A Hartman Hotz Symposium: Intelligence, Law, and Democracy

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Introduced by Dean Donald R. Bobbit

I. INTRODUCTION

Following the attacks of 2001, the United States has been confronted with great challenges in its efforts to protect its soil, its people, and its interests. Perhaps none have been as challenging as the extent to which the President and other officials may act without oversight in their acquisition of intelligence and use of that information. Many novel practices have had repercussions across the globe as well as in Arkansas: the long-term detention of both foreign nationals and American citizens without judicial review; the use of brutal enhanced interrogation procedures on those detained; the trial of prisoners by military commissions when the courts are open; the mass interception of communications and seizure of papers without a warrant; and the routine excuse of national security to justify increased police activities against immigrants, students, travelers, citizens, and ordinary criminal suspects.

Since 2001, the Congress, the Supreme Court, federal and state officials, lawyers and bar associations have been engaged in myriad debates over the power of the executive to define its own authority over these matters, as well as the powers of Congress to retreat from what was once thought to be the clear dictates of both constitutional and international law. These debates have brought into question the roles of the people in a democracy and of the rule of law, as well as the degree, in times of danger, to which democracy and legal rules are essential or optional. Through these debates thread arguments of necessity
and effectiveness: what is gained and what is lost if torture, brutality, domestic spying, and detention without review are allowed?

On April 25, 2007, the University of Arkansas hosted an extraordinary symposium under the auspices of the Hartman Hotz Trust, to consider the intersection of intelligence, law and democracy. The presenters included three guests with extraordinary experience in dealing with problems in the legal environment of acquisition and use of intelligence: Lord Robin Butler, former head of the British Civil Service and now Master of University College, Oxford; Alberto Mora, former General Counsel of the United States Navy and now Vice President of Wal-Mart Stores; and William Howard Taft IV, former Acting Secretary of Defense and Legal Counsel of the State Department, now Warren Christopher Professor at Stanford University.

Collectively, these guests represent very diverse experiences in law and the oversight and management of intelligence. Most importantly, all three have been required to consider what information gathered by professional intelligence agencies is reliable, what techniques are lawful, and what processes are essential in the defense of their respective countries. The discussion was moderated and encouraged by Don Bobbit, Dean of the Fulbright College, and Steve Sheppard, Enfield Professor of Law. Contributions in absentia were provided by Professor Jeremy Waldron of New York University School of Law, whose valiant attempts to reach Fayetteville in time for the discussion were thwarted by a storm during his air travel.

II. PANELIST BIOGRAPHIES

The Right Honorable Lord Butler of Brockwell, KG, GCB, CVO, is Master of University College, Oxford. His career in the public service in the United Kingdom began in 1961 in the British Treasury, serving later as Private Secretary to Prime Ministers Edward Heath, Harold Wilson, and Margaret Thatcher. He as appointed Secretary of the Cabinet and Head of Home Civil Service in 1988, serving in that role under Prime Ministers Margaret Thatcher, John Major, and Tony Blair, in which roles, he was responsible for some aspects of the
management of security and intelligence in the United Kingdom. He has served as Master of University College since 1998. In 2004, Lord Butler chaired a Review by a Committee of the Queen's Privy Councillors to examine British intelligence on weapons of mass destruction prior to the decision to invade Iraq.

Mr. Alberto J. Mora is Vice President and General Counsel for the International Division of Wal-Mart Stores, Inc. His public service began in 1975 as a member of the U.S. Foreign Service in Portugal. After private practice, he was appointed general counsel to the U.S. Information Agency and served as a member of the Broadcasting Board of Governors, which oversee Voice of America, among other operations. He was appointed General Counsel of the U.S. Navy in 2001 by President George W. Bush, with responsibility for legal matters affecting both the Navy and the Marine Corps. He opposed efforts by the Department of Justice to approve the use of torture against prisoners, a policy subsequently disavowed by the White House. Mora was awarded the John F. Kennedy Profile in Courage Award in 2006.

Professor William Howard Taft IV is of counsel to Fried, Frank, Harris, Shriver & Jacobson, LLP, in its Washington, D.C. office, and is also the Warren Christopher Professor of the Practice of International Law and Diplomacy in the Stanford Law School. Following an early career in private practice and public service in the United States he was appointed in 1976 to be general counsel to the U.S. Department of Health, Education and Welfare, in 1981 becoming general counsel to the Department of Defense before being appointed Deputy Secretary of Defense and then Acting Secretary of Defense. From 1989-1992, he was U.S. Permanent Representative to NATO, a position he held during the first Gulf War. After a period again in private practice, in 2001 Ambassador Taft was appointed Legal Advisor to the U.S. Department of State, in which capacity he fought the use of torture in American prisons. After four years he returned to private practice, writing, and teaching.
Dr. Donald R. Bobbit is Dean of the Fulbright College of Arts and Science and Professor of Chemistry and Biochemistry in the University of Arkansas. He is a member of the Trustees of the Hartman Hotz Trust.

Steve Sheppard is the William Enfield Professor of Law in the University of Arkansas School of Law and a member of the Trustees of the Hartman Hotz Trust.

This symposium was sponsored by the Hartman Hotz Trust, a fund created in honor of Professor Hartman Hotz by his family, which promotes the intellectual community of the Fulbright College and the School of Law by supporting intellectually challenging events of interest to scholars and students in both divisions of the University of Arkansas. The following is a transcription of this symposium on intelligence, law, and democracy.

III. PANEL DISCUSSION

DEAN BOBBITT: Good afternoon. I’m Donald Bobbitt, Dean of the J. William Fulbright College of Arts and Sciences along with my colleague Dean Cindi Nance of the School of Law. I welcome you to this final event in the 2006-2007 series of Hartman Hotz lectures. Just as a word of background, Hartman Hotz was a distinguished graduate of the University of Arkansas. He went on to Yale Law School and later assumed a faculty role here at the University of Arkansas. Over the years of his career, he was a much decorated and honored teacher and scholar.

The endowment that supports this lecture series was established by his brother, Dr. Palmer Hotz, and family to honor his memory. This endowment and this series lecture are jointly administered by the School of Law and the J. William Fulbright College of Arts and Sciences. The purpose of these lectures is quite simple. It is to bring to campus new voices to challenge and inform, and I believe that today’s discussion is a capstone of a stimulating year of lectures. The topic today is both timely and critically important to our society. I want to offer some thanks before we began today’s program to the Hartman Hotz Committee. It includes Dr. Palmer Hotz, Dean Cindy Nance,
Dr. Barbara Taylor, Dr. Jeannie Whayne and Professor Steve Sheppard. In fact, Steve Sheppard serves as the intellectual force behind today’s lecture. He is an accomplished and decorated teacher and scholar. In addition he is simply unflappable. Please join me in welcoming Professor Sheppard to the podium to introduce the other members of the panel and the format for today’s discussion. Professor Sheppard.

PROFESSOR SHEPPARD: Thank you, Dean. Good afternoon. As Dean Bobbitt said, this is a wonderful opportunity to complete a fascinating year for the Hartman Hotz lecture program. It is a tremendous honor for me to be able to introduce the members of this panel. First, let me introduce Lord Butler. Robin Butler is the Master of University College, Oxford. To say he has had a distinguished career in the government of Great Britain is an understatement. Having served as the personal secretary to four prime ministers and the cabinet secretary to three other prime ministers, he is perhaps singularly the most acute observer of the executive in Great Britain in the later 20th century. He is the Right Honorable Lord Frederick Edward Robin Butler, Baron Butler of Brockwell, Knight of the Garter, Order of the Bath, as a Grand Commander, as a CVO, as a member of the Privy Council.

He was educated at Harrow and University College, Oxford where most importantly he was a Rugby Blue. He joined the treasury and worked for a variety of institutions but especially was private secretary to Prime Ministers Heath, Wilson, and Thatcher. He then was Cabinet Secretary, which is to say the head of the Home Civil Service, effectively the person to whom the entire civil service of Great Britain reports, including the Joint Intelligence Committee. In this role he would be, in a fictional world, the boss of James Bond’s boss’s boss. I think that’s accurate.

Upon his retirement from government, he became Lord Baron—a member of the House of Lords and Baron Butler Brockwell and has served with tremendous distinction as leader of University College, Oxford. University College has a reasonable claim as the oldest living institution of higher education in the English-speaking world.

