the rest of the population, which is in fact itself a gross violation of the laws of war, which are designed to protect civilians by requiring folks to clearly distinguish combatants from civilians. In a war like this where our enemies fight that way, I think the error rate is necessarily going to be higher than what it is in other kinds of conflicts. That's regrettable. It's also inevitable.

We have to be creative and figure out ways that we can reduce that error rate, the false positives, but we're never going to eliminate it. To some extent, how you proceed really depends upon the context. I think there is an argument to be made that at least after the period in time when the crisis passed, immediately post-9/11, that immigration roundups targeted at Arab or Muslim communities have more negative long-term effects than they do positive effects, even understanding that the people who are rounded up are out of status and violating the law. It is vitally important going forward, for our government to forge good relations to the Muslim community and the Arab community in this country because if and when additional al Qaeda agents arrive here, it's very likely that those communities are the communities to which they will gravitate in the first instance to establish themselves. And good relations with those communities are important to protecting us.

So to some extent it depends on the context. The immigration question – again, after the crisis has passed, you might balance that out in a somewhat different way. But it's also very important in thinking about the false positives to bear in mind the false negatives and the costs of false negatives. Too often this debate fails to take account of that other side of the equation.

We know that there are false negatives even in the context of the Guantanamo detentions which are criticized as among the most draconian and least justifiable things the administration is doing. Yes, over 400 of the people originally brought Guantanamo have been released through a combination of international pressure, the internal procedures that the military uses, some of the court actions that have been filed. That doesn't mean that none of those people were dangerous. It doesn't mean that most of them were not dangerous, because many of them were sent back to other countries on the condition that those countries keep an eye on them and essentially vouchsafe that they will not return to the fight against us.

But among the 435 that have been released through all of those procedures are quite a number that we know for absolute certain, despite having convinced us that they posed no threat, that they were innocent, have gone back to the fight, and have been found on the global battlefield trying to kill our troops again. We know that because some of them have been killed, some of them have been wounded and recaptured. Some of them have even boasted to the media after their release that essentially they tricked us. We had them sign a paper and one of them said "To me that was like toilet paper. It's nothing."

So we have real people in error in addition to having undoubtedly imprisoned some people in error, and where the cost of such an erroneous release can be the enabling of another attack on the scale of 9/11 or worse, we have to weigh that into the balance as we consider where the sensible line is as a matter of policy.

MR. COLE: The number I've seen of people who have gone back to the fight of the 435 is 18. So it is – that's the number as far as I know. Maybe it's slightly higher. But it's not very high compared to 435. We do have to think about false positives. That's true. I mean false negatives. That is true. And there's always this sort of balance between false positives and false negatives.

But I think the question you have to keep coming back to is the question that Donald Rumsfeld asked in an internal Defense Department memo, I think in 2002 and he said basically the real question here is "are we killing or capturing more terrorists than are being created every day?" That's the real question. And I think the danger with respect – and there are two dangers with respect to the kinds of measures that the administration has taken.

And I also want to say that I agree with Brad that this is not an indictment of the Bush administration in particular. This is an argument against this kind of response, which we argue in the book, we would have likely seen many of these measures had Al Gore been in office on 9/11 instead of President Bush. Maybe they don't appreciate that

message here, but I think that there's certainly evidence that Democratic, liberal presidents have overreacted in preventive measures. You need only think of FDR.

So it's not meant to be a partisan attack. It's meant to be a word of caution about the costs of the understandable response to the tremendous pressure to prevent the next attack. And I think that when you have a lot of false positives, particularly through measures that are deployed and justified on the grounds that we can target these people because they're Arab Muslim foreign nationals, and for little other justification, that then the answer to Donald Rumsfeld's question is almost certainly we are creating more terrorists than we are capturing or killing.

And that's why – I mean, the 9/11 Commission says we need to be reaching out to the moderate Muslim community. It's very hard to reach out to them when you're rounding them up – and when you're rounding people up on the basis that they're Arab or Muslim and a foreign national and very little else. And then – and Brad suggests well, you can't really know. Just because we were zero for 95,000, who knows? There might have been an al Qaeda cell there that we –

And in fact the administration's policy was called "hold until cleared" where they wouldn't deport somebody until the FBI had cleared them of any connection to terrorism. Because the last thing you want to do with a real terrorist is send them abroad, where they can join the fight against us. So there's actually pretty good reason to be confident about that zero figure. And I think, as I suggested earlier, that that amount of false positives is a disaster from a human rights standpoint for the victims from a security standpoint for all of us. And the concern about false negatives can be overplayed. It was a concern about false negatives that led to the internment of Japanese Americans during World War Two.

