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AMERICAN TERRORISTS ABROAD:
OPTIONS FOR U.S. POLICYMAKERS

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P R O C E E D I N G S

MR. RIEDEL: Good afternoon, ladies and gentlemen. I urge you to do the same. Please turn off your cell phones and any other electronic devices you have with you. I want to welcome you to the Brookings Institution, especially today because we are unveiling a new paper. I hope you've had a chance to pick one up -- *Tools and Trade-off: Dealing with the Question of Confronting U.S. Citizen Terrorist Suspects Abroad*.

This is an issue which has acquired a great deal of interest and importance over the course of the last six months. It is an interest that strikes at the heart of two fundamentally important issues -- the national security of the United States and the defense of the American homeland against terrorist threats from abroad. And the second question, the rights of American citizens to be protected against their own government. And it all comes together, as the paper indicates, very much in one individual, Anwar al-Awlaki. And I'm sure we will talk about Anwar al-Awlaki a lot today. But just as a teaser, I want to remind you that Anwar al-Awlaki may be dead, but his spirit is very much alive. For those of you who don't subscribe to *Inspire Magazine*, that's probably a good thing because otherwise you're going to be on the FBI's watch list, but you're probably on NSA's watch list anyway so you're not making a big risk.

Inspire Magazine is, of course, the online web magazine that was co-founded by Anwar al-Awlaki before he was killed by a drone. The latest issue, or at least the latest issue that I have, entitled *Who and Why* is dedicated in many ways to his memory and includes a page in which we have an interview with Anwar al-Awlaki in which he explains the answer to the question you're all wanting to know, *Why Did I Choose Al Qaeda?* And on the page facing it, and I think this is done deliberately, is a picture of Tsarnaev, the Boston bomber, with a message to his mom on why he martyred

himself in Boston this year. The message from *Inspire* is clear. Anwar al-Awlaki may be dead, but he continues to inspire Americans to carry out acts of terrorism.

So what do we do about people like Anwar al-Awlaki over the course of the future? Fortunately, my two colleagues at Brookings have written what I think is an exceptionally good paper dealing with that subject. Let me just briefly introduce them. You have their files.

Benjamin Wittes is a senior fellow in governance studies at the Brookings Institution. He is the co-founder and editor and chief of the *Lawfare* Blog which is devoted to sober and serious discussion of hard national security choices. He is the author of numerous books, but I'll just mention a couple -- *Detention and Denial, the Case for Candor after Guantanamo, Freedom and Technological Change, and Twelve Independent Ideas for Improving American Public Policy*. He served as an editorial writer at the *Washington Post* before he joined the Brookings Institution, and he is a graduate of Oberlin College.

Dan Byman is a senior fellow in the Saban Center, and director of research in the Saban Center. He is also a professor at Georgetown University's Securities Studies' Program which he chaired for quite a considerable period of time. He is a former U.S. government analyst, hint CIA. He was a member of the 911 commission report, and he too has published numerous books, the most recent of which is *A High Price, the Triumphs and Failures of Israeli Counter Terrorism*. He has a PhD from MIT.

We're going to proceed today by hearing a little bit of an introduction of the paper, a little synopsis of the paper from Ben, and then I'm going to ask each of them a bunch of questions and after awhile we will open it up to you and get your questions as well. So that is how we'll proceed, and with that introduction, Ben, if you'd kick us off.

MR. WITTES: Thanks, so this is a bit of an odd project. It was an

amazingly fun project for me because one of the things -- and I write about law and terrorism -- but there's actually a subject that I don't know very much about which is terrorists. You can spend a lot of time, as I do, writing about the sort of law under which one confronts terrorists and what you are and are not authorized to do to them. And it's amazing how arid that discussion can be of actual terrorists. And so working with Dan, who knows a lot about terrorists, I'm not quite sure what that says about Dan, but spends a lot of time thinking about terrorists. He knows a lot about the groups in question, as of course does Bruce. It is actually a bit of an eye-opening experience for me and sort of injects into work that can be very aridly legal -- you know, actual people and subjects which is an amazingly fun experience.

We focused the paper, for reasons that I'll explain, on a very narrow subset of terrorists which is not all the terrorists that the United States confronts. It's not even all the citizen terrorists the United States confronts. It's citizen terrorist suspects whom it confronts while they are fighting the United States abroad. And the reason we limited it this way is that the moment somebody flies back to the United States, (a) there is an enormous set of path dependencies that are created the moment somebody walks into the United States or flies into the United States which is that a whole series of tools are taken off the table as a legal matter that are available, at least in theory, when somebody's overseas. And secondly, that the range of U.S. powers that are available, specifically, surveillance powers and law enforcement powers, grows enormously. And so they become (a) much more available, much more consistent, and (b) much more legally exclusive, not completely so but much more so. And so by focusing on the period before somebody comes back, you end up talking about and confronting a much broader range of possible tools that you could use.

Therefore, there are some notable omissions when people think of U.S.

citizens who've become terrorist suspects. They often think of people like Jose Padilla or Padilla depending on your pronunciation choice or Najibullah Zazi or many of the people who've been arrested domestically or detained domestically. These people are, by dint of that fact alone, not covered in the paper. And that's a bit of an artificial distinction in some instances, because in some cases the tools are the same. In some cases it's not.

So when you look at the range of tools -- and what we tried to do in the paper was (a) describe sort of two distinct axes, one is the range of tools that the United States uses to confront citizens overseas. The second is to look at the range of people who meet that criteria which turns out to be much broader, much more interesting and frankly, more fun than just as an analytical matter to look at the range of individuals who the United States in the years since 911 has kind of had to think about, what are we going to do about so and so?

And so broadly speaking, I'm sure a lot of the individual stories of these people, which actually kind of what makes the paper interesting in a lot of respects, will come up repeatedly in this conversation. But I'm going to put that aside for now and focus on the second axes, which is realistically, what are the range of tools that we have, once you've identified an individual suspect whom you feel like you probably need to do something about, and who is in some meaningful sense allied with the enemy. But who is (a) abroad and therefore, you can't just walk over and pick them up, and (b) a U.S. national and therefore entitled to some consideration of their constitutional rights in the discussion.

Broadly speaking, we've identified five tools, approaches and they are -- I'll tick them off and then I'll tack back and talk briefly about each one. So, the one of course that we open with that has gotten a great deal of attention recently, including last week in a court hearing here in Washington, is targeting the person with lethal force.

The second is capturing the person and bringing them to criminal trial. And as a practical matter, as a legal matter, that criminal trial by dint of its being a citizen, will always be a federal court trial, never a military commission. So, you've walled off military commissions by dint of limiting this to citizens.

The third, which for reasons I'll explain, is largely a dead option, at least for long term purposes, is military detention, but this has been tried at various points.

The fourth, which is very seldom discussed, but is actually a significant piece of the arsenal, is simply assisting other countries to prosecute them or detain them for us. And this actually has been done quite a bit in ways that we'll talk about and that I think actually plays a non-trivial role in the way policymakers confronted with individuals, sometimes think of what to do about them.