William Howard Taft IV is, I’m pleased to announce, recently appointed the Warren Christopher Professor of the
Practice of International Law and Diplomacy at Stanford University. He has served in the United States in a variety of government positions after a B.A. from Yale and a J.D. from Harvard Law School: working in the Federal Trade Commission, the Office of Management and Budget, and the U.S. Department of Health, Education and Welfare. He has also served as the ambassador to the North Atlantic Treaty Organization.

He was very, very influential and a very long serving member of the senior administration of the Department of Defense, serving not only as Deputy Secretary but as interim Secretary of Defense in the first President Bush’s administration. He has actually served very widely throughout the government, but in his most recent appointment was the legal counsel to the Department of State and, therefore, was Colin Powell’s lawyer and the chief legal officer for American diplomacy.

Alberto J. Mora—it is a pleasure to root for the hometown man. Mr. Mora is presently the Vice President of Wal-Mart in charge of all of their international legal operations. As such, he has supervisory roles over legal staffs, not only in the United States and Europe working on international legal matters for Wal-Mart, but also in Asia and we suspect soon in Africa. Alberto Mora has a B.A. from Swarthmore and has been practicing law following his degree from the University of Miami. He has served not only as a diplomatic officer in the Department of State but has had a variety of executive appointments, including in the United States Information Agency. He has been appointed not only by republican but also democratic presidents to senior positions and most recently was the legal counsel for the United States Navy, the chief legal and ethical officer of the United States Navy and Marine Corps.

In both the capacity held by Mr. Mora and by Mr. Taft, I think that you will very quickly see not only was theirs a very important supervisory role but it was an important role for the development of policy and the advocacy of law in government. It is a pleasure to welcome all of you. Thank you very much for coming. Today’s discussion is meant to be among three specialists. My role is to help create a platform for that discussion and occasionally to spin the wheel faster and
encourage them to engage one another in this discourse. Toward that end I would like to raise a few points and then I will be quiet and ask Mr. Mora to begin.

The role of intelligence and policy especially in war and diplomacy is now very acutely known to the American public, but it has always been important. One of the most important questions for us is how do we learn from our own mistakes and how do we learn from the past? We are fixed now in an engagement in Iraq, Afghanistan, and in countries across the world seeking knowledge that will allow us not only to defend ourselves, but to project the type of security for American interests, liberty, and values across the world. This has never not been true and I would like to offer two quick stories as contrast.

In the beginning of the Vietnam War most of you will remember the Gulf of Tonkin incident in which there was a belief, based upon military intelligence and military operations, that a naval group of two American destroyers, the Maddox and the Turner Joy, had been attacked. An insufficient evaluation of that intelligence and a rush to use it lead to the Gulf of Tonkin Resolution, which significantly escalated the American presence in Vietnam and led to quite a few continuing problems for the country from that stage forward.

It is now widely acknowledged that there were severe problems with that analysis and indeed, the second of the two attacks, the one that was considered the greater problem and the basis for the resolution, may well never have happened. It is not always the case, however, that American intelligence makes mistakes. It is often the polity. Many of you are aware of the destruction of the battleship Maine in the harbor of Havana, Cuba in January 1898, when it was believed by many that the Maine may have been sunk by Spanish revolutionaries and the then colony of Cuba. A very careful and a very swift evaluation was conducted under, I suppose, the U.S. Naval intelligence at the time and the Department of the Navy. The recommendation to President McKinley was that there was insufficient evidence to determine the exact cause of the destruction despite it being such a horrible loss of life and, therefore, it did not serve as the casus belli leading to the Spanish-American war, because of careful evaluation by intelligence professionals.
Now, the question is not only about intelligence, the question is about law. In the midst of all the problems that we have seen in trying to determine the truth of the matter and to determine how our enemies might behave, law can provide two different forms of assistance. First, law can help set the rules of the game. Law can tell us what agents of the State may do. There will be much discussion about what amounts to torture and whether it may be used. There will be much discussion of other types of activity that we would like to think do now resonate with American values. Law may set the rules of the game and enforcement of those rules may be very valuable, not only externally through the courts, but also internally by the very, very well-trained professional staff that incorporates those laws into their practices.

Additionally, besides the rules of the game, law may provide the map board for the game itself. Law may draw the squares upon which the maps are played out. Law can determine whether or not intelligence can be given directly to elected officials. Law can determine the types of analysis. Law can determine what forms of evaluation are required and indeed must be used before policy and other decisions of State may be based upon it. I think we are all aware that there were flaws in intelligence handling in the recent decisions regarding Iraq. To determine what we've learned from those, to look to the future, to try and both protect ourselves and our values and to do it in a way that we believe is going to be, in the long-term, how we wish to see ourselves; that surely can be the province of law.

And lastly, the question of democracy—what is it that we the people must demand? Can we rely upon statements of truth from which we cannot find a rationale because the source of the rationale is a secret, yet we must respect some secrets or we can never learn new secrets? These are the questions that these men have grappled with throughout their professional lives and careers and they have, I can say with great, great confidence, much to say. I will now be quiet and ask them to say it. It's my pleasure now to introduce again Mr. Mora.

MR. MORA: Stephen asked me to start my presentation with a discussion of the personal circumstances that led to my involvement in some of the issues that are the topic of today's panel. Before starting to do so, let me say how honored I am to
be here today at the University of Arkansas. It’s always a pleasure to be here and I count many of your law school graduates among my colleagues at Wal-Mart and can attest to the fact that it is an excellent law school producing excellent graduates and lawyers.

Let me also indicate that it’s an honor to be here with Lord Butler and Will Taft. Lord Butler’s relationship with me is only less than a day old, but Will Taft I’ve known for a long time. And I’ve had occasions in other settings to describe him as possessing one of the most distinguished resumes of public service in our generation, and I’ll repeat that characterization today. If you take trouble to see all the responsibilities and positions he has held in the U.S. government over a course of many years, you’ll recognize that to be a conservative statement of his achievements. And I’m also glad to be here with Steve Sheppard. Both I learn from him and I always have a good time in Steve’s presence, all the more reason to be here.

I will now turn to the vast issues of intelligence, law and democracy, which I want to introduce with this vignette. I was serving as general counsel of the Department of the Navy when late one afternoon, into my Pentagon office walked the director of the Naval Criminal Investigative Service, an organization that falls under the responsibilities of the Navy General Counsel. Director Brant said that his agents down in Guantanamo were hearing rumors that detainees were being abused.

He let that sink in and then he asked the question, “Would you like to learn more?” The subtext of that question was, “or is this too hot; would you rather that we not go further down this path?” Well, my response was that I needed to learn more. And he said, “Very well, why don’t I come back tomorrow with some of my colleagues and let you know what we know.”

The next day Director Brant came back with his chief psychologist who plays an important role in NCIS applying the tools of psychology to the problems of law enforcement and national security, and two other senior agents. Although they had not witnessed this themselves, because NCIS is not involved in these interrogation exercises, they had heard that harsh interrogation techniques were being applied to certain detainees at Guantanamo. Guantanamo is a small enough place that such
things could be heard at the mess hall and at the athletic and recreational facilities.

Director Brant then indicated that abusive treatment was taking place. In fact, they provided fragments of transcripts of interrogations that demonstrated abusive treatment. They further indicated that they were concerned that these techniques may have already violated American law. They felt that there was the possibility, even the probability, a phenomenon known as force creep could occur, if not checked. This phenomenon is one in which interrogators applying force in an interrogation get frustrated and then, because they’re already applying force and they think that if the application of one time force is good, then perhaps two times force is twice as good, and so on and so forth. This apparently is an established phenomenon documented in the psychological literature. They were afraid that unless forestalled this could be manifesting itself in Guantanamo as well. In the view of the NCIS agents the techniques they were hearing about were unlawful, unethical, unprofessional, un-American—contrary to all our values and a potential disaster for American military and foreign policy.

Then they turn to me, and of course, the ball is now in my court. What do I do in this circumstance? I’ll leave it to you because I think this is one of the questions that all of us who are lawyers or who will become lawyers need to think about. These issues will come up in the course of your professional careers, perhaps not in the exact same setting but in analogous settings and one needs to think about these things ahead of time.