MR. BERENSON: I agree with David that Rumsfeld's question is essentially the right one. That is the right metric. It's a very difficult question to answer, but I think it's the right question to ask. But there's another question that I think critics of the approaches taken thus far need to be able to answer themselves, and David and his co-author take a stab at this in their book, but the question is this: what would you do differently than we were doing on September 10th, 2001? Because the one thing we know for sure is that whatever we were doing back then wasn't good enough. 9/11 is all the proof most people need for that proposition.

So I think there is a burden on critics of the measures that have been taken since 9/11 to say what it is they support, what is it they would do that would have had a realistic chance of preventing 9/11 itself and therefore would have a realistic chance of preventing other kinds of attacks in the future.

MR. AGRAS: While we're talking about prevention, let me raise one issue that is covered in David's book and that's the issue of preventive detention. We've touched on it a little bit here and I wanted to get to it because I think David's discussion may surprise some civil libertarians, at least to some degree. He asks whether preventive

detention can ever be justified in cases in which the government has evidence that an individual is a flight risk or a danger to the community.

And, David, you argue that short-term preventive detention may be constitutionally permissible in narrow circumstances and subject to strong procedural safeguards. And among the safeguards you'd require are strict time limits on detention, a prompt evidentiary showing of the necessity for the detention before a judge, and access to a lawyer and an opportunity to challenge the basis for the detention in court.

Assuming you're right, and Congress could constitutionally enact that kind of system, given everything you've said, do you actually trust the government not to abuse that authority? As you point out in your book, the government's been holding large numbers of foreign nationals without having a preventive detention law, even in cases where judges had ordered their release. Wouldn't a law of that kind make matters worse?

MR. COLE: Well, that's a very good question, and I am somewhat agnostic about it. I'm not agnostic about the position that it wouldn't necessarily be unconstitutional; that is, that one could draft a preventive detention statute that would satisfy constitutional scrutiny. After all, we already engage in preventive detention in a variety of areas of civil commitment to people who have a mental disorder that impairs their ability to stop them from endangering others: sexual offenders who again can't control themselves and can be held after they've served their time; denial of bail to criminal defendants when they are only defendants, not convicted, still have the presumption of innocence and yet we say if you can show that there's a danger to the community or a risk of flight, you can lock them up. You've got to have a fair process for doing that, but you can lock them up. It's got to be short term. Same thing for immigrants and immigration proceedings. The same thing under the law of war for enemy combatants.

So I don't think there's a – I think preventive detention is not something like torture, that – where the only – the appropriate legal response is it is never legally permissible. I think that there are situations in which can be – (unintelligible). Now whether it would be a good idea or not the question I ask is, what if we had had on 9/11 a preventive detention statute along the lines that I suggest that required the government to actually make some showing before a judge, et cetera, of danger and the like? And at the same time we had constraints on the immigration detention power, the material witness detention power, so that they couldn't be abused – as they were – to further purposes that they were never designed to serve.

It might well be that we would have a better, more targeted response. We might have fewer people ultimately subject to preventive detention. So I think if you could combine a kind of – the creation of safeguards around the powers of that government traditionally abuses to obtain preventive detention in a kind of backdoor fashion, and in a quid pro quo give the government a more targeted preventive detention statute, we might be a better place.

MR. AGRAS: Well, suppose we did that, Brad. David's proposed a set of requirements that would be fairly restrictive and might in fact confine the use of that kind of authority to very extreme emergency circumstances. In that situation – I mean, could you live with that? If it's so hemmed in with due process guarantees, is that something that would even be useful?

MR. BERENSON: I think it probably would be useful. We are still, as a nation, feeling our way toward the right set of procedures to deal with this threat, specifically as they relate to preventive detention. I've been an advocate for years, since shortly after I left the administration, of getting Congress fully engaged in a policy making process on this and related issues. The administration declined to do that for a variety of reason until it was in essence forced to by the Supreme Court. I think that was a mistake and a lengthier, fuller, more deliberative, and more comprehensive policy process years ago might have saved us lot of trouble in the interim.

I don't think we've come to rest on this quite yet. We have addressed part of it through the Military Commissions Act of 2006, but the constitutionality of that statute is under challenge and the Supreme Court's going to hear that case this year and the statute may or may not survive. We may again by the court be sent back to the drawing board.

