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"Secret Law and the Threat to Democratic and Accountable Government"

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The United States today finds itself committed to a difficult and protracted military, ideological, economic and diplomatic conflict with a resolute foe – the Islamo-fascist and Jihadist network typified by such terrorist groups as al Qaeda and the Taliban. We did not seek this conflict, but we must fight and win it. To prosecute this war successfully, it is essential that we act within the proper legal paradigm. Indeed, contrary to what many people believe, war is not a domain of pure violence, but one of the most rule-driven of human activities.

Since September 11, the Administration has embarked on a concerted effort to resolve the difficult issues of both international and domestic law raised by this conflict. These issues include the applicability of the Geneva Conventions of 1949 to the conflict with al Qaeda and the Taliban and the rules governing the collection of electronic and other intelligence, as well, and a whole host of other matters. That much of this analysis was originally classified is neither inappropriate nor

unprecedented. The issues of attorney-client and executive privilege aside, keeping this material secret from the enemy was a vital necessity. Much of the legal analysis prepared for the Administration was based on sensitive factual information and tended to reveal how the U.S. government would likely operate in certain circumstances.

I realize that a number of the Administration's legal positions, as they become publicly known, whether as a result of leaks to the media or the declassification of the relevant legal documents, have attracted considerable criticism. The questions that the Administration's lawyers have sought to address, particularly those dealing with the interrogation of captured enemy combatants, are uncomfortable ones that do not sit well with our 21st Century sensibilities. Many of the legal conclusions reached have struck critics as being excessively harsh. Some have since been watered down as a result of internal debates and political and public pressure brought to bear upon the Administration.

Though I would not defend each and every aspect of the Administration's post-September 11 wartime policies, I would vigorously defend the overall exercise of asking difficult legal questions and trying to work through them. To me, the fact that this exercise was undertaken so thoroughly attests to the vigor and strength of our democracy and of the Administration's commitment to the rule of law, even in the most serious of circumstances. In this regard, I point out that few

of our democratic allies have ever engaged in so probing and searching a legal exegesis in wartime. I also strongly defend the overarching legal framework chosen by the Administration. I believe that it is the critics' rejection of this overall legal framework that underlies most of their criticisms of the Administration's specific legal decisions.

The proper legal paradigm for confronting the terrorist threat is that established by the laws of war. The laws of war are essential to organized warfare, particularly when waged by a civilized, democratic society. The first key task performed by the laws of war is to create a framework within which acts of violence – ordinarily rejected by a civilized, democratic society – may legitimately be performed in the defense of that society. In my view, modern democracies are not capable of sustaining protracted military engagements without the legitimacy afforded by the laws of war.

This legitimating function aside, the specific rules contained within the laws of war paradigm help determine how to balance individual liberty and public safety, a balance that must be struck differently in wartime as compared with peacetime. This, by the way, is an entirely unexceptional position. Its truth has been recognized throughout American history, a point well explained in a superb book by the late Chief Justice William Rehnquist, entitled "All Laws But One." Indeed, for the United States to have retained the pre-September 11 balance

between liberty and order, would have meant either that the government was grossly derelict in failing to discharge its core duty of protecting the safety of the American people, or that the peacetime balance was unduly tilted against individual liberty. In my view, given the decades of jurisprudence from the Warren and Burger Courts, this last proposition is not very likely.

It is here that we find most critics of the use of the laws of war paradigm to be fundamentally wrong. In the many debates in which I have had the privilege to participate, I frequently pose the following question: "If you don't like how the Bush Administration has altered the peacetime balance between liberty and order, how would you alter the balance?" I have never received a serious answer. The proffered answers range from the useful but trivial, such as strengthening airline cockpit doors, to the clearly insufficient, such as giving more money to first responders, or giving the FBI better computers and more personnel.

Most critics prefer to evade this difficulty by not crediting al Qaeda with posing much of a threat to the United States. They certainly do not subscribe to the view that what happened on September 11 and thereafter merits the use of the term "war." This not being a war, in their view, it is both inappropriate and unnecessary to use the laws of war paradigm. Instead, they endorse the exclusive use of the law enforcement paradigm. In their view, al Qaeda fighters are to be treated as criminal defendants to be tried in regular federal courts. Similarly, all surveillance

conducted to guard against the post-September 11 terrorist threat should be done, they insist, within the context of the unmodernized 1978 Foreign Intelligence Surveillance Act (FISA). The bottom line is that the critics are wrong, as a matter of both law and policy.

Whether or not we are in a state of war with al Qaeda, the Taliban, and various Iraqi Jihadist groups, is a fairly straightforward question. The international laws of war provides a series of objective tests to determine whether a given extent of violence, or a series of violent encounters, rises to the level of an armed conflict. These tests rely on such factors as the scope and intensity of fighting, the number of casualties involved on one or both sides, the value of the targets that have been attacked, whether the warring parties espouse political or merely pecuniary goals, the nature of the weapons being used, and the conflict participants' own stated views of what is taking place – especially whether one or both parties has claimed for itself belligerent rights, as has the United States with regard to those responsible for the September 11 attacks. By all of these indicia, the United States is at war with al Qaeda and its affiliated entities.