My response, which led to a series of events that continues almost without interruption to this day, was to involve myself precisely in the question of what place, if any, does cruelty have in American life, in American foreign policy, in American law, and in American values. To my surprise, this is a question of such a vastness that it does not have a simple answer. I expected there to be a very easy answer to this kind of question, but in point of fact it’s not easy. It’s led me into an exploration of the underlying philosophical purposes of the law.

What is the philosophy of law; what ends does law serve and what is the relationship between law and values? For example, one of the dilemmas I faced as general counsel—what does one do in a situation where the President has indicated that
the Geneva Conventions do not apply to a certain class of detainees? And if you do the research, you’ll find that if you take Geneva out of the equation, and then you examine the body of law that applies to detainees held outside of the American jurisdiction, you’ll find that the answer is not automatically easy to find. Then there are other issues and questions that then arise in concentric circles once those central questions are posed.

But leaving aside the anecdotes, let me then turn to the points I would like to make. I will be addressing the issue of cruelty. What role should cruelty have in American values, law, foreign policy, and national security policy? I’ll come to a judgment on this, but let me start with certain initial assumptions. The first assumption is that the threat that the United States faces is very, very real. To anyone out there who believes that the threat is exaggerated or overblown, or only of historical fact, no longer a present danger (meaning that 9/11 occurred and that since there have been no further attacks we’re no longer facing the threat that we had once faced) let me suggest to you that that it is not a safe assumption.

My belief is that the threat continues. My belief is that there will be other terrorist attacks against the United States. I always think in this context of a statement that my former boss, the Secretary of the Navy, Gordon England, now the Deputy Secretary of Defense, makes in some of his presentations. He says he’s figured out why the terrorists killed three thousand Americans on 9/11. He says it’s very easy. The reason they killed three thousand Americans is because they couldn’t figure out how to kill three million.

I don’t think that’s an exaggeration. I think there are individuals out there who are at this moment attempting to devise ways to kill Americans in quantity, industrial quantities. These are individuals who, if they could, would purchase or acquire the loose nuclear weapon; who would, if they could, develop or purchase biological weapons of mass destruction or chemical weapons of mass destruction and employ them as easily as you or I cross the street. To them the issue of killing those we would classify as innocent Americans (they would see that as an oxymoron) is not a moral issue at all. In fact, a number of these terrorist leaders, including Osama bin Laden, have stated that, in fact, it is an ethical obligation to kill
Americans. I think that the threat is real and significant and will be a persistent threat for the foreseeable future, so my comments as I make them in my analysis and recommendations should not be considered in the context of downplaying the dimensions of this threat.

Second of all, the importance of intelligence cannot be overstated. In this kind of war, intelligence is at the heart of both successful defensive and successful offensive military operations. In fact, in this context it’s interesting to reflect, as I heard said at the Pentagon, that the nature of war has changed in the last decade. For all of human history, war was classified by the following equation, and the equation goes that it was very easy to find the enemy because, of course, they massed. In World War I, World War II, and the Korean War you would have masses of troops, large fleets, and large air formations. You knew where they were more or less, and they were visible through a fairly rudimentary reconnaissance; but the other half of the equation is that it was hard to kill the enemy, so easy to find, yet hard to kill.

Well, since the revolution in military warfare that has been caused by the adoption of precision munitions by the United States and its leading allies, the equation is reversed. Now it’s very easy for the United States and other allies to kill the enemy. It’s extremely easy for the United States, once the location of an enemy is identified, to dispose of him, but now it’s hard to find them. With these assumptions in mind, I am of the opinion that the decision to apply cruelty rested on four false legal and policy assumptions or judgments. The first is that the unlawful combatants are not protected by the law and have no rights. Because the Geneva Conventions do apply, the detainees did have rights that attached and U.S. maltreatment was proscribed. I think that even unlawful combatants who may have committed the most unspeakable acts possess certain rights even when in captivity outside of U.S. territory.

The second false assumption is that the application of cruelty would not adversely affect our legal regime, our foreign policy interests, and our national security interests; meaning that we could apply cruelty without adverse impact to these other considerations or these other structures in our society. The third
false assumption is that unless cruelty were applied, more Americans and perhaps even many more Americans would die.

The last of the four assumptions is that if the American public or international publics learned that cruelty was being applied to these detainees, or if it was disclosed that this policy was in effect, no one would care. Such was the resolve of the American people, such was the nature of the threat, such was the obvious compelling rationale for the application of cruelty that the American public en masse would be of one mind that this, of course, was the right thing and necessary thing to do. These were the four assumptions that underlie the adoption of a policy of cruelty.

Now, I think that each of these assumptions is incorrect, each one of them. I think Americans care whether we apply cruelty or not. I think that there are laws that prohibit the application of cruelty and I think there are rights that protect individuals who might be the victims of cruelty. I think cruelty is not necessary to protect American lives. In fact, I think it weakens our defenses. I think there are adverse effects to our system of laws, to our values, to our foreign policy and to our national security with the adoption of cruelty. Let me say just a few more points before wrapping up.

Most of the analysis and most of the discussion on this issue centers on the legality and ethics of cruelty. That really is the starting point of any of this analysis. One of the lessons that I learned, as I thought through these issues in the months and years after that initial event, is that it really all comes down to a basic principle. It really all comes down to the value that one attaches to the protection of individual dignity.

If you believe, as I do, that the protection of individual dignity is the organizing principle of our country and democratic societies, then you need to ask what the violation of this principle would mean for our foreign policy and national security interests. Let’s analyze this as a matter of policy. As a matter of policy the question becomes: does a policy of cruelty support or not support our overarching foreign policy objectives and our overarching national security interests?

My answer to this question is overwhelmingly, no. Cruelty weakens the United States and has weakened the United States. Cruelty makes us less safe and not stronger. This is the main
point I would leave you with today—thinking about the purposes of this colloquium, my personal objective would be to disabuse anybody who thinks that we are safer if we adopt another tool in our defensive arsenal, the use of cruelty in interrogation.

Let me just outline very briefly the reasons why this is so. Going back to the law, I think cruelty is ultimately destructive of our legal system because cruelty is destructive of the underlying philosophical principles upon which we are based. We can never contain the application of cruelty to areas outside of America’s borders. It will infect the domestic legal environment and undermine our constitutional foundations. With respect to American foreign policy, since World War II, you’ll see that the overriding objective has been the creation of international institutions, values, and rules that promote human dignity shielded by the rule of law. In fact, we have fought for these objectives in the last five decades.

After World War II, the Geneva Conventions were established,1 the United Nations was organized,2 and the UN Charter was adopted.3 We built all the multilateral financial institutions. We strengthened the West, in fact, we created a community of Western nations all sharing the same values. We developed a foreign policy that more or less consciously is based upon the rule of law dedicated to the protection of human rights. We’ve been so successful in organizing and achieving that kind of objective, so much so that the prohibition against cruelty is now an institutional part of the law of every European democracy and, in fact, of all our traditional allies. I would include Australia, Canada, and New Zealand in this group.

The application of cruelty in each of those countries would be a criminal act under their jurisdictions. Consequently, when the United States adopted a policy of cruelty and we asked leaders like Tony Blair to ally with us in the war on terror, we were potentially asking leaders and lower ranking officials in

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these governments to aid and abet in the commission of criminal acts under their legislation. Those countries can’t follow us in that direction, and if we’re thinking correctly we would not want them to follow this lead.

Now, what are the foreign policy consequences? The immediate foreign policy consequence is that the United States would never be able to build and sustain the alliance necessary to fight a war on terror effectively. If Afghanistan and Iraq and the war on terror more generally have taught us anything operationally, it is that the going-alone policy is not an effective war fighting strategy. As a matter of strategy, we wish to build a long, durable, and broad coalition of like-minded nations to fight this war together with us. There’s really no other way to find and detect these dispersed terrorists who are scattered throughout multiple jurisdictions.

Now, this is why it doesn’t work as a security policy. If you analyze the impact operationally of these policies of cruelty what you will see is that there’s been a distancing of these traditional allies from us during the course of this war for the reasons I mentioned. They could not, as a matter of law, politics, or policy accompany us into the swamp of cruelty. It’s not a choice that those societies are prepared to make.