But even if we're not, I thin what David is referring to is a preventive detention regime that is about civilians, that is about individuals in the U.S. who are on our territory or who are citizens or lawful permanent residents or visitors have, some other lawful immigration status. So it would not answer the question one way or the other what we do with the al Qaeda terrorist whom we capture in Yemen or the Taliban soldier whom we capture in Afghanistan. That would still be governed by the laws of war, as supplemented by whatever statutory regime we ultimately have, whether it's the Military Commissions Act or something else.

But in the civilian context, I think David is right that the temptation to reach for a tool not designed for these purposes – like the material witness statute, like the immigration laws – would be much less if there were a tool that was designed for these purposes. And I think that would probably be a step forward overall, both for liberty and security.

MR. AGRAS: Okay. Well, let's talk a little bit about interrogation. I want to get another couple of issues out on the table. Let's start with Brad. Proponents of harsh interrogation techniques are fond of citing the so-called "ticking time bomb" scenario which David mentioned earlier. Obviously this is very familiar to people who watch television, but leading intelligence experts have said that those kinds of scenarios actually have little to do with the real world.

And in his book David quotes Lieutenant General John Kimmons, who was the Army's deputy chief of staff for intelligence, as saying, and I'm quoting; "no good intelligence is going to come from abusive practices. Moreover, any piece of intelligence which is obtained under duress, through the use of abusive techniques would be of questionable credibility and would do more ham than good when it inevitably became

known that abusive practices were used.” And instead, General Kimmons argues that good intelligence comes from the expert use of humane interrogation techniques that are authorized in the Army’s own interrogation manual. If this is the case, what justification does the government have for insisting on the use of so-called enhanced interrogation techniques?

MR. BERENSON: Well, I am not a supporter or defender of aggressive interrogation techniques. I am a believer in the argument that both as a moral and as a practical matter and as a legal matter, that torture and cruel and inhumane treatment need to be categorically off limits.

The only exception, and it isn’t really an exception, being the one that David describes in his book; that is, where someone in the government is so convinced that it is absolutely necessary that they are willing to take upon themselves the legal risk associated with intentionally violating those laws, counting on the fact that they will be right in the long run and that the system will somehow find a way to excuse them. But I think as a legal, practical, and moral matter cruelty and torture should not be permitted and are not beneficial.

You will get some differing views from interrogators about the value of tougher techniques short of torture or cruelty. The people in the FBI will tell you that stuff doesn’t really work. It’s not very productive. The kinds of techniques we’ve developed over the decades of law enforcement, which do involve dialogue and trying to gain the trust of the detainee being interrogated work much better.

You will then hear interrogators from the intelligence side, from the CIA say “yes, but.” And the “but” is that’s true for an ordinary individual who has not received counter-interrogation training, which we know formally trained and pledged al Qaeda agents mostly have. And where you are confronted with a person like that about whom there is the most concern, and associated with whom there is the greatest risk, you do need to be able to do something other than simply have a conversation.

Now at this point in time, the argument about cruelty and torture has been won. I don’t think you’d find anybody in the CIA today advocating those things. But the president tells us – and I don’t know, I was actually ignorant of all of this when I was in the White House – the president tells us that the CIA’s High Value Detainee Program now uses a list of approved techniques that go beyond what you expect in normal law enforcement, but stay short of the line of cruelty or torture. I assume we have to rely on our intelligence committees in the Congress to satisfy themselves that that is so, but the CIA people and some of the military people will tell you that something more is needed in the case of hardened terrorists.

MR. AGRAS: David, let me go over to you. You acknowledge in the book that the ticking time bomb scenario, while largely a myth and very rare, is not impossible. And you discuss a number of proposals that are out there that would authorize the use of highly coercive interrogation under these kinds of emergency situations including the so-called torture warrant that’s been proposed by Professor Dershowitz.

Now you oppose these proposed exceptions because they blur what is otherwise a clear prohibition and could be said to open the door to all kinds of abuse. And I believe you argue that if exceptions are to be made, as Brad was saying, they should be made tacitly and after the fact when those doing so are convinced that the law will vindicate them later.

But if we believe that interrogators may confront situations in which they have to bend or break the rules, wouldn't it be better to have that decision made by a politically accountable official, by the president, by the attorney general or by an impartial judge considering a warrant?

