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# TABLE OF CONTENTS

**DAY TWO**

**Volume II of II**

<table>
<thead>
<tr>
<th>Panel IV – Extraordinary Rendition</th>
<th>Outsourcing Torture” by Jane Mayer</th>
<th>125</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Testimony of Dr. Daniel Byman before Senate Foreign Relations Committee</td>
<td>131</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Panel V – National Security Strategy for a New Administration</th>
<th>The Inheritance and the Way Forward” by Kurt Campbell and Michèle Flournoy of the Center for a New American Security</th>
<th>137</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>“Renewing American Leadership” by Barack Obama</td>
<td>159</td>
</tr>
<tr>
<td></td>
<td>“Rising to a New Generation of Global Challenges” by Mitt Romney</td>
<td>163</td>
</tr>
<tr>
<td></td>
<td>“Reengaging With the World” by John Edwards</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>“Toward a Realistic Peace” by Rudolph Giuliani</td>
<td>171</td>
</tr>
<tr>
<td></td>
<td>“Security and Opportunity for the Twenty-first Century” by Hillary Clinton</td>
<td>175</td>
</tr>
<tr>
<td></td>
<td>“An Enduring Peace Built on Freedom” by John McCain</td>
<td>179</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Keynote Speaker: Gen. Charles Dunlap</th>
<th>Lawfare in Modern Conflicts” by Maj. Gen. Charles Dunlap</th>
<th>185</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Panel VI – Can Congress Regulate Intelligence? Must the President Comply? – A Constitutional and Policy Conversation</th>
<th>The Legacy of the Church Committee” by M.E. “Spike” Bowman</th>
<th>211</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>“The Lessons of Shamrock” by M.E. “Spike” Bowman</td>
<td>215</td>
</tr>
<tr>
<td>Statement by Dr. Louis Fisher before House Judiciary Committee on “Constitutional Limitations on Domestic Surveillance, June 7, 2007</td>
<td>217</td>
<td></td>
</tr>
<tr>
<td>Statement of Prof. Robert Turner before House Judiciary Committee regarding Warrantless Surveillance and FISA, September 5, 2007</td>
<td>225</td>
<td></td>
</tr>
<tr>
<td>“FISA v. the Constitution” by Prof. Robert Turner</td>
<td>247</td>
<td></td>
</tr>
<tr>
<td>“The Surveillance Law that Matters” by Prof. Robert Turner</td>
<td>249</td>
<td></td>
</tr>
<tr>
<td>Link to additional Congressional Testimony by Dr. Louis Fisher</td>
<td>251</td>
<td></td>
</tr>
</tbody>
</table>

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1 Some documents have been edited or excerpted for length.
PANEL IV:

EXTRAORDINARY RENDITION

MODERATOR:
PROF. SCOTT L. SILLIMAN
On January 27th, President Bush, in an interview with the Times, assured the world that "torture is never acceptable, nor do we hand over people to countries that do torture." Maher Arar, a Canadian engineer who was born in Syria, was surprised to learn of Bush's statement. Two and a half years ago, American officials, suspecting Arar of being a terrorist, apprehended him in New York and sent him back to Syria, where he endured months of brutal interrogation, including torture. When Arar described his experience in a phone interview recently, he invoked an Arabic expression. The pain was so unbearable, he said, that "you forget the milk that you have been fed from the breast of your mother."

Arar, a thirty-four-year-old graduate of McGill University whose family emigrated to Canada when he was a teen-ager, was arrested on September 26th, 2001, at John F. Kennedy Airport. He was changing planes; he had been on vacation with his family in Tunisia, and was returning to Canada. Arar was detained because his name had been placed on the United States Watch List of terrorist suspects. He was held for the next thirteen days, as American officials questioned him about possible links to another suspected terrorist. Arar said that he barely knew the suspect, although he had met with the man's brother. Arar, who was not formally charged, was placed in handcuffs and leg irons by plainclothes officials and transferred to an executive jet. The plane flew to Washington, continued to Portland, Maine, stopped in Rome, Italy, then landed in Amman, Jordan.

During the flight, Arar said, he heard the pilots and crew identify themselves in radio communications as members of the "Special Removal Unit." The Americans, he learned, planned to take him next to Syria. Having been told by his parents about the barbaric practices of the police in Syria, Arar begged crew members not to send him there, arguing that he would surely be tortured. His captors did not respond to his request; instead, they invited him to watch a spy thriller that was aired on board.

Ten hours after landing in Jordan, Arar said, he was driven to Syria, where interrogators, after a day of threats, "just began beating me." They whipped his hands repeatedly with two-inch-thick electrical cables, and kept him in a windowless underground cell that he likened to a grave. "Not even animals could withstand it," he said. Although he initially tried to assert his innocence, he eventually confessed to anything his tormentors wanted him to say. "You just give up," he said. "You become like an animal."