Of course, as a non-state entity, al Qaeda itself has no legal right to make war in the first instance. In other words, all of its violent actions are punishable – unlike the actions of a sovereign state that resorts to armed force. That does not mean, however, that al Qaeda cannot be involved in an armed conflict. It can, but

only as an unlawful or unprivileged belligerent. Certainly, al Qaeda has insisted that it is at war with the United States (in the form of a "jihad") since the mid-1990s. During this time, al Qaeda has used both military-style weapons as well as improvised weapon systems to attack a broad array of American targets throughout the world, including warships, military barracks, embassy buildings, the Pentagon, and the heart of our financial infrastructure – New York City.

Thousands of American civilians and military personnel have lost their lives as the result of such attacks. Indeed, the number of Americans killed on September 11 alone rivals the number killed during the Japanese attack on Pearl Harbor. Moreover, al Qaeda's goals are political and religious – to drive the United States from the Middle East, and to spread its form of Islam throughout the region and then throughout the world. Al Qaeda simply is not comparable to a criminal gang or an organized crime syndicate, and the United States – which does have the right to make war – is fully justified in invoking the rights of a belligerent against al Qaeda and its allied groups. That conflict continues, with al Qaeda forces striving to carry out additional attacks on U.S. soil. Al Qaeda fighters are engaged in combat with U.S. and allied forces on a virtually daily basis, in places ranging from Iraq to Afghanistan, Somalia, Yemen, Jordan, and Saudi Arabia. In this global war, the battlefield is correspondingly large. We must accept the fact that it encompasses our own territory. Our enemies have come here to launch

attacks against us for the first time in more than half a century. As such, the laws of war paradigm is not only an appropriate and legitimate choice for this country in the post-September 11 world, but one that has been imposed upon us by the terrorists themselves.

I want to stress that adhering to the law enforcement paradigm in these circumstances would be a great folly. The most obvious problem is that, unless the U.S. is in a state of armed conflict, deadly force cannot be used by the U.S. military against al Qaeda targets. Instead, policing and ineffectual extradition efforts would be our sole recourse.

We know all too well that exclusive reliance on the law enforcement paradigm has failed to protect Americans from terrorist attack. The successful prosecutions of the 1993 World Trade Center bombers did nothing to prevent the 2001 attacks. Nor have the indictments of at least some of the culprits in the bombings of the U.S. embassies in Kenya and Tanzania, or the conviction of Zacharias Moussaoui abated for a moment Al Qaeda's attacks.

The 9/11 Commission Report explored in great detail the various deficiencies in the Clinton and Bush Administrations' policies which contributed to this tragic outcome. Among the worst of these were the infamous "wall" between the FBI's and DOJ's law enforcement and intelligence sides, the inability to mount robust paramilitary operations against Osama bin Laden (on account of

both bureaucratic snafus and a misplaced obsession with the Executive Order Against Assassinations) and the "kinder, gentler" rules of the game followed by the CIA's Clandestine Service, such as the ban against working with "human rights violators." I suppose one could argue that all of these problems could have been fixed, while retaining the basic parameters of the law enforcement paradigm. I very much doubt it, however.

In any case, our criminal justice system is inherently ill-suited to the task of protecting the American people from terrorist attacks. In part, my skepticism about the ability of the law enforcement system to meet and defeat al Qaeda is predicated upon the legal and political developments of the last forty years, which have made our criminal justice system increasingly defendant-friendly.

More fundamentally, however, the criminal justice system itself is reactive. It is designed to punish bad behavior and not to prevent it in the first place. Some individuals can, of course, be deterred by the fear of punishment, but deterrence is not a particularly effective weapon against individuals who are ideologically or religiously motivated. The guilty pleas or convictions of individual terrorists notwithstanding, it is difficult to imagine how prosecutions could be consistently and successfully conducted against individuals who operate on a trans-national basis and who may have the assistance and protection of foreign states.

I have recently had the occasion to study the experience of those European countries most hostile to the application of the laws of war paradigm. Their governments have opted to rely more or less exclusively on law enforcement tools to protect their populations against terrorist attack. I concluded that the European judicial and investigatory systems are far more capable of mounting successful prosecutions of terrorists than the U.S. system, largely because of features of the Civil Law system – such as lengthy pre-trial detentions, looser evidentiary rules, and a higher degree of secrecy – which would be incompatible with our Constitution. I would rather rely on the laws of war in these circumstances, than attempt fundamental changes in the Common Law system that we all value. Even so, it is interesting that despite the more robust aspects of law enforcement in Civil Law systems, a number of European law enforcement officials have begun to call for enhanced counterterrorism authority, borrowing, in many cases, from the laws of war paradigm that their governments have formally rejected.

The bottom line is that relying on the law enforcement paradigm would put Americans at greater risk than would proceeding under the laws of war paradigm. The American people are neither legally nor morally required to assume that risk. In this war, as in previous wars, the laws of war provide the only legal architecture consistent with the security and success of the American people.