MR. COLE: Well, here I agree with Brad that it's a categorical – there's a categorical prohibition, it ought to be a categorical prohibition in international law. It is of highest level of prohibition, meaning it brooks no exceptions whatsoever and there's a reason for that and it's a good reason. And so I'm opposed to anything that undermines that categorical – the categorical nature of that prohibition. I think that the reality is that in any system of laws, including the criminal law, there is room for discretion.

A prosecutor who knows that someone has committed a crime can choose to bring a prosecution or not bring a prosecution. He's not compelled to bring a prosecution. A jury which is presented with evidence that the defendant committed a crime has the discretion to acquit. It's called jury nullification, even if the evidence is conclusive that the person committed the offense. A president has unchecked authority to pardon someone who has been convicted of an offense. So there is already built into our system a fair amount of discretion which could be employed were a ticking time bomb situation ever to arise in which after the fact we, as a society, felt that this was a justified exception to the categorical rule.

So I think that – in other words I think the law already creates plenty of room. Putting in place a kind of – an ex ante way of authorizing these kinds of things. First of all, it by definition sort of says we are going to legalize torture. You don't create a torture warrant system unless you think, yes, torture can be permitted and we can identify those particular things in advance, et cetera. And I don't think you can. And I think the cost of undermining the prohibition by creating that ex ante approval would be disastrous.

The last thing I'll say is that the ticking time bomb hypothetical is a long standing subject of debate in philosophical – public philosophy kinds of classrooms. But the reality is that not – I don't think once in the post-9/11 context has the government ever identified any instance in which they had anything close to a ticking time bomb.

Even Khalid Sheikh Mohammed, the mastermind of 9/11 who they water-boarded and worse, we don't know all the details – they don't claim that there was some ticking time bomb, that they knew that he had the information, they knew that the only way they could get it was by using cohesive tactics and there was no other way to get the information and they knew the bomb was going to go off if they – no, they don't claim that. And that's certainly not the claim at Abu Ghraib.

So we have – that theoretical justification, which I think led the administration to authorize a whole set of tactics, which most people would call torture and they call enhanced interrogation tactics, has led to a proliferation of this conduct in contexts that are as far removed from a ticking time bomb as you can imagine.

MR. BERENSON: One interesting historical footnote to that is I think based on what I've read, and as I say I wasn't involved in these decisions when I was in government, but I think that a perceived ticking time bomb scenario was actually the impetus for a lot of the loosening of traditional restrictions that took place, which led us down the road to things like Abu Ghraib.

It involved the case of Mr. al-Kahtani, who the government believed then and I think still believes actually was intended to be the 20th 9/11 hijacker and proved highly resistant to traditional forms of interrogation. And my understanding is that government believed that he likely had information about whatever second wave of attacks was planned. And so I think he became the test case for these propositions. And it was in part some form of the ticking time bomb scenario which caused the policy to be loosened, with all of the negative consequences that eventuated.

MR. COLE: And anybody who's interested, we talk about the al-Kahtani case in our book, but there is a 100-page Army document that was somehow leaked to *Time* magazine that details every tactic that they employed against Mr. Kahtani over something like almost a six-month period of 16 to 20-hour-a-day interrogation sessions. And he was the one who was injected with IV fluids and then not allowed to go to the bathroom so he urinated on himself.

And at the close of this, an FBI agent observed him and described him as someone who's kind of left sort of cowering in a corner blabbering incoherently to himself. I mean, it's almost like an animal that has been rendered inhuman by this set of tactics. So if that's the case that led to it, you've got the evidence for why we shouldn't do it right there.

MR. AGRAS: Let me ask one last question and then invite the audience to take the rest of the time with their questions. And this concerns another book that has recently been written. It's Jack Goldsmith's book called *The Terror Presidency*. Jack Goldsmith is a Harvard law professor who resigned from the Department of Justice after serving nine months as assistant attorney general for the Office of Legal Counsel in 2003-2004.

In his book he describes really the pitched battles that went on between the White House and the Justice Department over the legality of some of the measures we've been discussing on detentions, interrogations, as well as electronic surveillance, which we're not discussing because one of our panelists is involved in litigation on that subject. Mr. Goldsmith is a conservative who supported the president's antiterrorism efforts and wanted to place those efforts on a firm legal footing.

But when he discovered that – what he discovered when he got there was that the policies were based on what he called severely damaged legal foundations and were based on, quote, “minimal deliberation, unilateral action and legalistic defense,” close quote. And legal opinions that had been issued by some of the lawyers at OLC, including Jay Bybee and John Yoo, he called “sloppily reasoned, overbroad, and incautious” in asserting extraordinary constitutional authorities on behalf of the president. Eventually, Mr. Goldsmith succeeded in getting some of those particular opinions withdrawn and revised, but he was clearly swimming against the current and ultimately found it impossible to continue. And now he has written his book.