Let me leave you with two last thoughts—the German Constitution, Section one, Article one, provides that the protection of human dignity, and I’m paraphrasing, is the principal function of the State. It is the duty of all public organizations of the German State to advance this principle. Now, when one reflects on this fact, that the German State, the state responsible for the two catastrophic wars of the 20th century should now have adopted this policy, one realizes that this is, in and of itself, a significant fact. It is significant, and credit goes to the German nations and citizens that it is an element of their Constitution today. They are the ones who deserve the credit, but the fact that this element to the Constitution was adopted in 1949 when the United States and its allies had control over the totality of Germany reflects credit on

5. See Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] May 23, 1949, art. 1, § 1.
the enlightened statecraft of the United States, Great Britain, and the other allies in the war on terror.

This represents the operational pursuit of a human-rights policy as a principal objective of our foreign policy. It has been an overarching operational foreign-policy principle for the last five or six decades and has yielded enormous benefits for our country. It's created a system of rules and institutions which protect the United States, that make us safer, not weaker. If we abandon this concept—as we necessarily must if we adopt a policy of cruelty—we start dismantling not only our values, but we start dismantling the architecture of foreign policy and national security which we have built up during these last decades. That will not make us safer. That is a dead end from which the United States must retreat.

Let me close, with a tribute to Professor Waldron who made an observation about cruelty and the law that I think is so central to our discussion. Because what I hope I’ve touched on is the fact that there is an interrelationship between values, laws, foreign policy and national security; all are interconnected. The application of cruelty cannot be restricted to only one section without having impact on the others, but this is where it starts. Professor Waldron talks about the principle of non-brutality and he writes:

Law is not savage, law does not rule through abject fear and terror, or by breaking the will of those whom it confronts . . . . There [is] an enduring connection between the spirit of the law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable . . . . [T]he rule against torture functions as an archetype of this very general policy. It is vividly emblematic of our determination to sever the link between the law and brutality, between the law and terror, and between the law and the enterprise of breaking a person’s will.

I think that sums up my fundamental position on this issue.

6. Professor Jeremy Waldron is a University Professor at New York University School of Law. He was originally scheduled to moderate this lecture program. Professor Waldron was unable to attend due to disruption in travel plans.

MR. TAFT: Thank you, Steve. I’m delighted also to be here as part of this group and to see Alberto again. As he’s mentioned, we’ve worked together for some years and also to get to know Lord Butler. And I also want to compliment the University and the Law School for putting on this type of forum and sponsoring this discussion.

Alberto I think has spoken extremely well and I find very little to disagree with in what he has said and I don’t want to repeat it. So what I thought I would do is to focus just on two questions, one of which he did touch on but the other one, not so much. They were questions that were raised in the beginning of the discussion. The first question was whether there are tools that should be illegal in the gathering of intelligence, one of which certainly would be torture or in a milder form, perhaps, cruelty. And the second question was what obligation, and it’s really a different type of question focusing more on intelligence, what obligation should there be on officials in a democracy to disclose the basis of intelligence that is used and which it is said supports or requires that the government take military action?

On the first question, are there some tools that should not be used in gathering intelligence? We must consider this question in light of the absolute necessity, more important now than previously, that we must gather intelligence if our security is to be preserved and if we are to be successful in frustrating those people who want to do us no end of harm. So given their intention, one must be very cautious in laying limits to what can be done and what we would permit or prohibit in the gathering of intelligence. But just to take on torture and cruelty, my own view first on the legal point, is that torture and cruelty are prohibited by legal instruments to which the United States is a party—torture specifically by the Convention against Torture, and cruelty by common article three in the Geneva Conventions, which the Supreme Court has determined is applicable to any of the persons that we might take into custody in the war with the terrorists.

In a way then, it is possible to say we have resolved this issue, at least as a matter of law. We have signed up as the rest...
of the world has done, and these two conventions, or the four Geneva Conventions and the Convention against Torture are virtually universally adhered to, or at least subscribed to, and they do prohibit both of these forms of interrogation. It’s also fair to say that torture is itself—it’s beneath our values and inconsistent with our values even if we had not undertaken the obligations in the convention on torture. And I think it’s fair to say that before we became a party to the Convention against Torture that we already had proscribed it as a tool in gathering intelligence.

It is also, I think, not a reliable way of obtaining intelligence. Unfortunately, there isn’t any way to prove this. Now, I am aware that people say that the methods of interrogation which were certainly coercive, and which I and many others would have said amounted to torture, have produced valuable intelligence which has saved American lives, perhaps many American lives. This, however, is unfortunately not something that is subject to direct proof; but even if it were true, the problem with the proposition is that you can’t do it both ways. You can’t torture a person and also not torture the same person and know what intelligence would be produced by not torturing. The fact is that over the years under the policies the Department of Defense has had in place, and they did not include torture as prescribed in the manuals governing the conduct of our forces, a great deal of very valuable intelligence has been obtained from people in custody. And it would be easy to say that a great deal of intelligence has been obtained which has saved American lives and, therefore, that is the way that you should be conducting your interrogations.

So while it’s hard to deny, not knowing what is being relied upon or stated, that perhaps a person subject to torture or cruelty has provided important intelligence information, other methods also have the same track record. For that reason it’s not possible to say that torture is the valid approach.

There are, of course, issues as to what is torture and as Alberto suggested, even issues as to what is cruelty. I do think it is important to recall that the idea that you cannot use coercive methods of interrogation does not mean that you can’t ask very tough questions. A cross-examination can be extremely rigorous, and a procedure which is not comfortable for the
witness, but I don’t think anybody would say that it is torture. It is a perfectly legitimate method—vigorou...
Intelligence Surveillance Act,\(^\text{10}\) which the administration has suggested is inadequate to allow for the gathering of crucial intelligence. And all I would say about that is I think that the Act itself is a balancing and it may be that in this day and age when it is now possible and when the stakes are extremely high we might want to balance it in a slightly different way. I think that the American people over the last four or five years have indicated that they will—not because they’re in favor of cruelty, they have not said that at all, but they have indicated that they will tolerate a significant amount of inconvenience, intrusion into their privacy, and intrusion into what have been previously civil liberties that they have enjoyed, if it can enhance their security in this time of very serious threat. These are issues that I say should be balanced by the legislature and should be carried out under the supervision of the judiciary. But it’s not clear to me that we should rule out that a rebalancing of the law in that area might be a good idea and might be something that the citizens of the United States would welcome in view of the benefits to be had.

The second area that I mentioned is the question of when officials have intelligence information which suggests to them that they need to take action of a military sort to assure and to protect our security—what is their duty to disclose, or should there be a duty to disclose that information publicly? If not publicly disclosed, should they disclose to at least some portion of the government? My own view is that there is no requirement to disclose intelligence that the administration, the government might feel it has to use, or that suggests the need to take military action. If on balance, it feels that the disclosure of that information would either jeopardize its ability to defend against the threat that it is aware of, or in some other way be too costly because it would expose sources and methods of gathering intelligence in a way that would prevent us in the future from getting intelligence that we need, it should be able to keep the information from the public where terrorists would become aware of it.

The main downside of disclosing such information obviously is that we would expose our sources and methods. On

the other side we should have in mind the benefit of disclosure to the public, which is that over time any military action that we undertake will require continuing support not just within the government but from the public at large. If you simply tell the public at the beginning that there is intelligence which requires us to take this action and leave it at that, you will not give yourself as much of a chance of getting that public support as if you are able to and feel that you should disclose a little more of the basis for your conclusion that you need to take that action. The public will probably go with you for a while, but wars tend sometimes to go on longer than people anticipate and they’re not always going well, in fact, most wars at some point don’t go well. They may go well at the end, but public support is needed throughout. When you decide not to disclose to the public the basis for your analysis of the threat you face, you risk losing that support.

Now, there is an intermediate ground—in our system where we have three branches of government, and particularly where we have in the Congress a coordinate branch of government which has responsibility for authorizing the use of military force, what is the responsibility to disclose their intelligence information or what is the ability to withhold intelligence information? I would say that it is essential that where a branch of the government, obviously, I have in mind here the Congress, does have authority and responsibility for authorizing military actions it needs to be informed. Now this can be done in whatever form it decides, and it might decide to do it in a restricted form of just a few members or a few committees; but it would be a lot sounder, in a situation where basically you are asking these people who have been elected to vote and authorize certain actions, that they should have the basic information that the executive branch relies on in making these decisions and should have all of it.