And the fifth, which is the one that we simply never talk about, but we have become convinced is a tool that is actually used, is deciding to do nothing and simply tolerate the activities of the person in question.

So, just to lay those out is to suggest that each of them has certain advantages and disadvantages. So, what I'm going to do, in each case I'm going to give one example, and then I'm just going to stop and we can go into a conversation about it.

So, the targeting with lethal force option is of course very much discussed because of Anwar al-Awlaki, but it is worth noting at the outset, that this is a category with exactly one example, which is to say Anwar al-Awlaki is the only case in which an American citizen was individually, specifically targeted by the United States government. Eric Holder declared that there were three other cases during the Obama administration of collateral damage, killings of U.S. nationals, including Anwar al-Awlaki's son, and the erstwhile editor of *Inspire Magazine*, Samir Khan. There's actually a fourth example from early in the Bush administration. An American national was killed in

Yemen in one of the early drone strikes.

So, we think there are probably four cases of people who were not specifically targeted but were killed. Those are not examples of what happens when the government has to decide what to do about an individual. So, it's really a case of an end of one that said, it's a very dramatic end. And we'll talk later on about the problems and attractions of that as a mode of dealing with suspects.

The overwhelming recourse in dealing with U.S. nationals abroad is the criminal justice system and the hard question as a practical matter. This list of tools often looks like a sort of haphazard completely disorganized collection of options that you kind of do whatever you can in any given case.

There actually is an organization to it, and the organization is, the first question seems to be: can you capture the person and bring him to trial? And only if the answer to that question is no, do you then look and see what your available other options are.

So, if you go through this paper, the huge volume of cases that have reached any sort of disposition, have reached disposition on the basis of criminal prosecution. This is a point that, you know, in the political polarization of this subject where everybody has to have an opinion about criminal prosecution being either weak or good or virtuous. It is just worth noting as an empirical matter that it is hugely powerful in terms of the numbers of cases that get resolved.

In addition, foreign prosecution is an important element. So there are a lot of cases that we discuss in here, some of which are famous, a lot of which are not famous in which U.S. people go overseas, get involved with the enemy and some other government picks them up. The United States may be directly involved, may be indirectly involved, may be passively involved, or not involved, but is perfectly happy to see those

people prosecuted or even just detained. Sometimes that goes on for awhile and sometimes it resolves toward U.S. prosecution in the long run. There was a famous case in the Fourth Circuit where the Saudis arrested somebody who they thought, and quite rightly, was a very significant figure in a local Al Qaeda cell. They held him for something like 18 months, and finally transferred him to us, and we prosecuted him for, among other things, trying to kill President Bush or plotting to kill President Bush. So, you know, these cases can be proxy in the short term and resolved toward U.S. prosecution in the long term. Or they can be proxy from beginning to end.

And then finally, there is just toleration, and we were able to find a number of examples where U.S. people are just kind of known to be operating overseas. Sometimes they're indicted and just never caught, either because we don't care that much -- sometimes they're not even indicted. We're just kind of aware that they're doing it, and the decision is that it's not important enough, not threatening enough to U.S. interests to justify any extraordinary measure like a drone strike or a capture operation, or anything that it would take to bring them in. And so they end up doing this for long periods of time, essentially unmolested by their own government. The result of this, I suppose, is we think of this as a strategic option in certain cases, that there are people who you're just going to ignore.

Finally, one further thought before I stop is that these options are not always mutually exclusive. Anwar al-Awlaki was tolerated for a long period of time before the judgment of our government changed to the effect that he had become operational and they couldn't tolerate him any longer. Adam Gadahn, who is sort of the American spokesman for Zawahiri, is effectively tolerated. There's an indictment for treason pending against him, but I haven't seen any evidence that anybody's making any extraordinary efforts to capture him. Should we capture him, should we stumble upon

him and get him, we would certainly prosecute him under that indictment. So, people move from one category to the other.

So, I'm going to stop there, and that's a sort of broad overview of the analytic and basic empirical description of the paper.

MR. RIEDEL: Thank you, Ben. Dan, since you've already been identified as hanging around with bad sorts, there's an interesting dichotomy in the paper, seems to me. On the one hand we have Anwar al-Awlaki who the government has made, I think, a pretty impressive case, was involved in serious operational activity as well as in the propaganda field. And may have been involved going back as far as 2001.

And then the others that you characterized, many of whom, frankly, come across a little bit as the keystone cops of terrorism. Can you say a little bit more about the pool, how bad of an apple is al-Awlaki, how much are the others not, and is there any reason to believe this pool will change over the course of time? In other words, is Anwar al-Awlaki really a one off or should we reason to believe that there is more of this problem to come?

MR. BYMAN: Awlaki is unusual, and I would say for a couple reasons. Most important, he was very much a skilled propagandist, and that's something that is unusual in that he could go between worlds. He had some credibility in the Middle East, not as much as a learned say, Saudi sheik, but still some credibility. And he could turn around that credibility and use it to appeal to American and more broadly Western audiences.

And he did so in an idiom that was extremely compelling. If you listen to Zawahiri's speeches -- just listen to them as a regular American -- they sound wooden. The translation sounds off. They're not the sort of thing that necessarily inspires. And that's in part because Zawahiri is not the most gifted of orators. But even putting that

aside, it's hard to translate inspiration. It doesn't go well. So, when someone can speak the local language, that person is much more able to attract recruits. So, Awlaki was very dangerous for that reason.

But what's striking about most of the Americans involved is that they're remarkably unskilled as operators. And in my view that's in part because the number is in part limited, but also most of the broader Jihad communities counting non-Americans, starts off unskilled. But then they go abroad and they train, and they fight wars. And then after years there's a somewhat Darwinian process where those who survive, those who prosper, end up, you know, having a lot of skills, just as you would expect from years of survival and combat.

Many of the Americans who have gone abroad or who have been at home haven't had that ability to train or fight. They've often been arrested quickly after leaving the country, and it's unusual that someone's been able to spend a long period of time.

Now we're starting to see exceptions to this though. And one big exception is the number of Somalian Americans that have gone off to fight in Somalia. And for the most part, from what we know, none of these have made their mark as kind of skilled senior operators in a dramatic sense, but it's reasonable to expect that some of these individuals are further radicalized and that even worse, some of these are gaining a lot of skills. Iraq attracted some people and certainly Syria has the potential to attract people. So, I think part of the reason we're seeing the low skill level is that in contrast to a number of countries, people are not able to train, thankfully, in the United States. And they haven't been able to reach out and form connections as effectively as other nationalities abroad, but that may be changing over time.

MR. RIEDEL: In the case of al-Awlaki, you highlight his propaganda

skills. The paper suggests there is a bit of gap, in at least administration's thinking, about what is the difference between building a bomb or giving someone a bomb? Anwar al-Awlaki gave Umar Farouk Abdulmutallab a bomb, and writing a piece for *Inspire Magazine*, how to build a bomb in your mom's kitchen, which apparently the Boston bombers read and successfully put together without their mom we hope.