A year later, in October, 2003, Arar was released without charges, after the Canadian government took up his case. Islamist Moustapha, the Syrian Ambassador in Washington, announced that his country had found no links between Arar and terrorism. Arar, it turned out, had been sent to Syria on orders from the United States government, under a secretive program known as "extraordinary rendition." This program had been devised as a means of extraditing terrorists suspects from one foreign state to another for interrogation and prosecution. Critics contend that the unstated purpose of such renditions is to subject the suspects to aggressive methods of persuasion that are illegal in America— including torture.

Arar is using the U.S. government for his mistreatment. "They are outsourcing torture because they know it's illegal," he said. "Why, if they have suspicions, don't they question people within the boundary of the law?"

system. "You can’t kill him, either," he added. "All we’ve done is create a nightmare."

On a bleak winter day in Trenton, New Jersey, Dan Coleman, an ex-F.B.I. agent who retired last July, because of arthritis, was asked at the idea that a C.I.A. agent was now having conversations about ambitions. The C.I.A., Coleman said, liked rendition from the start. "They loved that these guys would just disappear off the books, and never be heard of again," he said. "They were proud of it."

For ten years, Coleman worked closely with the C.I.A. on counter-terrorism cases, including the Embassy attacks in Kenya and Tanzania. His methodical style of detective work, in which interrogations were aimed at forging relationships with detainees, became unfashionable after September 11th, in part because the government was intent on extracting information as quickly as possible, in order to prevent future attacks. Yet the more patient approach used by Coleman and other agents had yielded major successes. In the Embassy-bombings case, they helped convict four Al Qaeda operatives on three hundred and two criminal counts; all four men pleaded guilty to serious terrorism charges. (The confessions the F.B.I. agents elicited, and the trial itself, which ended in May, 2001, created an invaluable public record about Al Qaeda, including details about its funding mechanisms, its internal structure, and its intention to obtain weapons of mass destruction. (The political leadership in Washington, unfortunately, did not pay sufficient attention.)

Coleman is a political nonpartisan with a law-and-order mentality. His eldest son is a former Army Ranger who served in Afghanistan. Yet Coleman was troubled by the Bush Administration’s New Paradigm. Torture, he said, “has become bureaucratized.” Bad as the policy of rendition was before September 11th, Coleman said, “afterward, it really went out of control.” He explained, “Now, instead of just sending people to third countries, we’re holding them ourselves. We’re taking people, and keeping them in our own custody in third countries. That’s an enormous problem.”

Egypt, he pointed out, at least had an established legal system, however harsh. “There was a process there,” Coleman said, “but what’s our process? We have no method over there other than our laws—and we’ve decided to ignore them. What are we now, the Hunt? If you don’t talk to us, we’ll kill you?”

From the beginning of the rendition program, Coleman said, there was no doubt that Egypt engaged in torture. He recalled the case of a suspect in the first World Trade Center bombing who fled to Egypt. The U.S. requested his return, and the Egyptians handed him over—wrapped head to toe in duct tape, like a mummy. (He was another prisoner Egyptian with links to Al Qaeda who had cooperated with the U.S. government in a terrorism trial was picked up in Cairo and imprisoned by Egyptian authorities until U.S. diplomats secured his release. For days, he had been chained to a toilet, where guards had urinated on him.)

Under such circumstances, it might seem difficult for the U.S. government to legally justify dispatching suspects to Egypt. But Coleman said that since September 11th the C.I.A. “has seemed to think it’s operating under a new set of rules, that it has extralegal abilities outside the U.S.” Agents, he said, have “told me that they have their own enormous office of general counsel that rarely tells them no. Whatever they do it is all right. It all takes place overseas.”

Coleman was angry that lawyers in Washington were redefining the parameters of counter-terrorism interrogations. “Have any of these guys ever tried to talk to someone who’s been deprived of his clothes?” he asked. “He’s going to be ashamed, and humiliated, and cold. He’ll tell you anything you want to hear to get his clothes back. There’s no value in it.” Coleman said that he had learned to treat even the most despicable suspects as if there were “a personal relationship, even if you can’t stand them.” He said that many of the suspects he had interrogated expected to be tortured, and were stunned to learn that they had rights under the American system. Due process made detainees more compliant, Coleman said. He had also found that a defendant’s right to legal cooperation was underutilized not only to suspects but also to law-enforcement officers. Defense lawyers frequently persuaded detainees to cooperate with prosecutors, in exchange for plea agreements. “The lawyers show these guys there’s a way out,” Coleman said. “It’s human nature. People don’t cooperate with you unless they have some reason to.” He added, “Brutalization doesn’t work. We know that. Beside, you lose your soul.”