And I just wonder if I could ask each of our speakers for their thoughts on the Goldsmith experience.

MR. BERENSON: Jack is an old friend of mine and a thoroughly honorable individual and an absolutely magnificent lawyer. And I think there are a lot of lessons from Jack’s experience. One of the profound insights that one comes away from a period of service in government with is how important personnel actually are; that is, the individual human beings occupying particular offices at particular moments in time. History can turn on who is in the room at a given moment. And I don’t just mean which executive branch official, I mean which human being has been invested with the authority of that office at that particular moment in time. How the conversation goes. How assertive someone is. How persuasive someone is. What someone’s views are. These are the kinds of things that can exert an idiosyncratic influence on the course of events.

The fact is that after 9/11, particularly in that first year, year and a half, the pressures were absolutely enormous. A sort of I think understandable and justifiable group-think took hold inside the executive branch, inside the administration. I think the closer you were to the Oval Office, the more keenly you felt the weight of responsibility on the president’s shoulders to assure himself and to assure the public that everything consistent with law that could be done was being done to try to prevent another horror like those attacks.

So there was enormous pressure. Under those circumstances, the Office of Legal Counsel in the Justice Department was one of the checks, and probably the most important check in ensuring that that precondition to action – that is that it was legal – would be taken. The lawyers in the White House Counsel’s Office, because of the velocity of issues and events that they’re involved with, generally don’t have time to do in depth legal analysis of really complicated legal questions. That job falls to the White House’s outside counsel, which is the Office of Legal Counsel in the Justice Department.

It would have been extremely beneficial and extremely important at that moment in time to have a strong, self-confident, confirmed assistant attorney general for the Office of Legal Counsel, who had some stature, some gravitas, some expertise in the subject and some political skills to try to put the brakes on and draw the line in a place that was sensible.

I agree with what Jack has to say in his book about some of the errors the administration made along the way. I also agree that they were made in complete good faith by all participants, and they were made in the genuine belief that they were being done to protect the country rather than for any base political or personal motivations.

But the fact to the matter was that at that moment in time, there had been a long confirmation battle and frankly nomination battle over the assistant attorney general for the Office of Legal Counsel. The assistant attorney general who runs that office had been relatively recently confirmed, was not an expert in any of these areas of law. One of his deputies was and to make matters worse that assistant attorney general wanted to be a federal judge, and now is a federal judge on a court of appeals.

And I can't remember whether the nomination had been made or was simply under consideration, but the assistant attorney general was not able to exercise the restraining influence of that particular office and that particular official at that particular moment in time that would have been so critical and so necessary. And that's, I think, one of the lessons that I take away from Jack's book.

Personnel is policy, and there's no way you can foresee these things. There's no way you can guarantee that everything works right, but if we could take down the temperature on some of the confirmation battles, regardless of who's in the White House, regardless of who's in the Congress, and make it easier and more efficient for the president to have the personnel that he wants in the offices he wants, I think the chances of failure – of personnel-driven failure of this sort, either because there's nobody confirmed or someone's awaiting confirmation or someone's awaiting confirmation as a judge and so he's steering clear of particularly controversial things, the chances of that would be much less.

MR. AGRAS: Thank you. David?

MR. COLE: I think the president got his confirmation in Alberto Gonzales and John Ashcroft and that's where I lay a lot of the blame. Although I also think that Jack Goldsmith is right that much of the impetus for the excesses comes out of the vice president's office. Vice President Cheney, who a couple of weekends ago, Dan Rather – not Dan Rather, Dan Schorr on NPR made a comment about how Dick Cheney had to go into the hospital and he had to transfer the powers of the presidency to George Bush. (Laughter.)

And the most powerful vice president ever, with a counsel, David Addington, who takes the most extreme views, and in Jack's book is the person that Jack is always fighting with. So in some sense I think you had people there with pre-commitments that were the worst possible people to have on the job when this incredible pressure came after 9/11. And I think whoever was in those positions at that time, would have felt that pressure. And I agree with Brad and Jack on that front as well.

But I guess my only point would be – just a different emphasis – is precisely because the pressures are so powerful in those moments that it is so critical that we

adhere to the rule of law and recognize that it is the way to respond to terrorism, not by throwing it by the wayside.