Obviously, the disclosure to the Congress can be on a confidential basis and there are risks in that, no doubt, but I think that whatever method the Congress were to determine is required to carry out its functions is the one that the executive branch should have to follow. Well, let me just leave it at that—we will be able to get more deeply into these particular issues, I’m sure, in the discussion that follows.
LORD BUTLER: Thank you very much, and can I say how delighted I am to be here and taking part in this discussion. I think this sort of discussion, if I may say so, is the sort of thing that American universities mount absolutely marvelously. I've already enjoyed the discussions that I've had with Alberto and Will and indeed I've learned a lot from what they've said this afternoon, so it is great pleasure to be here and taking part in this.

They have addressed quite a lot of their remarks to the question of torture and I agree with what they have said about that, but lest you should think that we are all in absolute harmony and that this is an easy question—I want just to put something that we might come back to in discussion: torture is wrong; torture is not in our long-term interest; torture is not consistent with our values. But what do you do if you have picked up a guy who has placed a nuclear bomb somewhere in Manhattan which is due to go off in twelve hours time? What do you do in order to get that information out of them? Are you justified in those circumstances in taking the sort of measures that you wouldn't take in any other circumstance? I just raise this as a classical question; it's not an unfamiliar one. It's in the textbooks, but what is the answer? I have my answer, but we might, if we address this question of torture in discussion, just go back to it.

Now, I really want to talk about the U.K. end of this and I want to address some of the wider questions, particularly the ones that Will Taft was addressing at the end of his remarks and discuss in this age when intelligence is of huge importance. It's going to be important throughout the lives of this generation that are now in this University for the reasons that have been given. It is the principal, in my view, tool of war if there are further wars in this century and it is the principal tool for countering terrorism. It is too late when people are already off with the bombs in their knapsacks. The way in which it's stopped is through gathering intelligence, so it's going to be very important.

In those circumstances what I would like to discuss is what is owed to the citizens in these circumstances, including the citizens who may be the targets of that intelligence-seeking and may be, in some cases, wrongly the targets of that intelligence-
seeking. Let me just put it in context and say a little bit about the way the intelligence machinery works in the United Kingdom. We have three main agencies. We have the Secret Intelligence Service which is, if you like, the opposite number of the CIA. We have GCHQ which is the interception agency and which is the opposite number of the NSA, and we have the Security Service which looks after internal security and is the opposite number of the FBI. It’s not quite as clear as that, but that is the basic structure.

I was never a member of any of those agencies, but my role as Cabinet Secretary was to be a link between those agencies and the politicians, and in particular to the Prime Minister. I was responsible to Parliament for the expenditure on the agencies through what we call the secret vote. I was the channel for conveying intelligence to the Prime Minister and I chaired the committee which determined the priorities for the use of the budget of the secret vote by the agencies.

It was a principle of the U.K. system that on the whole we tried to prevent unprocessed direct access by the agencies to the politicians. The head of the Secret Intelligence Service and the head of the Security Service do have direct access to the Prime Minister. If they exercise that, they’re meant to keep the cabinet secretary in touch with it, but we tried to discourage that direct access for this reason—we wanted to avoid the sort of situation which Steve Sheppard referred to in his opening discussions of the Bay of Tonkin and its part in the lead up to the Vietnam War.

Intelligence is a dangerous commodity. It is something which may come from corrupt sources. It may have been placed with you by the enemy. It may be there to mislead. And during the second World War, Winston Churchill set up an apparatus in the U.K. called the Joint Intelligence Committee which was intended to be an intermediary between the agencies and the policy makers, the politicians. Our preferred method of operating is that the intelligence which is gathered by the agencies, whether it’s from intercept, whether it’s from agents, or by whatever means it’s discovered, is processed by a committee which also takes into account the intelligence which is being obtained by overt means—through diplomatic channels, the trade channels, or indeed through the media, reading the
newspapers. The way in which our system works when it has the opportunity, the time to work this way, is that all these sources are put into the joint-intelligence committee. The joint-intelligence committee then processes it, assesses it, and sets one source of intelligence against another because they may be saying contradictory or inconsistent things and only on the basis of that gives a picture, an assessment, to the policy makers and to the politicians.

We think it is very dangerous for the head of an agency who has got an exciting bit of intelligence to rush off to a decision-maker, to a politician, and say “I’ve got this nugget of intelligence, it’s very exciting, I believe in it, you’ve got to act,” because that can lead to some of the classic mistakes that have been made in history. Of course, on some occasions, let’s take the Manhattan example that I quoted earlier, if you’ve got a bit of information like that, you’ve got to act on it really quickly, but it isn’t the preferable way of handling intelligence.

Now, in an age when intelligence is going to be an important part of our lives what ought to be the restraints on it? Under what regimes should it be governed in the interests of our values, our freedom, and our citizens’ rights? In the U.K. all of this has developed very quickly over the last twenty-five years. It’s extraordinary to think that the very existence of the Secret Intelligence Service and the Security Service and of GCHQ was only officially acknowledged by the government in 1981, just over 25 years ago. Before that their existence were open secrets: we all knew about them; we all knew about MI6; and we knew about MI5; but government would not acknowledge them. They would not acknowledge the location of these agencies and they would not acknowledge their personnel.

You remember from James Bond that it was well known that the head of the Secret Intelligence Service was called M. Actually he was called C. Now we are allowed to know what his real name is. But paradoxically we are not allowed to know what Ms. Moneypenny’s real name is, but since the agencies were avowed, since their existence was avowed in 1981, we have passed a whole lot of legislation which defines explicitly what their powers are and what the rights of the citizens in relation to them are. We know now where they’re all located, and those of you have seen recent James Bond films will
remember James Bond coming out in a shiny speedboat out of a building which is indeed the building of the Secret Intelligence Service.

Now, I think that this is necessary. I start from the premise that all acquisition of intelligence is an abuse of human rights. It is by definition the acquisition of information which the owner of it does not wish the people who are acquiring it to have. It is, therefore, an abuse of the human rights of privacy of the people from whom the information is being obtained. But that human right to privacy is not an absolute human right. It is qualified and it must be qualified by the need to set the public interest against it where the information you’re trying to acquire is information to prevent crime, to prevent terrorism, or is information which enables you to preserve your national interests against an enemy.

So it is legitimate to infringe that human right to privacy in those circumstances. But I think that there must be certain requirements and the principles that underlie our legislation are these, that the action which you take in infringing those human rights must be proportionate. It must be proportionate to the injury which you’re trying to prevent. Second, it must be under democratic control. It must be under powers that are granted by a democratic process through Parliament and enshrined by legislation. Third, it must be subject to democratic accountability. What I mean by that is that the actions must be authorized by a member of the executive who is democratically accountable, in our case one of the ministers who is answerable to Parliament. Fourth, because in these circumstances you can’t always trust the executive and you can’t always get to know what the executive is doing, it must be monitored by an authority which is independent of the executive.

In our case, in the case of the Security Service and the Secret Intelligence Service, there is a judge, a member of the judiciary who has access to all of the papers, all the decisions of the agencies and can monitor them to ensure that the action that is being taken is compliant with the law. That judge is within the circle of secrecy. It is the way that we try to resolve the dilemma that the public has a right to know that what the agencies are doing is consistent with the powers that have been granted to them by Parliament. But the public can’t, for reasons
of secrecy, know directly what those actions are. So we entrust a judge as independent of the executive to do that for us.

And finally, there must be a right of appeal by citizens. You or I, if we feel that we are the victims of the agencies in a way which goes beyond their powers, must have some form of redress. Now, how can we do that, because clearly if we say, “I think my telephone is being tapped, please will you tell me whether it is,” then the agencies aren’t going to willingly tell us. So we have set up tribunals in both the case of the Secret Intelligence Service and the Security Service and GCHQ to which any citizen can go and say, “I’ve heard a click on my telephone, I think that I may be under surveillance.” The answer that they get is not, “yes, you were under surveillance” or “you’re not under surveillance.” The answer is from somebody who has seen what’s going on and has access to all the papers, that there is nothing going on which is not authorized under the law.