What about this gap, and is there some way of addressing it, first to Dan, from the standpoint of identifying the continuum on which people will be, and then second from Ben on the legal issue of when does propaganda go from being inspiring to actually helping someone carry out an act of violence?

MR. BYMAN: This was one of the early things that got me so excited about this paper because Ben and I approached the propagandist issue from very different perspectives. And I'll ask Ben to say more, but from a legal perspective a lot of Awlaki's activities are protected activities under the U.S. Constitution.

What's fascinating from Al Qaeda's point of view is they often value the propagandist more than they value the operator. They have a fair number of people -- it's really probably too many in some ways -- who are willing to plant a bomb, who are willing to blow themselves up. Those people are not in short supply. Where it gets harder is the number of skilled operators who can train, who can fund-raise, and also who can inspire others, either to give money or to join the cause. So, if you think of someone like Awlaki, he was able to inspire people around the world to give their lives for this. So, in a way he has an operational role, and the U.S. government stressed that in acting against him. But from Al Qaeda's point of view, he was most valuable because he could attract recruits in many different countries. And those recruits could be trained, they could be hooked up with other operators and become far more deadly.

And so, I think there is a bit of a gap because something that's very

valuable in their organization, the recruiter of the propagandist, is harder for us to go after for our own reasons. But as your question indicated, a lot of this simply requires identifying the roles of individuals in this organization. Awlaki can be used as a good example where -- these organizations don't have the same strict organization chart that we have. And a lot of people play multiple roles. So, if we identify someone as an important propagandist, it's worth also asking what other roles do they play? And can we go after them for playing those other roles despite limits in going after them as a propagandist?

MR. WITTES: So there is a gap. The gap has a name. It's called the First Amendment, and it's actually a deep value. And one of the things the First Amendment does, is it prevents us from doing everything to everybody that we would like to, based on the things they say and believe and wish that they could get other people to do, and try to get other people to do. And that legal line is extraordinarily protective. And, you know, maybe too protective in some ways. So, if you go back to the Supreme Court decisions that gave rise to it, they involve I believe -- it's been a year since I've looked at *Brandenburg*, but I believe it involves a clan rally in which, you know, people are urging the overthrow of the United States government and killing blacks and Jews. And the Supreme Court's response to this is, this is protected speech unless and until the speech is urging something that would cause the language of the cases imminent lawless action. There has to be a particular person or a particular building.

So, you have to really be -- before you're outside of First Amendment protection in the purist's speech land, you have to be awfully, awfully specific about killing people. The only wrinkle here and the only reason that this gap isn't paralyzing, is that people don't generally act independently. So, if you publish *Inspire Magazine* yourself, just because this is all the things that you believe, this is absolutely First Amendment

protected. And if any one of you on your own, with no links to Al Qaeda publishes, you know, something as vile and hateful as *Inspire Magazine*, there's really very little the U.S. government can or will do about it.

But here's the thing, people don't actually do it that way. What they do, is they do propaganda on behalf of and in coordination with an organization. And the moment that you hook up with AQAP to publish *Inspire Magazine*, this is no longer First Amendment protected activity, this is material support to terrorism and that's a crime.

And so, the first thing that saves counter terrorism against this gap is just that there are things that you're allowed to say on your own behalf, but the moment you do them as work for a designated foreign terrorist organization, you're sort of outside of First Amendment land. Because while you're allowed to say and believe those things, you're not allowed to give material support, including your own labor to the terrorist organization.

That's the first thing that really, I think, makes a big difference. And it's the reason why, I think, had Samir Khan not been killed, but had fallen into the hands of U.S. law enforcement, not that they ever indicted him, but I think they would have been able to had they been able to prove that in fact he was the editor of this magazine.

The second thing, as Dan says, people do play more than one role. And Anwar al-Awlaki issued a lot of statements. He made a lot of, you know, a lot of tapes, a lot of videos that if he's speaking on his own outside of the context of involvement with a terrorist organization, he's allowed to say. But you know he also played an operational role, as both the president and the attorney general have talked about publicly now, in some very specific plots. And specifically, and most importantly, he personally coached Umar Farouk Abdulmutallab as he was getting ready to get on that airplane to Detroit. And, you know, it is possible that a lot of his activity is constitutionally protected, but you

don't have to do too much of that sort of thing before you're really outside of that land.

So, I think as a practical matter there is a gap, and there's a lot of activity that, when U.S. nationals overseas do, we really have to hope that they do it in coordination with some prescribed group or that they don't only do that. And so far I think we've been kind of lucky in that regard, in that people haven't been disciplined enough to say, "Okay, I'm going to consult counsel and be really careful not to engage with groups that will subject me to the material support law. I'm just going to be an inspiring figure, and I'm never going to cross a line into any operational activity." I think the day the next Anwar al-Awlaki makes that judgment, that is going to be a very scary day for the United States.

MR. RIEDEL: Just as a point of information here, Ben mentions coaching Umar Farouk Abdulmutallab. Had Umar Farouk Abdulmutallab gone to trial in Detroit, the prosecution would have presented the evidence then of Anwar al-Awlaki's coaching to him. I know that because I was the expert witness for the prosecution on Al Qaeda in the Arabian Peninsula. But when he decided on the second day of the trial to plead guilty, of course the prosecution never put any of that evidence forward.

MR. WITTES: They put it in a sentencing memo.

MR. RIEDEL: They have now put it forward after that. I think they missed an opportunity there to make their case about Anwar al-Awlaki much more powerfully, and then they needed to do some catch up later on after the drone strike.

Let me turn to another question to you, Dan. One of the options that's in here, and one that you indicate has been used a fair amount, is capture or detention by U.S. allies. Can you speak a little bit more about how often does that happen? How often do American citizens fall into that category, and what are the pluses and minuses of an approach like that?

MR. BYMAN: Ben and I wrote an article at the beginning of the year for the *Atlantic Monthly*, but it was on their website, and unusually that was deliberate. And that was because we did it as an interactive flow chart. And the idea was you could click on various things and see the results. And one of the key questions we asked was, is the suspected terrorist in the territory of an ally? And sub-questions were, does the ally control its own territory? And just as Ben began his remarks by saying, if the suspected terrorist is in the United States, you just use U.S. laws and go after the person. It's straightforward from a policy point of view.

If they're in the territory of an ally that controls its own territory, then you ask the ally either to act on your behalf and transfer them to the United States, or the ally uses its own laws, because usually the suspected terrorist is violating the laws of the ally, as well as of the United States.

So, if you're joining a militant group in France, usually you're targeting the government of France as well as Americans. And there are some exceptions to that, but for the most part allies can and often prefer to prosecute under their own laws. Just as we would. If there was someone involved in anti-American activity and anti-Canadian activity, we'd probably prosecute under our own laws rather than transfer them to Canada, except in somewhat unusual circumstances.

So, allies often play an important role, in part because Americans are violating their law. Where things get tricky, is when we feel allies either cannot or will not use their laws to go after terrorists. This is Pakistan. This is Yemen, where there's some ambiguity about whether the government simply doesn't want to, or whether the government won't because it doesn't exercise sovereignty. But even there you have a number of Americans who are in jail, in part because they've gone astray of local laws.