And I think that where we got in trouble was by throwing it by the wayside. And I come back to a quote that I – in the book: counter-posed to Justice Barak’s quote about how the rule of law strengthens our spirit and at the end of the day brings us success in the fight. And the counter-quote comes from the Pentagon’s official document from 2005, the National Security Strategy in which it says “The strength of the nation state” – ours – “will continue to be challenged by a strategy of the weak, using international fora, judicial process, and terrorism.”

That is a remarkable statement because that statement treats the rule of law, judicial process, and international fora as a strategy of the weak, not for us, dismissible by the strong, and allies it with terrorism. And I would think that when terrorists take action like they did on 9/11 that the rule of law would be on our side. And our argument in the book is that just as Justice Barak says it is on your side if it is properly understood. But the pressure to respond, the pressure to prevent I think caused the administration to view the rule of law as an obstacle rather than an asset and that’s where it got into trouble.

MR. BERENSON: And there I need to just disagree very briefly. I think it would be wrong to believe that the rule of law as such in an abstract sense is the answer to this problem because I can guarantee you that nobody participating in these debates in the White House, in the office of the vice president, in the Office of Legal Counsel, took law or the rule of law lightly or thought for a moment that they were setting it aside. There were conflicts and debates over how to interpret it.

One of the areas of law least well understood and with the fewest precedents on the law books is where the boundary of the president’s Article 2 authority as commander-in-chief ends and where the role of Congress begins. And a lot of these fights were at that boundary. And so it was a matter of interpretation. There were sincerely, deeply held views on both sides. David Addington did not think for a moment that law didn’t matter – the rule of law didn’t matter, the law could be cast aside. He just had views of the nature of presidential war-making powers under Article 2 that would have rendered permissible – that did render permissible for a time – things that other lawyers wouldn’t have agreed with.

So I just want to make that final statement for the – on behalf of the good faith of the participants in these debates on all sides, because I didn’t see anything in my two years inside the White House working on issues related to some of the ones we’re talking about today that suggested to me that anybody was acting out of base or venal motives, but rather they were trying to do the best job they could under very difficult circumstances and advancing sincerely held beliefs, whatever you may think about those beliefs.

MR. COLE: And let me just add to that that by suggesting that they threw the rule of law out, I’m not suggesting that they were acting out of bad faith or venal

motives. I think they felt that this was what was necessary to save the country, to respond to this pressure. But – and I think that it is understandable that they would feel that pressure, but I think that’s – the reason we have the rule of law is precisely because we understand that human beings will feel that pressure and will respond in way in which they, quote unquote, “reinterpret the rule of law” to the point where it no longer imposes any constraints on their actions.

And that is exactly what the commander-in-chief theory does. It says the president as commander-in-chief –if he’s engaging the enemy in any way shape or form. It doesn’t matter what Congress says. It doesn’t matter what the courts say. The president gets to call the shots. That is putting yourself above the law. That is throwing the rule of law aside. That’s why I think we need to have a different attitude towards the rule of law. But again, I’m not suggesting it’s an act of bad faith or venal motive. I think it’s just wrong.

MR. AGRAS: Well that I think is a good note on which to go to our audience. We’re going to have a question period now and please wait until I recognize you and the microphone is brought to you. Then state your name and affiliation. Please remember to use the mike so that your comments are recorded. Please don’t make speeches because we’d like to get in as many questions and answers as we can.

The gentleman in the front row.

Q: Bob Gris (ph). I’m here representing myself. Both speakers claim to want to prevent terrorism, and yet I’m wondering whether there are methods for legitimating the grievances of the weak that would be useful for making terrorism unappealing not only to the broader community, but to the terrorists themselves.

In other words, when bin Laden goes on – makes a video to communicate to the public, are there ways of responding in a non-police state fashion or even rule of law fashion that would help resolve the conflicts, which I think ultimately create the crisis and make terrorism appealing.

MR. COLE: Yes, and we addressed that in our book, in the prevention part three, the alternative preventive response. I mean, one response is precisely to try to figure out ways that the United States can act in the world that reduce the resentment that we face. And some people take the position, well, we’re always going to be resented so it doesn’t matter. Let’s make them – have them fear us. I think that’s wrong.