Now then, that may well be if you’re a crook you are being bugged; but you’re being bugged legitimately and in accordance with the powers. The answer may well be, and I’m glad to say it hasn’t happened yet, there hasn’t been an instance of it in the U.K., “yes, I’ve discovered that there is an abusive power going on and you are eligible for redress.” So to sum up, the system in the U.K. to protect the liberty and the rights of citizens are each agency is governed by a specific law. The powers of the agencies are defined. They cannot do anything which is not justified by legislation. The legislation does not cover or authorize either torture or assassination, and as a matter of policy these have not been, even before the law was passed, within the activities of the British intelligence agencies. Every activity must be warranted. It must be warranted by a Secretary of State. All these actions have to be monitored by a judge with full access to the papers and the activities. Every citizen has a right to appeal.

And finally, there is oversight by a committee of parliamentarians just like the intelligence committees of Congress. That in my view, that last thing, is the weakest part of our system. Because although this is subject to secret hearings and the members of Parliament do have access, they don’t have the sort of access which I believe your congressional committees
have, and these are committees of parliamentarians rather than committees actually within Parliament. I think we’re going to have to go further in that respect of having parliamentary scrutiny than we have already. So these are the arrangements which have been put in place in the U.K. in the last twenty-five years to govern the activities of the intelligence agencies, to reassure those who may be its victims and the citizens generally that they act within what is proportionate, what is reasonable, and that people have a right to know if they are worried that they may be illegitimately the subject of that investigation.

I think I would like to stop there. We could follow up other things in discussion.

PROFESSOR SHEPPARD: As to interrogation of suspects taken abroad and held in a variety of places but especially in Guantanamo Bay, which at that time was under the province of the Secretary of the Navy to whom you had special obligations—how did you come to the position that you would oppose the White House Counsel? Did that only develop later, and at what point did you realize that this was an argument, as opposed to a policy discussion? How did you individually come to the positions you took in moving forward?

MR. MORA: Steve, there are a couple of incorrect assumptions there. First of all, the Guantanamo interrogation operations did not come under the Secretary of the Navy because they were operational concerns. Although this is a complex organizational fact, in fact, the Department of the Navy, like the other departments, is charged only with training, equipping and organizing the military services. They are no longer responsible as we were during World War II with operational matters. So, in fact, the interrogation operations in Guantanamo were never contracted by the Navy. They were not authorized by the Department of the Navy. There was no reporting that came up to the Secretary of the Navy in our chain of command on this particular issue, so the fact that David Brant came to me, was something really done outside the ordinary chain of command or chain of responsibilities.

Now, the second point is that I was not, to be fair, engaged in the discussion on the Geneva Conventions’ applicability. I became engaged subsequently on the matter of abuse, but this was only a year after Geneva issues were had. To be frank, I
initially accepted the analysis that Geneva did not apply to these unlawful combatants but subsequently, have come to the view that, in fact, that was a legal mistake. The correct view, as I think the Supreme Court has indicated and Will has suggested as others have indicated, that the better view of Geneva is that there is no person not protected by Geneva on the battlefield, whether it be a combatant or a civilian. Even if Geneva did not apply, my view always was that there was an underlying obligation not to abuse individuals, even without Geneva. So my analysis of what was going on in Guantanamo was really independent of the Geneva analysis initially. I presumed that there was a level of both personal rights and also obligation of the part of the United States which prohibited the application of cruelty. That would be the short answer to the question.

MR. TAFT: Well, I guess I should say I was involved in the discussion which came up around the turn of the year 2001-2002 as to whether the Geneva Conventions applied and basically as to the treatment of persons that we were taking into custody in the conflict with Al Qaeda and with the Taliban. Our view in the State Department was that the Conventions did apply to both groups. Subsequently, I came to think that perhaps they did not apply to Al Qaeda, but I continued to think that they applied to the Taliban.

The way we in the State Department finessed this issue, however, was by relying on the statement of the President that was put out by the press secretary—we would comply even if it was determined that Geneva did not apply. That was the advice that the president had been given by the attorney general and which he was advised was authoritative; I didn’t agree with it, but that was the advice he was given and I can understand why he would have accepted it. But the President also decided we would nonetheless comply with the spirit of Geneva and we relied on that in our thinking. In fact, we wrote an extremely long memorandum in the Department of State which basically said what was happening in Guantanamo could be viewed as complying with our international obligations. Not perhaps because we thought that we had to comply, but that anybody who was wondering whether we were complying would find that that was our intention.
One of the problems with this, of course, was that we were not aware that the fact that the President had decided that the Geneva Conventions did not apply was actually being used to confuse the understanding of those involved in the operation as to what did apply, and there wasn’t any solid guidance on that point. Alberto actually has more experience on this than I, but it developed—it came out subsequently that people were fairly unsure in the Department of Defense and down in Guantanamo as to what they could and could not do, and indeed I guess most dramatically even the Attorney General and the Secretary and the Deputy Secretary of Defense, when they were asked by members of Congress in public hearings whether they could say what was permitted and what was not; they said they could not. This confusion is what led most seriously to the creeping of conduct there into what ultimately was, in many instances, clearly unlawful.

But that was our experience and we in the State Department certainly opposed the decision that was made to depart from Geneva. It was inconsistent with our practice which, typically, had been not to bother to figure out whether Geneva applied or not, but to apply it to anybody we found on the other side of a conflict. That was what we had done in Vietnam. That was what we actually told our troops to do when they entered Afghanistan in October of 2001, and it was a serious mistake not to continue that policy.

PROFESSOR SHEPPARD: Thank you very much. Lord Butler, you chaired the Committee of Privy Counsellors which issued the review on intelligence on weapons of mass destruction, and I know as a part of that process you and the other members of the Privy Counsellors Committee engaged in a very thorough review, not only of the intelligence that was gathered, but the methods of its analysis. I wondered in that process, is there anything that in summary fashion you would say that ought to guide intelligence handling not only by one of America’s most critical allies but by American itself as we look to the future in trying to figure out how best to take such information and use it in the best way?

LORD BUTLER: I think that for both the United States and for Britain the experience of intelligence that led up to war in Iraq was a disaster. It was a disaster for our intelligence
agencies. It was used as a part of the base justification for the war. Since the war, the existence of weapons of mass destruction when we had complete access to Iraq couldn’t be established, and in general now I think that although one can never prove a negative, I think it is generally accepted that those weapons and that justification didn’t exist. And so why did it go so very wrong? Well, I think that there are actually all sorts of reasons why one has got to have a great deal of sympathy for the intelligence agencies.

This was about as difficult a case as you could possibly have and I have never doubted that the conclusion that was reached by the intelligence communities of the West and was accepted by the politicians—that Saddam did have chemical and biological weapons and was trying to develop a nuclear weapon—I have never doubted that those conclusions were reached in good faith and were accepted in good faith by the politicians. So why, if we did get it wrong, did we get it so wrong? I think this is a textbook really for all intelligence agencies about the traps that you’ve got to be aware of. And the first trap was, of course, that Saddam had a record. He had had this stuff. He had used it in the Iran-Iraq War and he had used it against the Marsh Arabs. What reason had he got to get rid of it? The second thing was that when at the end of the Gulf War, the United Nations had access to Iraq, they discovered to their horror that Iraq was a great deal more advanced towards obtaining a nuclear weapon than any of the intelligence agencies in the West has supposed, and that was a great shock.

So the first thing that misled people was Saddam had had the stuff. There was no plausible reason why he should have got rid of it. The second thing was his behavior at the time when the United Nations inspectors went into Iraq in the autumn of 2002 led by Hans Blix. There was plenty of evidence that the UN inspectors would go to a place where they had been told by U.K. and U.S. intelligence that they might find the stuff and there would be some demonstration going on which prevented them from carrying out their searches. They had to go away and they would come back two or three days later and lo and behold the stuff wasn’t there. And indeed, there was satellite observation. As the UN inspectors arrived at the front door, there were trucks going out of the back carrying crates, and so on. So again, that
was extremely suggestive, that deceptive action on the part of Saddam that there was something going on.

And then the third, I think, lesson to be learned and why mistakes were made was that it’s very easy to assume that your adversary will behave with the same logic and by the same rationale that you yourself behave. It does really defy credibility that with the U.S. and the U.K. massing on Iraq’s borders, forces that he had no realistic chance of resisting, he should continue to behave in a way that suggested that he had these weapons. Why didn’t he just come out with his hands up and say, “For God’s sake, I haven’t got them, come in and look, I haven’t got them?” Of course, the reasons may be, you know, difficult for us to understand; reasons of face, reasons of internal credibility, credibility with your neighbors. But I think we all found it difficult to understand that reasoning.