And here is something worth pointing out which is, often there is a

certain degree of political popularity for these governments to go after Americans and put them in jail. So, you have individuals not far from here, who came from Alexandria, Virginia, who went to Pakistan, supposedly to train and find training for Jihad. And the Pakistani government arrested them and tried them and jailed them, and that was relatively popular, in part because they don't like Americans. So, going after some Americans was a good thing. They don't like Jihadists, so going after Jihadists was somewhat of a good thing.

So, the advantages are pretty clear in that allies often have the capabilities and they can often use their laws. From U.S. policy point of view, this gets people off the streets, and at times the allied case against them may be stronger than the American case. They may have done something relatively minor by U.S. laws, but something much more significant by the laws of the ally.

It's been mentioned, the one thing that I believe the courts do not tolerate, is when we're actually asking the ally to act in our stead. When we say, you know, it would just be too tough to prosecute them according to our laws, so let's have the ally do all the work and we'll pretend that we had nothing to do with it. The courts would not see that as legitimate.

But for the most part, this has been something that's been accepted and there have been, I think, different degrees of U.S. government effort to try to intercede with the ally to get them tried in the United States rather than in the allies' territory.

MR. WITTES: Just to be clear, it's not that the courts have not tolerated that, it's that there's been some expression of anxiety, not clear what the U.S. court reaction to that would be, but it's a little dicier

MR. RIEDEL: Let me follow up on that with a subset. You've made an interesting distinction between allies who control territory, and allies who are willing to do

it. It seems to me there's a third category, an ally who clearly controls its territory, let's say Italy, but for some reason or another, the United States intelligence community decides to go in and capture an individual and extraordinarily rendition them. Now as far as I know, that's never happened to an American citizen. But it's happened in more than one case in a foreign country. What would be the legal basis for the United States carrying out an extraordinary rendition in a country like Italy or, let's say Mexico? On the face of it everyone would say, well why didn't you just ask the government of Italy to do it?

MR. WITTES: Well, so in the case of the Italian operation from 2002, that was a joint Italian/American operation, at least according to the public reports. So, my understanding of that would be that that would actually be all the consent that you need. I mean if you're cooperating with local authorities -- now there may be huge disadvantages to doing that on the soil of an ally. But for purposes of sovereign consent, you know, that's actually pretty good.

MR. RIEDEL: Even if they have regret the day after.

MR. WITTES: Even if they regret the day after and their own courts turn around and prosecute both them and us for it. The harder case is the case where you know you do not have the consent of the host government. You're doing it in violation of local law, and you're doing it because you don't believe the local government would cooperate. And there are certain famous cases of that, both inside the terrorism context and outside. The case that got to the Supreme Court in that sort of thing involved the kidnapping of a doctor in Mexico who was believed to have helped torture a DAA agent to death. And that was a counter narcotics case, not a terrorism case. So, it doesn't only arise in the terrorism context. Look, the simple answer is when you do that, you're violating international law. You may choose to breach your international obligations for

purposes of a certain operation. But, you know, you shouldn't kid yourself.

And the State Department or the relevant agency may choose to argue that it doesn't breach international law because the country was unwilling or unable to do it. You know, as a practical matter, I think you're not in a comfort zone of legal compliance when you do that sort of thing.

MR. RIEDEL: Let's open it up to you. Please raise your hand if you want to ask a question or make a brief comment. And I would urge it to be a brief comment. Please also identify yourself and wait for the microphone before it gets to you. Don't be bashful. Here we go.

MR. EISENBERG: Hi, Mitch Eisenberg, U.S. Navy lawyer, just got a degree in national security law. You talked about tolerance as one of the options. Is there more to it than tolerance and actually trying to work outside of helping foreign jurisdictions outside of prosecution to prevent further actions and/or prevent that type of stuff from just occurring?

MR. WITTES: I'm not sure I follow the question.

MR. EISENBERG: So, I'd say tolerance would be letting the behavior continue. What do you think are the options to work to prevent it, but short of prosecution, killing, or assisting a foreign government?

MR. WITTES: Look, when we say tolerance, we mean tolerance vis-a-vis the individual. That is you're not going to take specific coercive or violent action against the individual. There may be other things that you do, like asset freezing or, you know, lots of foreign policy instruments that you have, ranging from strengthening the government of Somalia so that it can handle its own affairs, including incidentally the few dozen Americans who've shown up there and done bad things, but that aren't directly targeted at the individual. When we say tolerance what we really mean is that there is no

specific tool being directed at the individual in an effort to neutralize whatever level of threat they pose. And we included it as an option, frankly, partly to be a little bit provocative. We tend to think of people we haven't caught as failure. Adam Gadahn is still out there because we haven't caught him. That's a failure of action. But I actually think, and Dan can speak for himself, but I actually think we should think of those more as choices. If we really wanted to get Adam Gadahn, and we were willing to invest the kind of energy that we have invested, say in al-Awlaki or Bin Laden, I think we probably could do it. It's really a question of how much energy and time and money and collateral costs to U.S. interests you want to incur in order to do it.

And so I think when you ask the question about, you know, when you're breaking it down and thinking about the level of individuals, what are we going to do about this bad guy, Ben Wittes, one more option is realistically if he happens to show up at a U.S. port of entry, we'll prosecute him. But we don't think he's going to be the guy who gets somebody on an airplane with a bomb on him. And short of that, we don't care that much.

And, you know, it doesn't mean that you ignore all the surrounding issues. But I do think there's this group of people that we haven't really gone after in a sustained and serious way.

MR. BYMAN: I'll just add briefly, when we think of Al Qaeda or associated organizations, we think of terrorism, but a lot of what they do is kind of the day-to-day of guerilla warfare and its urgency. And there you have literally thousands of fighters, individually who don't really matter much, it's in the aggregate. So, it's not, you know, a small number of highly dangerous individuals. It's a large number of individuals who, if you're fighting as part of a Shabaab militia in Somalia against another Somalian group, I'm not sure that matters too much.

What's interesting is this American recently came back fighting with Jabhat al-Nusra in Syria. I don't think the United States was particularly focused on him while he was in Syria. But when he came back we duly brought him to the attention of law enforcement because he was linked to a Jihadist group, even though in this particular case he was fighting against foes we are also opposed to.

So, I think it's very much also a question of, how much do these individuals matter? And with many Americans, they don't matter much. The question is they could matter over time. So, I would add when we think about tolerating people, it's often tolerated minder. It's pay attention to them if their threat status changes. If we say this individual was radicalized in Somalia, we have information he is going to come back to the United States and blow a bunch of stuff up, then I think the attention to him goes way up as opposed to, he's just going to keep fighting for the militia until he's shot.

MR. RIEDEL: Let me just follow up on that if I might with both of you. Let's take the case of Anwar al-Awlaki. Even before he started publishing *Inspire*, his activities in 2000 and 2001 with regards to the 911 hijackers were extremely suspicious. For those of you who don't remember, he met with them on at least two occasions, or at least a group of them.