The Bush Administration’s redefinition of the standards of interrogation took place almost entirely out of public view. One of the first officials to offer hints of the shift in approach was Cofer Black, who was then in charge of counter-terrorism at the C.I.A. On September 26, 2002, he addressed the House and Senate Intelligence Committees, and stated that the arrest and detention of terrorists was “a very highly classified area.” He added, “All you need to know is that there was a ‘before 9/11’ and there was an ‘after 9/11.’ After 9/11, the gloves came off.”

Laying the foundation for this shift was a now famous set of internal legal memos...some were leaked, others were

made public by groups such as the N.Y.U. Center for Law and National Security. Most of these documents were generated by a small, hawkish group of politically appointed lawyers in the Justice Department’s Office of Legal Counsel and in the office of Alberto Gonzales, the White House counsel. Chief among the authors was John C. Yoo, the deputy assistant attorney general at the time. (A Yale Law School graduate and a former clerk to Justice Clarence Thomas, Yoo now teaches law at Berkeley.) Taken together, the memos advised the President that he had almost unfettered latitude in his prosecution of the war on terror. For many years, Yoo was a member of the Federalist Society, a fellowship of conservative intellectuals who view international law with skepticism, and September 11th offered an opportunity for him and others in the Administration to put their political ideas into practice. A former lawyer in the State Department recalled the mood of the Administration: “The Twin Towers were still smoldering. The atmospere was intense. The tone at the top was aggressive—and understandably so. The Commander-in-Chief had used the words ‘dead or alive’ and vowed to bring the terrorists to justice or bring justice to them. There was a fury.”

Soon after September 11th, Yoo and other Administration lawyers began advising President Bush that he did not have to comply with the Geneva Conventions in handling detainees in the war on terror. The lawyers classified these detainees not as civilians or prisoners of war—two categories of individuals protected by the Conventions—but as “illegal enemy combatants.” The rubric included not only Al Qaeda members and supporters but the entire Taliban, because, Yoo and other lawyers argued, the country was a “failed state.” Eric Lewis, an expert in international law who represents several Guantánamo detainees, said, “The Administration’s lawyers created a third category and cast them outside the law.”

The State Department, determined to uphold the Geneva Conventions, fought against Bush’s lawyers and lost. In a forty-page memo to Yoo, dated January 11, 2002 (which has not been publicly released), William Taft IV, the State Department legal adviser, argued that Yoo’s analysis was “seriously flawed.” Taft told Yoo that his contention that the President could disregard the Geneva Conventions was “unteachable,” “incorrect,” and “confused.” Taft disputed Yoo’s argument that Afghanistan, as a “failed state,” was not covered by the Conventions. The official United States position before, during, and after the emergence of the Taliban was that Afghanistan constituted a state,” be wrote. Taft also warned Yoo that if the U.S. took the war on terrorism outside the Geneva Conventions, not only could U.S. soldiers be denied the protections of the Conventions—and therefore be prosecuted for crimes, including murder—but President Bush could be accused of a “grave breach” by other countries, and be prosecuted for war crimes. Taft sent a copy of his memo to Gonzales, hoping that his dissent would reach the President. Within days, Yoo sent Taft a lengthy reply.

Others in the Administration worried that the President’s lawyers were wayward. “Lawyers have to be the voice of reason and sometimes have to put the brakes on, no matter how much the client wants to hear something else,” the former State Department lawyer said. “Our job is to keep the train on the tracks. It’s not to tell the President, ‘Here are the ways to avoid the law.’” He went on, “There is too much as a non-covered person under Geneva Conventions. It’s nonsense. The protocols cover fighters in everything from world wars to local rebellions.” The lawyer said that Taft urged Yoo and Gonzales to warn President Bush that he would be “seen as a war criminal by the rest of the world,” but that Bush was ignored. This may be because President Bush had already made up his mind. According to top State Department officials, Bush decided to suspend the Geneva Conventions on January 8, 2002—three days before Taft sent his memo to Yoo.