I think that for example one of the few countries where anti-Americanism actually dropped significantly in the period after 9/11 was Indonesia, a country with a significant Muslim population. Why did it drop? Because after the Tsunami we sent President Clinton and former President Bush over there and we put some substantial resources into providing foreign aid for the victims. And they saw us as reaching out through aid and through support rather than reaching out through military might. So I think shifting – we have – the amount of resources that we put into the military in this country dwarfs that of I think the next 10 countries combined. It’s far beyond our needs. And when you look at

one of the things that sort of is a push-button issue for the terrorists, it is this notion the United States is acting through force and military might, not through public diplomacy, not through foreign aid.

So we spend tremendous amounts of money on military force. We put military bases in countries that are sort of rubbing their nose – people's nose in it and we have one of the lowest per capita foreign aid programs in the world – in the world. And so I think there are – I think that's one way that we can respond. I think more multilateral efforts to respond as opposed to asserting this kind of unilateral right of America to respond regardless of what other countries do would again present a different picture of the United States.

I think greater effort to solve the Palestinian-Israeli crisis and not simply to back Israel would be important. That is a continuing sort of wound that I think creates tremendous resentment throughout the Arab and Muslim world. And we are perceived, whether rightly or wrongly, as being far too supportive of Israel and not sufficiently interested in a fair resolution of that crisis.

So I think there are a whole range of again, supporting moderate Muslims around the world, things that we could do that would be affective in responding to those (under ?). And I don't think by doing that you're somehow giving in to the terrorists. I think you're recognizing that you've got to answer Donald Rumsfeld's question.

MR. BERENSON: There are two senses in which you might have meant that question. And if it's sense one I think I agree, if it's sense two I think I disagree. Sense one is whether we should be engaging in more public diplomacy; that is, engaging with bin Laden's arguments in some public fashion to show why they're wrong, they they're bankrupt – to present the other side. The process of persuasion and attempting to claim the moral high ground for ourselves and our values that proved very important in the Cold War. I certainly agree that we should be doing that.

But if by the question you meant legitimating their grievances in the sense of accepting those grievances as valid and trying to appease them by accommodating their policy priorities, that is something I certainly would not support. To take just a couple of examples, David mentioned military bases. One of bin Laden's principal grievances is that we had military bases in Saudi Arabia, which for Muslims, at least of the Salafist school is infidels on holy ground.

I don't think that when we take a look at our national security interests throughout the world, whether they involve after the first Iraq war against Kuwait, protecting the newly freed Kuwait against the power of Iraq, keeping Hussein's Iraq in check, whether they involved supporting an ally like Israel, whether they're bound up with securing oil supplies that global economic health depends on – I don't think we can subordinate those interests to the religious dogma of the bin Ladenites and simply close our bases in Saudi Arabia because he doesn't like them.

Other policy priorities, they – the Salafists and the al Qaeda folks abhor our decadents. The Taliban used to think that the appropriate repose to homosexuality was to take a homosexual and bury him or her alive. I don't think that there is any way in which we should be attempting to legitimate that kind of grievance or accommodate it. I think if that was the sense of the question, I would not support responding in those kinds of ways.

MR. AGRAS: Next question.

Q: My name is Joanne Kim and I'm with DC for Democracy. As a follow-up to this question, so these grievances, are you suggesting point blank that they're all false grievances? I mean, do we just – are we approaching it with an open mind to listen and hear what the grievances are without prejudgment?

MR. BERENSON: Well, think it's important to listen and hear under any circumstances, and not just our intelligence community listening and hearing, but I think it should be part of the broader public debate to understand what these folks are saying. But we shouldn't let that shade into a temptation to appease what are substantively illegitimate grievances. I don't doubt bin Laden's sincerity. I don't doubt that he honestly believes that his interpretation of his religion gives him grievances which are legitimate in his own mind, but we need to be very careful not to start agreeing with him too readily.

I mean, Hitler always tried in the run up to World War Two to articulate historical grievances that were justifying the actions that he was taking that one could try to argue with oneself and persuade oneself to accommodate. And much of the world did that. And I think we have to keep very clearly in mind that this is a very extreme, fanatical, absolutist interpretation of a religion which drives this; that that kind of religious tyranny is among the most lethal and dangerous, because people who believe they have a mandate from Heaven to do that they're doing, as we've seen, will be quite extreme; and that the values that lie behind this particular interpretation of Islam are illiberal in the extreme and fundamentally incompatible with most of the values that all of us in this room, Republican and Democrat, prize most highly.