The 911 commission report noted that the coincidence was extraordinary and suspicious. Then he goes off and he does all this. We don't actually, as far as I know the case, you know it better than I, pin him to an operational attack until after the Detroit attempted attack. Well, it seems to me as an American citizen that's a little late in the game for my government to start making the decisions. So my question is first to you, Dan, from the counter-terrorism perspective. You say monitor, well you're putting an awful lot of faith in the CIA's ability to know exactly what moment the guy goes from being a poison pen writer to building poison.

And then from a legal perspective then, isn't the very fact that he's part of the organization sufficient grounds to say, we're not going to tolerate your activity anymore. Aren't we, legally at least, in safe ground in saying okay, you say you belong to Al-Qaeda, you've written an op-ed saying why I joined Al Qaeda, you're fair game.

MR. BYMAN: To me, the great book on Awlaki is yet to be written. And if there are journalists here in the audience, please write this book because he's utterly fascinating in a variety of ways, so many issues come into play.

And one of them is, in the 90's and also after 9/11 he's involved in support for radical activity, yet at the same time he's doing prayer breakfasts with politicians. And he's in the *Washington Post*, which I assume was your decision, Ben. He's in the *Washington Post* talking about Islam as a very peaceful religion, so he's really able to kind of pursue a radical side, and at the same time, pursue a very peaceful face.

And, as you mentioned Bruce, the 911 story is very disturbing to me. And I would like to see a kind of exhaustive and brutal FBI investigation into their own practices on this because the FBI investigation was very much to me the strength and limits of law enforcement investigation, which it was looking for a very high burden of proof. And since the reality was not that neat, it did what is, as we almost in all cases agree is appropriate for U.S. citizens, which is you don't put someone in jail.

In fact, there are some things Awlaki did, such as he would solicit prostitutes and transport them across state boundaries. So, this is a crime. It's the transporting is the problem. So, they debated going after him on those grounds, because there you can make a criminal case.

But Awlaki to me is a great example of, what to me are going to be inherent limits of intelligence. If you're saying tolerate, you're implicitly saying sometimes you'll be wrong. That sometimes you will be watching somebody and you will not catch

the signals, or they'll change in 48 hours. By the time it comes to your attention, it's too late to do anything about it.

So, tolerate means accepting some risk. Not tolerate means taking on a lot more cost, a lot more effort, and at times perhaps making the situation worse. You're taking someone who is a minor threat and pushing them into a more extreme position.

MR. WITTES: First of all, I just want to echo Dan's point that the great book about Anwar al-Awlaki has not yet been written. And that you can tell actually, almost the whole story of the post 911 era through the case of Anwar al-Awlaki, that he follows every, you know, from the initial investigative questions after 911 which Dan has just talked about and Bruce has just talked about, through the rise of targeting as a way of dealing with overseas threats and the context of a light footprint. You can sort of tell that whole story through the case of Anwar al-Awlaki.

At one point when we were researching him, I posted something on Facebook, just a question to some of my Facebook friends. And I got this response actually, from somebody who had worked with my wife in a past life, who had come from the southern California Muslim community and who had, by coincidence, known Anwar al-Awlaki when he was a teenager, when this guy was a teenager and al-Awlaki was a preacher out there. And wrote me a note that basically said, this guy was always a radical and don't let the revisionism fool you.

There's people sort of who are in both camps about al-Awlaki. One is that he kind of migrated to radicalism, and the other was that he was basically always there, and he put on a really good show. And, I'm kind of agnostic about what the right answer -- and that is a warning sign about toleration. The narrow legal answer to your question is that, yes, the moment you hook up with a group that is proscribed, that is a designated foreign terrorist organization, you can be prosecuted for that. But al-Awlaki

didn't do that in a provable sense until after he had left the country. Now he may have done that in a covert sense long before. But we don't actually, other than the fact that he met with some of the hijackers, which is indeed extremely suspicious, we don't really have any evidence of that. What we do have evidence of is that at some point he showed up in Yemen and became a very prominent figure in the external face of AQAP. And at that point, yes, if he had been capturable, he is certainly prosecutable at that point.

MR. RIEDEL: Over here, ma'am.

MS. RIECHMANN: Hi, I'm Deb Riechmann with the Associated Press. You mentioned the five different options, and I was looking at the first option which is the targeting with lethal force. And I know that President Obama has talked about narrowing the criteria for deciding when to use that. And I was wondering if you could address that, whether or not he has, whether or not he hasn't. And also, there's always talk that the secretary of state might be going to Pakistan soon, and a lot of these guys are running around in Pakistan. So, I was wondering if maybe you could address what kind of issues might come up in their discussion about counter terrorism.

MR. WITTES: Well, I can address the first part of that question. I wouldn't venture to guess on the second. The standard that the president used as a legal matter to decide whether the targeting of al-Awlaki would be lawful, has not been narrowed. And the reason is, is that it was very narrow to begin with because of al-Awlaki's citizenship. And the standard was the Justice Department determined, and the president accepted, that the targeting of somebody like al-Awlaki, which is to say a senior operational leader of Al Qaeda or an associated force, would be lawful if three conditions were met,

The first is that the person was, you know, an operational terrorist. So,

not simply a propagandist, but had an operational role. The second is that capture was not feasible. And the third was that targeting would be consistent with the laws of war. And that judgment was made that al-Awlaki met those criteria.

Now in his May 23rd speech the President somewhat narrowed the criteria for the targeting of non-citizens, and he narrowed it in ways that make it substantially similar, though not exactly the same as the standard that he used in the al-Awlaki case. I think the next U.S. citizen who reaches the threshold, and we can hope that this doesn't happen, the next U.S. citizen who reaches the same threat threshold and profile as al-Awlaki will be targetable on the same basis.

MR. RIEDEL: I'll take a very brief stab at the Pakistan question. Of the most wanted on the United States most wanted terrorist's list, there are three believed to be in Pakistan. One, is Ayman Al-Zawahiri and Amir Valkida. He is presumed to be in hiding from, not just the United States, but the government of Pakistan. I say presumed because a lot depends on whether you think Osama Bin Laden was in hiding from the government of Pakistan at all. That's a separate debate.

Second on the list would be Mullah Omar, the head of the Afghan Taliban, who it is widely believed, certainly by the government of Afghanistan, our ally, to be hiding in an ISI Pakistani intelligence safe house in Quetta, which means he's not really hiding from the government of Pakistan. So, one would assume Secretary Kerry will at least raise the question of where is Mullah Omar.

The third is Hafiz Saeed, the head of Lashkar-e-Taiba, and the mastermind of the attack on Mumbai in November, 2008, who is not hiding at all, who appears on Pakistani television once or twice a week, calling for violent action against United States, Israel, India, and a host of other countries. There is, I believe, a \$10 million reward for information leading to his capture, and I would assume Secretary Kerry

will at least put on record that the government of Pakistan needs to do something about this. It can't collect the reward since -- how do you get information leading to the capture of an individual who appears on television regularly? It doesn't mean like you really need a lot of information about where he is, maybe just his booking agent.