The fourth thing is that I think that the agencies were misled by their earlier mistakes. I mentioned earlier it had been a shock at the end of the first Gulf War to find out that Iraq was nearer having a nuclear weapon than any of us had supposed and the intelligence agencies didn’t want to be caught again. It’s very natural. Similarly, when Saddam Hussein’s son-in-law, Kamel Hussein, defected in the mid-1990s, he brought information that Iraq had a very much more advanced biological weapons program than anybody had supposed. They didn’t want to be caught out.

And that leads on to the fifth thing which is that the risks of underestimating the potential of the enemy are greater than the risk of overestimating it. You know, if you’re an intelligence agency, you’re advising your troops on what they need to do if they are conducting military operations against Iraq. If you’re going to err, you want to err on the side of overestimating the enemy’s capacity rather than underestimating it.

The sixth thing which actually did happen in the case of Iraq is very interesting, very interesting to me. The intelligence agencies, particularly the U.K. intelligence agencies, and they gave this to Hans Blix, had a figure of chemical agent that was unaccounted for at the end of the first Gulf War. They could find no record or any proof that this had been destroyed. They, therefore, assumed that it was there and was hidden. But when people came to look at it after the Gulf War what they worked
out was this hadn’t been a fact, the assessment of the chemical agent that Saddam possessed. It had been an estimate and it was an estimate based on what would have been the amount of chemical agent that was there if Saddam had gone on producing it at the rate that he was producing it at the end of the Iran-Iraq War, for three years. So it was a deduction drawn from a hypothesis, but nobody questioned whether maybe the hypothesis could have been wrong.

The seventh thing, again familiar to all of us, that many of the sources, the human sources, that our Secret Intelligence Service used had agendas of their own, although I think in the case of our intelligence services we did avoid the émigrés, the most obvious sources. Nonetheless, many of the people who did give evidence had motives for deception which we didn’t get around to.

Another thing famous was group-think, and this is a great danger for intelligence agencies and exists even between the U.K. and the U.S. We’re close intelligence partners, but there is always a tendency for intelligence agencies to say, for example, our Secret Intelligence Service, “the CIA think that Saddam has got this stuff. Maybe they know something that we don’t know.” Maybe, you know, they’ve got a source that is too sensitive. I think people thought the same about Mossad, about the Israeli Intelligence Agency, and so intelligence agencies, however close their partnership, will always think that if others have reached the conclusion maybe they know something which they themselves don’t know and that is a reason.

And then finally things that have been well argued; the pressure of time, the political pressure, and the protection of sources. Certainly in one case in the U.K. a source that was extremely influential was one that was thought so secret that the report couldn’t be made available to the agencies within the Ministry of Defence who are real experts on the subject. When they saw it after the war they said, “We could have seen through that.” It was only shown to the most senior people who were not the most expert people. I think all these are lessons which emerge from the experience over Iraq and which I’m quite sure our intelligence agencies, both British and the American, will be learning from the experience.
PROFESSOR SHEPPARD: In what circumstances does it work to have a court or a tribunal within the military or within the intelligence community and in what circumstances must there be a judge that is outside the intelligence community in order to assess those things that have to happen in intelligence? The military-commission question, of course, deals with violations of law of war, but assuming there is a lawful boundary around the gathering of intelligence who must assess this? We obviously have to look at the FISA court again and re-look at this balance, but who should hold the balance, who should hold the fulcrum? Can it be done within an agency or must it be done with external oversight?

LORD BUTLER: Can I just start on that because as it were I answered it from the U.K. point of view before? We believe it has to be a judge.

PROFESSOR SHEPPARD: Right.

LORD BUTLER: I don't know what the U.S. system is and I don't know whether a judge doing this would command confidence in the U.S. system.

MR. TAFT: Let me first of all on the military commission say that I do not have paternity in that instance. They were established in November of 2001 by the President's order which I was completely unaware was going to be issued at the time and had nothing to do with. Actually neither the Secretary of State nor the National Security Advisor were aware that the order was established and was going to be issued until after it happened, which was extremely unusual and odd, but that was the case.

MR. MORA: I should chip in on this point. The military services likewise were not involved. This came as a complete surprise to us as well. So it's probably less surprising that the civilian general counsel was not involved, but it's much more surprising that the military JAGs, who are the senior uniform military lawyers, were not consulted within our individual services either.

MR. TAFT: But as to the question of who or what—how we institutionally guard the guards, I think in our system the Congress is the place to look to for this type of supervision.

Structurally it should work better than in some instances it has. These committees are not partisan. They have the same number of persons on them from each party, which is true regardless of who holds the majority of the case. Now, the Senate gets chairman and a co-chairman, in fact, and in the House not quite that, but they should be able to provide the supervision and monitoring that will keep the executive in check.

Unlike in the British system, our Congress is a complete, separate coordinate branch and not accountable to the executive and not run by the executive, so it is independent and it ought to be fully informed, ought to insist that it be fully informed on these matters. And I think it’s a better system than relying on the judiciary. I’m not very comfortable, and I don’t think the judges are terribly comfortable with operating in the dark, which is necessary. The judiciary, they did do it under the FISA act, but I don’t think they like it. If you can get it done by congressional oversight and monitoring, which should be possible, that seems to me the better way to go.

MR. MORA: If I could say a couple things about the military commissions because, as everybody knows, they’ve not been successful. Five years after their design they’ve not really had a full-blown trial, and it’s not clear that they ever will. It’s clear also that holding a trial under the current rules probably would be seen by history as an unmitigated national disaster because few people will accept the outcomes.

Obviously, the proof is in the pudding which has been the administration’s argument to the courts. Let us have one of these commissions and then you can judge it based upon the full record. But not many people are buying this, and it highlights a couple of aspects about the commissions. First of all, the commissions highlight that there is an interrelationship between law and policy. In my experience in government, the American government hasn’t done a good job of understanding the policy implications of legal decisions. This is particularly true in this war on terror. If you look at the architects of the military commissions who made the legal decisions, they were almost all lawyers and there were very few people who applied a broad policy analysis to these kinds of decisions.

So what happened? Well, internationally the world has changed since 1945 and the United States’ concepts of justice...
have also changed since 1945. If you were an administration lawyer bent on establishing a system of military commissions, you would find ample Supreme Court precedent, starting with *Eisentrager*,\(^\text{12}\) that would say: the Supreme Court has approved this and it's likely to approve it again, so let's go forward with the commissions. But this was the system of due process or the concepts of due process that were applicable back in 1945, not necessarily the concepts of due process that most courts and most citizens would find applicable or just today. And if that's true of the United States, it's also true of European systems for a number of reasons including, for example, the fact that Geneva has implications for due process, and European countries are now applying modern concepts of due process. So military commissions never found favor with the European allies and this caused, along with the application of cruelty, yet another factor leading to a divide between the United States and Europe on what proved to be strategic aspects of the war on terror.

The absence of a common legal architecture between ourselves and the Europeans has been a strategic impediment to the successful prosecution of the war, as a matter of fact. This was not recognized and I think is still imperfectly recognized today by the administration. What happens here is that most lawyers have never been involved in the policy world and have no understanding what the foreign-policy implications of these decisions may be. By the same token, most policy makers tend to be mesmerized by the suggestion that an issue is a legal issue and then they tend to take their hands off of it and leave it to the lawyers to decide. Well, both sides are acting with incomplete understanding of the relevant facts and this can lead to a poorly thought out decision.

And what also wasn’t recognized by the architects of the commissions is that the American legal system is a unitary whole—we can’t be unjust or be perceived to be unjust in our conduct of military law, and not have it implicate the rest of our legal system. It's a judgment that’s rendered against all of American justice. It creates these kinds of political tension and even political dissent within the system, which touches on the point that Will touched earlier, it tends to undermine the all-

\(^{12}\) Johnson v. Eisentrager, 339 U.S. 763 (1950)
important political support for the war, particularly in a complex war like this one.