MR. COLE: And just to be clear. We don't advocate appeasement in that sense, but I do think it's important to understand what drives people to take the kinds of actions that we have seen taken against us, that Israel has seen taken against it, that the UK has seen taken against it. And that's an important part of figuring out how best to respond. And Louis Richardson, who is a professor at Harvard and who studies what drives terrorists argues, I think with a lot of historical support, that what drives terrorists is not some sort of abstract, ideological, utopian end state because those are always very hazily drafter, et cetera. What drives them is a sense of injustice, a sense of a need for revenge, a sense that by acting out you might gain renown and you might push the country against which you are seeking revenge to take further responses that only increase your sympathy among your potential supporters.

And that's where I think so many of the ways what we have responded is exactly backwards, because we are giving them injustices that will drive people to take further action. We are giving them renown by calling them warriors essentially, and we are overreacting in ways that have built sympathy for them. So that in many countries of the world today Osama bin Laden has a higher approval rating than does George Bush.

MR. AGRAS: Last question. Yes, sir?

Q: Hi. My name's Chris (unintelligible). I'm with the American Bar Association. I have a quick yes/no question with a follow-up. Is the war on terror strictly within the role of the government? And then the follow-up is, would expanding the application of the rule of law or this fight where there's an absence internationally create new partnerships for terrorism – like where is their a community basis for fighting terrorism?

MR. COLE: I'm not sure I understand. Is it – by community based, you mean international community?

Q: I guess with –

MR. COLE: Or the public?

Q: The public.

MR. COLE: Yes. Well, I think there's a – I think that part of this notion that what you've got to do is isolate the terrorist from the potential communities of support is that you want to the support of those communities in helping you identify who the terrorists are so you can go in and capture and arrest them. So in that sense yes, you want the support of the public. And a particular public that you want the support of is the one that's going to be able to provide you with information. So in that sense it's, I think, a communal reputability and I think you have to think about the ways in which you respond in such a way that you will encourage that support rather than discourage that support. And I think we've done it backwards.

The other way – the other sense in which there is an importance of sort of community support or public support is that I think in a time like this it is critical that government have the trust of the people, because in a time like this the government necessarily has to rely on secrecy more than it would in other times, and for legitimate reasons. There are, as we know, illegitimate uses of secrecy, but there are also legitimate needs for secrecy. And whenever a government has to act in secret in significant ways, it essentially has to rely on the trust of the community.

And I was struck by a comment I heard last fall in the UK by a former – a guy who used to head up counterterrorism for Tony Blair's government who said precisely for that reason it's absolutely critical that the government act above board, according to principle, consistent with the rule of law, because if you are discovered to have deviated from these sort of basic principles, then you lose the trust of the people. And I think

that's what's happened with this administration. It's lost the trust of the people. It's created – and we shouldn't be in discord about responding to al Qaeda, and yet we're in tremendous discord about it I think because they fritted the trust by failing to abide the principles.

MR. AGRAST: Brad, last word.

MR. BERENSON: Yes. My answer to your question would be no, it's not exclusively a governmental responsibility to combat terrorism. Government is necessarily going to have a vastly disproportionate and important role because the tools of the state, whether they be military power, intelligence agencies, law enforcement or public diplomacy, are in the hands of the government. So the government is going to be a leading actor in this, but clearly there's a role to play for communities – local communities just in terms of vigilance. If one sees a very suspicious set of circumstances in an airport lounge waiting area, there's a role for any citizen to call that to the attention of someone who can make a judgment about whether it actually warrants some further questioning.

But more importantly in the broader community that is Islam around the world – I mean, ultimately this is a fight about whether a particular interpretation – a particular fundamentalist interpretation of Islam is going to be seen as legitimate and laudable and is going to attack adherents long term or whether the community of Muslims around the world is going to say that this is not our religion, this is not a proper interpretation. These people are on the fringes and outside the bounds of acceptable religious discourse within our faith tradition.

There are probably only very limited ways that non-Muslim nations and governments can impact that internal debate within the world of that religion. Most religious communities don't take particularly kindly to being told how to think by non-adherents, but that community itself has something very serious to grapple with collectively as it moves forward. And I don't know how long that process is going to take of sorting this out. But I'm confident that in the long run it, like every other major religion over time, will come to the right conclusion.

MR. AGRAST: Before we close a couple of quick announcements. First, a reminder that copies of the book are available at the back of the room and our author is here to sign them if you wish. Let me also note that a video and transcript of the program will be available on our website at www.americanprogress.org. I'd like to thank the New Press which published this book. And Borders Books for helping us to distribute it. Our wonderful staff who worked so hard on the event. And now please join me in thanking our terrific speakers.

(Applause.)

(END)