There would be an interesting question about an American, of course, if David Headley had not been captured in Chicago. David Headley was the reconnaissance agent for Lashkar-e-Tabia for the Mumbai attack, who spent an awful lot of time in Pakistan. Had he successfully flown to Pakistan and stayed there, he would have raised all the questions that this paper raises about, what do you do about an American citizen who's been deeply involved in acts of terrorism, in fact killing American citizens, but is being protected, more or less, by a foreign intelligence service? More questions. Right here, sir.

MR. BROWN: Seyom Brown from the American Security Project. Can you tell us a little bit more about the judgment that Awlaki was not capturable. What was the finding on what it was based? Was it determined that it was technically impossible or that it would be politically or legally too messy. What was that finding based on?

MR. WITTES: I have not seen the document which Mr. Snowden was not good enough to give me, yet. But there's a certain amount that we can infer about it based on things that have been said in public, specifically by the president in the May 23rd speech.

So first of all, the standard is not capture is impossible. The standard is capture is not feasible. And feasible is a funny word because I think there's a sort of implicit or bracketed thing that follows the not feasible, which is without unacceptable costs. And I think broadly speaking, they never say it that way, they say capture not feasible without unacceptable costs. But I think that's actually what it means. And there

are three categories of costs, one is risk to U.S. forces, and I think certainly a capture operation in, you know, rural Yemen in that situation involved substantial risk to forces.

Second is a risk of collateral consequences to civilians. You know, there are circumstances in which a drone strike is an air strike, whether from a drone or an F-16 or whatever, is more dangerous to civilians. There are also circumstances where a fire fight is more dangerous to civilians. And that's actually a factor they are legally obliged to consider.

And then the third, which nobody ever talks about, except interestingly the president out loud in the May 23rd speech, is the risk of consequences to relationships with allies. And the president talked, it's one of the aspects of the speech that people have really not drawn attention to that I think it is actually really important, about how devastating the Bin Laden operation was to U.S. Pakistani relations, and that you can't do that every time you want to get a terrorist. And that the low impact way is much less costly to U.S. Pakistani relations when something goes boom and then the drone flies away, and people get upset for a day and a half and then we go on with life. Then when there's a crashed helicopter, there's a humiliating ongoing day after day after day set of coverage. It's an officially acknowledged U.S. operation so people are crowing about it. People are talking about it constantly. It stays in the news.

When you do a drone strike, we don't acknowledge it, so people don't talk about it in quite the same way. And so the consequences to relationships with allies are actually ironically much lower, even though in the aggregate they're quite significant.

So, I think broadly speaking, just a guess, the impact of civilians when you're talking about a relatively isolated compound as with the Awlaki's, probably about neutral whether you do it with an inserted operation, or whether you do it with a drone. The risk to forces is much greater if you do it by inserting forces. It is sort of publicly an

open secret that the Yemeni government's position toward all these strikes is kind of, do whatever you want. Don't acknowledge them, and let's pretend they're Yemeni air strikes. So, the friction with the ally is much greater if you insert people. And I think that's what that word unfeasible or not feasible is if you unpack it. That's the sort of set of things, that it's a kind of a weird legalistic way of saying.

MR. BYMAN: If I could add briefly a fourth part of, I think the determination, which is, one of the advantages of drones is their immediacy. Before 911 when we were thinking about killing Bin Laden, one of the difficulties was we had to know not where he was, but where he would be. Because it takes a couple hours for the cruise missiles in particular to cross from the Indian Ocean over Pakistan and into Afghanistan. And that's a much harder intelligence thing because, you know, in the case of Awlaki, he's driving down the road. Is he going to go right or left in two hours? We don't know. We don't know where he'll be. And to get a package of even very fast and rapid responders like the JSAC folks, to get them into the country, into position where they can do a snatch operation with a high chance of success, actually takes time.

And so with the drone you say, you know, we know where he is, and we know where he is now, we can take him out now. There is a question which is, you could follow him. Maybe the intelligence was good enough to know where he would be in three or four hours. But one of the advantages of a drone is that you can act immediately. And one of the disadvantages of wait is that the target may move, and that's just something to add to the list of things to consider. It's not always going to be this positive.

MR. RIEDEL: The gentleman right here.

MR. MEHMETS: My name is Mehmet. I'm an intern at the Turkey/American Alliance. We've talked about countries that have populations and traditions based on Islamic teaching. Yemen, Pakistan, and some other countries that

you guys went over. So how come these countries are failing to such an extent, losing their integrity to these organizations, and you said that when these organizations form they're actually going to be crimes both against the nation and against the nation that they commit these crimes to. And while countries like Turkey, which is also an Islamic state, are so successful.

And my second question is, have you looked at previous nations which have ruled the region, like the Ottoman Empire which had rule over countries like Yemen, Syria, and Iraq. They led these countries for 400 years. So, I'm pretty sure they didn't use drone missiles whenever a revolt happened.

MR. BYMAN: If you don't know about the great 18th century Ottoman Drone Program (laughter). There are some differences. A country like Yemen in particular, there have been historical periods of Yemeni Empire. But for most of its modern history especially, it was not really well governed. In the Ottoman period as well, there were urban areas where commerce happened, where there was government. But in the remote parts there were tribes that did whatever they want. And so in Yemen's case, it's a question I would say of failed state building, if you will, that if you have a government that was never able to exert control, but it's a very difficult task. Bruce knows much more about Pakistan than I do, but what's troubling about Pakistan is you actually have institutional decline that I would say many of the institutions of the rule of law in society in Pakistan are much worse than they were 30, 40 years ago.

To me, Yemen's case is more understandable which is, it's a remote area with a weak central government and strong peripheries, so it's hard to have that exertion of control that leads to a state. But it's more troubling when you have a state that had some strength gradually decline. And we can get into the history of military coups and the economic corruption that's gradually spreading and gotten worse, and on

and on and on, but to me this is one of the fundamental questions, is not just what kind of government does a country have, but how well governed and how extensively governed it is in the end.

MR. RIEDEL: Over here, please.

MS. NAKATAR: My name is Anna Nakatar, and I am from Pakistan. Thank you all for your comments. I wanted to ask you at what point do you think that, Ben I think you said that it's not always justified to go into the country like you did for Osama. So, at what point do you think the threat we've talked about, the fact that Lashka-e-Taiba just comes up on TV apparently twice a week and is giving interviews. And then they're going to Mumbai and launching attacks. So, at what point do you think that it is justified for the U.S. or any other foreign government to come in because Pakistan is certainly not doing anything. And is this not enough for a red alert for you to come in at this point now because they're basically harboring terrorists.

A second question I have is that what legitimacy to your sources do you have? Because if Afghanistan says, oh, there's a terrorist sitting in Pakistan, Pakistan says, oh, it's in Afghanistan the blood is porous, so how do you track them?

MR. WITTES: Well, I can address part of that question, but I want to lop off the part that I can't address. So, you're mixing two things that are actually worth distinguishing between. And one is what the legal standard is under which you're allowed to intervene on the soil of -- one country is allowed to say this other country that is neutral is harboring or tolerating the activities of people who are attacking us, who we then want to attack. And what's the standard under which that country can be the subject -- essentially the battlefield of the countries attacking the group.