PROFESSOR SHEPPARD: Given the hour, I think we have time for one more question, and I'm going to take Lord Butler's question of the New York bomber with a nuclear bomb set to go off in twelve hours and I'm going to tweak it in just one way. We have seen some measure of agreement that torture particularly, and even its slightly broader incarnation as a policy, has grave implications to the United States. The idea of a policy of cruelty is very dangerous and, therefore, one might presume that even in the face of such a threat that there might be a good prohibition against the use of cruelty or torture in order to discern the location of a twelve-hour bomb. But let me ask you—what ought the law to be and how should we deal with the agent who has found the suspect? The agent believes that the suspect has knowledge of a nuclear bomb to go off in twelve hours and what is the answer if the agent is right and there is such a bomb and this person does know? What is the answer if the agent is wrong, believing it truly? Is there a difference between these two cases?

MR. MORA: From the very first moment, I've always held the position that, in that kind of ticking bomb scenario, applying torture to the suspect may not be immoral but certainly must be illegal, and continues to be illegal. And the reason I say that is because in thinking through this scenario and other scenarios over the years it became impossible for me to find the threshold at which I would say, okay, from now on it clearly is immoral to apply the cruelty or the torture. In the New York hypothetical, perhaps 200,000 lives are saved. But who is to say that doing the same thing for 100,000, or 1000, or 50, or 10, or even one, would not be equally morally justifiable. And because it struck me that I couldn't find a break point on where to stop the torture, there would be an instantaneous race to the bottom.

Instantaneously you would authorize the application of torture in almost all cases because you can always make the utilitarian argument. In fact, this kind of ticking bomb scenario is present every day in Iraq. If you're a platoon leader and had two of your soldiers killed yesterday and you apprehended today somebody in the bomb ring, you understand that eliciting information from the detainee could save two more soldiers
tomorrow. What should distinguish that scenario from a utilitarian standpoint from the larger scenario? So you could easily see a situation where torture is always authorized and that can’t be the right answer for our civilization.

MR. TAFT: I come out, I think, in the same place. My view would be not to stress this question or subject. When you get in that situation, you would obviously have to make a determination. I would leave it until I was actually there, that it is unlawful, that torture is prohibited. This is exactly what we signed up to already, in fact. We resolved this question in signing up to the Convention against Torture and I would just say that is our view.

Now, whether we would continue to maintain that view at the time, I don’t know. The French, of course, have a passion for completeness in theories that would perhaps make them happy to address this subject. But in our jurisprudence we tend not to try to nail down every nook and cranny in theory beforehand. I would follow that practice here except leaving the possibility that we might answer the question differently than we answer it now. But our answer now is we don’t do it.

LORD BUTLER: I have agonized over this question and I think I come out where Alberto is. I have an analogy and I don’t know whether other members of the panel will think that it’s a suitable analogy. Let us suppose we’ve got this person and we have very good reason to think that he does know where there is a nuclear bomb that is about to go. I think in those circumstances you’re entitled to use any effective means within your power to discover where the location of the bomb, including torture.

Now, is this inconsistent with our earlier position? And the analogy I take is that if somebody is about to shoot my wife, I am entitled to shoot that person. That does not produce the conclusion that the law against murder is wrong. The law against murder still exists, but there can be quite exceptional circumstances when you are entitled to break that law and a court would take a lenient view of you in those circumstances, but it would depend on the circumstances. So to take the case that you raised, Steve, that suppose that the information turned out to be right, you’ve got the information, you did indeed find a nuclear device and you defused it and you saved Manhattan
going up, I think that no court would convict you for the means
which you had taken to prevent that happening.

Suppose you were wrong. Well, just as if it turns out that
the person who was threatening my wife only had a dummy gun,
then the courts would have to decide whether I had acted in
good faith or not. I suspect that as long as they thought I had
acted in good faith, again they would take a lenient view. So
that is my analogy. I see the analogy as one of self-defense.
The point I’m really wanting to make is, I don’t think that the
forbidding of torture can be absolute. There can always be
circumstances in which you can find it theoretically justified, but
that does not undermine the general position that torture should
be against the law.

PROFESSOR SHEPPARD: Are there are final thoughts
you would like to share with each of us, and perhaps if we could
begin with Mr. Mora these will be each of our last words.

MR. MORA: I'll just continue the analogy that Lord
Butler was making. I think he's got it exactly right in that
analogy. I will add the following as a legal matter and it's
getting back to the underlying policy of law or philosophy of the
law. If we were to adopt Alan Dershowitz’s view—and we
haven’t raised his name but he’s the Harvard law professor who
advocated for the legalization of torture under a torture
warrant. More broadly, if we analyze what the consequences
would be of the legalization of cruelty, then my view has been
that this necessarily entails a repeal of the Doctrine of
Inalienable Rights or at least the doctrine that every individual
has an inalienable right to be free from cruelty. If you think
about the implications of that repeal, then you’ll understand that
the destruction, necessary destruction, that would ensue to our
entire legal system would be enormous.

13. See, e.g., Alan M. Dershowitz, The Torture Warrant: A Response to Professor
Strauss, 48 N.Y.L. SCH. L. REV. 275 (2004); Alan M. Dershowitz, German Issue Is One
For U.S. Too: Can Torture, Or The Threat Of It, Be Right?, L.A. TIMES, Apr. 17, 2003, at
B15; Alan M. Dershowitz, A Challenge to House Master Hanson, Jerusalem Post, Oct. 2,
2002, at 9; Alan M. Dershowitz, The Public Must Know If Torture Is Used, AGE, Mar. 15,
2003, at 9; Alan M. Dershowitz, Warrant Would Make Those Using Torture Accountable,
FIN TIMES, June 8, 2002, at 8; Alan M. Dershowitz, Yes, It Should Be ‘On The Books’,
BOSTON GLOBE, Feb. 16, 2002, at A15; Alan M. Dershowitz, Want to Torture? Get a
We in the United States and the U.K. might say, well, this would be a temporary abridgment; it would be only limited to situations in which there are weapons of mass destruction that are threatened against populations. But if you repeal the right and the individual no longer possesses it, then what is to stop another regime, an Algerian regime or an Ugandan regime saying, that’s the West, that right certainly does not apply any longer; we’re going to apply cruelty to individuals who criticize the president. Once the person no longer holds this right, it becomes a matter of State discretion or State grace. The State has the right by default to decide whether or not it will apply cruelty or not. Then the inroads and corrosive effect on the whole notion of rights and human rights would be inevitable. The world would not be a better place long-term if that were to be done, which is why I go back to the necessity of maintaining the illegality of cruelty, understanding that there may be situations, extreme situations, and very unusual situations, such as the ticking bomb scenario, where a jury might decide to nullify a sentence under some circumstances. But when you think through these kinds of issues, I think you’ll come to the conclusion that we have no alternative but to preserve the legal prohibition and ethical prohibition against the application of cruelty.

MR. TAFT: Well, I don’t think that I have a great deal to add to what has already been said, but I would like to suggest that these are important subjects and that the difficulties that were addressed in the second part—in gathering intelligence, and monitoring the gathering of it, and the extent to which that infringes on civil liberties are extremely complicated questions. They’re not going to get any easier as time goes on and as our technology develops and it becomes simpler or more possible to invade people’s privacy, as Lord Butler puts it, in ways that we hardly dream of now. In that sense it’s not too late for the people here to become involved in these things. They have not been solved. They will be before too long after I’ve gone and I’m delighted to have had an opportunity to at least raise them. They will be very important issues over the next twenty to thirty years, particularly as technology develops and the threats develop.
LORD BUTLER: My final word is just to add to this point about torture. We've had a whole lot of high-flown reasons, reasons of standards, of human rights, why torture is wrong; but there's one thing we haven't mentioned that we should include for completeness—and that is, it doesn't work. It's not an effective way of getting intelligence out of people because somebody under torture will tell you whatever they think is necessary to get the pain to stop and there's no reason to think that that is the truth. And the same is true for other means of abstracting information from people, like blackmail and like money.

I think that the thought to leave with you—the most reliable way of getting intelligence out of human agents is to establish a commonality of interest where you've got a willing cooperator who is cooperating for their reasons and not just for yours. A point I made earlier this afternoon is that intelligence gathering is often thought of being as an amoral, perhaps even an immoral activity. It is actually something where integrity on the part of the gatherer is as important as it is in any other area of government activity.

PROFESSOR SHEPPARD: Thank you very much, Lord Butler. Thank you all for a wonderful afternoon.