The second question is, you know, when do you think we should do it? And when do you think we should refrain from doing it? Those are actually very different

questions. And the second one implicates a whole lot of foreign policy concerns that both of these two gentlemen know a lot more about than I do. But I want to just lop off the first part because it actually has a number of possible answers. I can tell you what the position of the United States is, which is that the United States reserves the right to act on the territory of a third party country when there is a threat directed toward the United States from the soil of that country, and that country is either unwilling or unable to take action to neutralize that threat.

At various times Pakistan -- the United States has never alleged that Pakistan is unable or unwilling, because as a practical matter, the United States' position is that Pakistan consents to the operations that it conducts on Pakistani soil. Certainly that is not the case in the Bin Laden operation, and I think there must have been a judgment at that point that they weren't even going to find out if Pakistan was able and willing to do it. They simply decided not to find out, and to assume it was unable and unwilling to do it.

Pakistan has been sensitive about this point, and the general working understanding between the two countries to the extent that one has existed, which it often has not, is that we will use consent which will be given in private and denied in public, as a way of skirting the unable or unwilling question. And so that's the general answer to the question of when it is, in the U.S.'s view anyway, legally available for it to do that.

The question of how it should handle, you know, Lashkar-e-Taiba leaders, that implicates policy concerns that I don't feel remotely qualify to address, and I wouldn't want to be fraudulent and try.

MR. RIEDEL: I'll make a stab at it though. I think Ben was right to highlight in the President's speech at NDU, what he said about Pakistan. It really was an

extraordinary statement. He basically said, I made the decision to get Osama Bin Laden even though I knew it would badly damage our bi-lateral relationship. And it has actually damaged it more than I thought it would. It's an extraordinary statement because it does hint at his thinking about other people like Ayman Al-Zawahiri or Hafah Siede or Mullah Omar in the future.

It's an extraordinary statement in another way too, which is the decision he made in 2011 not to notify the Pakistani's came at a point in which the United States had in the previous decade under two presidents, including President Obama, provided Pakistan with \$25 billion, b - billion, not million, billion dollars in economic and military assistance, precisely for the purpose of fighting Al-Qaeda. And yet here when high value target number one is found in Pakistan, he decided he couldn't trust the government of Pakistan. Whether you think he was right or wrong, I think the majority opinion is pretty clear that they think he was right. It's an extraordinary statement about the complexity of U.S./Pakistani relations.

Going forward, where does that likely leave us? I think if the president's remarks are any insight into his thinking, and I think they are, the bar is pretty high for the United States doing a repeat performance. Much more likely, as Ben suggested, to use drones. Now the problem with the drones, of course though, is that they operate only in a very restricted part of Pakistan. At least in their lethal mode. They probably operate much more widely, but they don't carry out lethal operations.

And the individuals I've discussed almost certainly are not stupid enough to be sitting in the area where we carry out lethal operations. So we may be in a position where we are de-facto tolerating Hafiz Saeed for the long term -- Mullah Omar as well.

Now, why do we do that? I think there's a lot of reasons. One of them unquestionably, is the fact that Pakistan is a nuclear weapon's state. And violating the

sovereignty of the nuclear weapons state is different that violating the sovereignty of Yemen, which is not a nuclear weapons state. Does that reinforce Pakistan's desire to have nuclear weapons? You bet it does. And does it send a message to Iran -- better get nuclear weapons? You bet it does. That's the reality of the policy trade-offs here.

One last thing I would say about this, if you haven't seen it, on Al Jazeera's website we know have the secret Pakistani government investigation of the hiding of Osama Bin Laden, and of the failure as the government of Pakistan looks at it, of the government of Pakistan to detect American preparations for the May, 2011 raid, and to thwart it while it was underway. All of which these secret Pakistani reports regard as failures of the Pakistani Intelligence Service, the ISI, and endemic of serious state failure of the Pakistani government as a whole. It's really a remarkable report and well worth taking a look at. Other questions? Right here.

MR. HOUGAN: My name is Matt Hougan. I'm with the Arab/American Institute. Firstly, I'd like to say thank you guys. I wanted to challenge something that you guys said earlier, in that you said that Anwar al-Awlaki's son was collateral damage in an attack. From everything I've read, he was killed while sitting at a café or a restaurant eating with his friends. So possibly he was targeted, and the rest of them were the collateral damage instead. Again, I wasn't there, but maybe that's something to look into as well.

My question for you guys is, you know, with Anwar al-Awlaki's death, will we see the U.S. use of lethal force or lethal targeted force increase or change? Did Awlaki set a precedent or change the precedent that we use, and, you know, where do you see the trend going, especially with his son's death? Do you think that they'll target people who are less involved, less active in planning against the U.S. in terms of people that have sentiments or connection like Awlaki's child.

MR. WITTES: Well, first of all a few factual points on al-Awlaki. So, it's not we that has said that it was a collateral kill. That's actually what the U.S. government has said. First of all there would be no lawful reason for him to have been targeted. He was a sixteen-year old who was by all accounts in that area of Yemen looking for his father. And it would be quite an extraordinary thing for the U.S. military to target somebody under those circumstances -- an unlawful thing and a horrible thing.

Moreover, it would be a completely senseless and militarily valueless thing. I've never seen any reason to think that the son was the target of any strike. What is known is that he was killed. It was a strike separate, by the way, and about two weeks after the strike that killed his father. He was listed specifically by Eric Holder in Holder's letter to Pat Leahy the day before the president's May 23rd speech as somebody who was not targeted, but was killed as a collateral death in a strike aimed at somebody else. And as I noted earlier, they listed three such people, him, Sameer Kahn, who was killed with Anwar al-Awlaki, and a guy named Jade Mohammed who was a low level person killed in Pakistan I believe. And then we mentioned somebody else who was killed in 2002 in Yemen, but again who was not the target of the strike that killed him. Is there likely to be a shift in U.S. drone policy with respect to citizens after Anwar al-Awlaki? I suspect not, and the president in the May 23rd speech did flirt with the idea that he might be interested in legislation to impose a level of judicial review on such targeting decisions. He did not embrace it by any means, and specifically suggested -- I think he said he'd like to engage with Congress over it, but then kind of pushed the idea away and said one proposal for it raised serious constitutional problems and another threatened to impose a layer of bureaucracy that would be a bad thing.

I think as long as the numbers remain as small as one, the likelihood of any significant reform is very slim and frankly, probably should be very slim. You know,

this is an extraordinary event in the history of American counter-terrorism, and it was an extraordinary event that was frankly justified by all the evidence that they had access to. And, you know, the people who wrote that legal opinion or reportedly wrote that legal opinion, have taken just an enormous public beating from a lot of people for it. I actually think it's an extremely careful and, not that the opinion itself is public, but that everything we know about it suggests that the legal analysis was careful and protective and quite thorough. And I'm frankly pretty comfortable with the process that the government went through in that case.

You know, the son's death is a separate incident, a very tragic one, as any killing of a child is in any overseas or domestic military operation. You know, I have nothing to say about it beyond that.

MR. BYMAN: Let me add very briefly, and this is something Ben and I have not talked about so I don't know if Ben shares my views. The killing of the son to me, is a case for more transparency in terms of what the actual target was, what the criteria were and so on. I have my own views on more transparency in the program overall. But I think when it comes to the death of an American, especially the death of an American child, it's perfectly appropriate for the family to demand more information to know why this happened because it is so tragic, and it is so horrible. And so to simply know that who are the individuals involved, what were the criteria, because it's reasonable for citizens to know at what level they're at risk when they travel abroad to these countries, and what sort of behavior is risky behavior?

My instinct is the government tries to be very careful on who is on the list and so on. But I would like to know more in this particular case.

MR. RIEDEL: We are reaching the witching hour, so what I'd like to do is to take three questions from the audience, add one of my own, and then ask each of you

to wrap up and conclude. So, three questions, one here.

MR. GUGGENHEIM: Hi, my name is Joe Guggenheim, just retired former federal employee at one point. I'm concerned about the issue of giving material support to terrorist organizations -- looking at that in a broad category in the context of capital punishment is implemented by the prosecution -- the government outside of the judicial system making that judgment. For example, if the crime had been committed in the United States and given material support to somebody who may or may not be killing somebody. To what extent in the United States would that be subject to capital punishment? Then the question then is what is the gradations of material support to terrorist organizations in light of that?

MR. RIEDEL: Right here, yes.

MS. STILLIA: Hi, I'm Sophia Stillia, and I'm an intern here at Brookings, and my question is when we talk about where these days it's no longer the conventional idea of a country versus a country. It's more fighting individuals or cells hiding within other countries. So, with that, do you think the rules of war today are outdated? Do you think we have to update them?

MR. RIEDEL: One more? Right there. Yep.

MR. NEUMEISTER: Hi, my name is Eric Neumeister. I'm with the PLO's delegation of the U.S. And so far this conversation seems to have taken place in the context of international law vis-à-vis domestic law, you know, the first amendment. And I'm wondering how the conversation would change if those domestic laws were different? If this conversation were taking place by policymakers in London or in Tel-Aviv, would it be any less legitimate in either your eyes, or the eyes of the U.S. government?

MR. RIEDEL: Let me just throw out my final question. You alluded to it. Do either or both of you think there ought to be a new kind of judicial review, a special

Pfizer Court or whatever for some kind of a legal process for the use of drones against a target like Anwar al-Awlaki? Who'd like to go first?

MR. BYMAN: Sure, I think I'll be briefer than Ben. The big question about how to think about this struggle of, is it war, is it in the broader context of law enforcement, to me is at the core of so many other questions. The problem is, the answer is either both or neither. You can look at aspects of this, and it can be clearly -- if we're talking about targeting forces in Afghanistan, fighting the Taliban, clearly on the war side, then police operations in Europe clearly can be much more on the law enforcement side. And the problem is the Bush administration in my view, saw that and they tried to come up with middle grounds. And the result was that they were heavily criticized because every single new thing they tried to push forward was seen as illegitimate, that it wasn't standing on precedent of one of these established foundations.

I used to be a big believer in kind of a middle way, but I'm increasingly moving away from that because it's hard for me to actually find out what the specifics of that would be. So, I tend to favor either very narrow interpretation of war or much broader interpretation on the law side, because I feel that to stray too far from one of those puts you in an area that's extremely difficult. And as a result, I think we're always going to be unhappy with some aspects of what we feel we need to do from a national security point of view. There will be some things that don't fit neatly and will generate criticism and this to me gets to Bruce's question about some of the procedures we have for this.

One thing Ben and I say in the paper, as you've heard us say today, is with Awlaki in particular, you know, it's one person. And the idea of establishing a whole set of procedures or rules for something that may never be repeated, seems to me a bit unnecessary at this point, in part because you may want to dramatically change them

depending on the future circumstances.

However, should this become something that becomes common, becomes a pattern, becomes regular, in my view certainly then you want to revisit this because then it's not simply trying to justify and explain one case, but rather have procedures for something that's going to show up again and again and again. But, we're not there now. And I think it would actually be quite interesting and something think tanks should do is come up with what possible rules and procedures would be. But I actually don't think the government should go too far in that direction until we are there in a more immediate and empirical sense.

MR. WITTES: So, let me take the questions in order. Let's see if I can remember them. The death penalty is not available under the material support statute; however, comparing the overseas military operation to prosecution under the material support statute is itself a bit of an analytical error because the legal basis for the targeting isn't material support for terrorism, it's that you're a lawful target under the laws of war as a result of the AUMF, the authorization to use military force. So, you're not really in criminal law land to begin with.

On the question of are the laws of war out of date? This is a huge question. I think broadly what you can say is, the laws of war have been remarkably adaptive and countries that have to fight wars have been really amazing actually at adapting them over time to new circumstances. There is a huge gulf that is emerging between countries that do and countries that do not ever fight wars over the substantive contours of the laws of war in which the countries that do fight wars necessarily have a more permissive sense of what you're allowed to do under them than the countries and the NGO's that don't.

And that gulf does need to be bridged in a meaningful sense. It tends to

show up as a trans-Atlantic divide, but it has other dimensions as well, and it's a very important thing. In addition, as Dan says, we are in a land of hybridizing wartime authorities with non-wartime authorities, and that's showing up all across the fabric of U.S. law that's a bigger subject than my remaining seconds can cover.

As to whether the international law is contingent on domestic law, the answer has to be no. The international law by its nature assumes that what is okay for one state to do is okay for another state to do. That's sort of the idea of the sovereign equality of states. It's a bit of a fiction, but it's a really important fiction, and it's the fiction upon which the international system rests.

And finally, there is a cautionary tale for everybody who wants to run and create a new court in response to Anwar al-Awlaki. If you look in the list of courts that exists in the United States federal court system today, you will find an oddly named little institution call the Alien Terrorist Removal Court. It has an appellate body too, Alien Terrorist Removal Court of Review. These were created to great civil libertarian anxiety in 1996, and I believe I wrote a piece in *Slate* that you will find, wringing my hands about the dangers of America's new Court. The Alien Terrorists Removal Court has to date heard zero cases. It has judges who have never convened because the government has never brought a case in the Alien Terrorists Removal Court. And its appellate body has also never heard a case.

And so there is a danger, if only of comedy, in creating judicial institution that you're in fact never going to use. And so for that reason and several others, I fully concur with Dan that we need to have some sense of what the universe of cases that we would really want a judicial body to review before you go and earnestly create the legislative framework for that judicial body.

MR. RIEDEL: I'm tempted to ask what the Bush administration really

meant in -- or Clinton administration I guess, was aliens from outer space.

MR. WITTES: Well, we successfully got rid of them all.

MR. RIEDEL: Thank you so much for coming today, and thank you for visiting the Brookings Institution, and thank both of you for an excellent paper and for presenting it today. Thank you.

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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