The legal pronouncements from Washington about the status of detainees were painstakingly constructed to include numerous loopholes. For example, in February, 2002, President Bush issued a written directive stating that, even though he had determined that the Geneva Conventions did not apply to the war on terror, all detainees should be treated “humanely.” A close reading of the directive, however, revealed that it referred only to military interrogators—not to C.I.A. officials. This exemption allowed the C.I.A. to continue using interrogation methods, including rendition, that stopped just short of torture. Further, an August, 2002, memo written largely by Yoo but signed by Assistant Attorney General J. Bybee argued that torture required the intent to inflict suffering “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” According to the Times, a secret memo issued by Administration lawyers authorized the C.I.A. to use novel interrogation methods—including “water-boarding,” in which a suspect is bound and immersed in water until he nearly drowns. Dr. Allen Keller, the director of Bellevue/N.Y.U. Program for Survivors of Torture, told me that he had treated a number of people who had been subjected to such forms of near-asphyxiation, and he argued that it was indeed torture. Some victims were still traumatized years later, he said. One patient couldn’t take showers, and
The Administration's justification for the war in Iraq is deeply flawed. The evidence presented to the United Nations Security Council was based on false assumptions, and the intelligence community was misled by the White House. The administration's claims that Iraq possessed weapons of mass destruction were not supported by the evidence. The administration's decision to invade Iraq was based on political considerations, not national security. The administration's handling of the war has been characterized by a lack of transparency and accountability. The administration's policies have had a negative impact on the United States and the world. The war in Iraq has resulted in the loss of countless lives, and the United States has been unable to fulfill its stated objectives.

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who has expressed support for Islamist causes—spent most of his trip in Afghanistan, and was "either supporting hostile forces or on the battlefield fighting illegally against the U.S." Last month, after a three-year ordeal, Habib was released without charges.

Habib is one of a handful of people subjected to rendition who are being represented pro bono by human rights lawyers. According to a recently unsealed document prepared by Joseph Margulies, a lawyer affiliated with the MacArthur Justice Center at the University of Chicago Law School, Habib said that he was first interrogated in Pakistan for three weeks, in part at a facility in Islamabad, where he said he was brutalized. Some of his interrogators, he claimed, spoke English with American accents. (Having lived in Australia for years, Habib is comfortable in English.) He was then placed in the custody of Americans, two of whom wore black short-sleeved shirts and had distinctive tattoos: one depicted an American flag attached to a flagpole shaped like a finger, the other a large cross. The Americans took him to an airfield, cut his clothes off with scissors, dressed him in a jumpsuit, covered his eyes with opaque goggles, and placed him aboard a private plane. He was flown to Egypt.

According to Margulies, Habib was held and interrogated for six months. "Never, to my knowledge, did he make an appearance in any court," Margulies told me. Margulies was also unaware of any evidence suggesting that the U.S. sought a promise from Egypt that Habib would not be tortured. For his part, Habib claimed to have been subjected to horrific conditions. He said that he was beaten frequently with blunt instruments, including an object that he likened to an electric "cattle prod." And he was told that if he didn't confess to belonging to Al Qaeda he would be eaten alive by specially trained dogs. (Hosannah El-Hamalawy said that Egyptian security forces train German shepherds for police work, and that other prisoners have also been threatened with rape by trained dogs, although he knows of no one who has been assaulted in this way.) Habib said that he was shackled and forced to stand in three torture chambers: one room was filled with water up to his chin, requiring him to stand on tiptoe for hours; another chamber, filled with water up to his knees, had a ceiling so low that he was forced into a prolonged, painful stoop; in the third, he stood in water up to his ankles, and within sight of an electric switch and a generator, which his jailers said would be used to electrocute him if he didn't confess. Habib's lawyer said that he submitted to his interrogators' demands and made multiple confessions, all of them false. (Egyptian authorities have described such allegations of torture as "mythology.")

After his imprisonment in Egypt, Habib said that he was returned to U.S. custody and was flown to Bagram Air Force Base, in Afghanistan, and then on to Guantánamo Bay, where he was detained until last month. On January 11th, a few days after the Washington Post published an article on Habib's case, the Pentagon, offering virtually no explanation, agreed to release him into the custody of the Australian government. "Habib was released because he was hopelessly embarrassing," Eric Friedman, a professor at Hofstra Law School, who has been involved in the detainees' legal defense, says. "It's a large crack in the wall in a house of cards that is midway through Habib's fall."

In a prepared statement, a Pentagon spokesman, Lieutenant Commander Flex Plesico, said that there was "no evidence" that Habib was tortured or abused while he was in U.S. custody. He also said that Habib had received "Al Qaeda training," which included instruction in making false abuse allegations. Habib's claims, he suggested, "fit the standard operating procedure."

The U.S. government has not responded directly to Habib's charge that he was rendered to Egypt. However, several other men who were recently released from Guantánamo reported that Habib told them about it. Jamal al-Harith, a British detainee who was sent home to Manchester, England, last March, told me in a phone interview that at one point he had been placed in a cage across from Habib. "He said that he had been in Egypt for about six months, and they had interrogated him with drugs, and hung him from the ceiling, and beaten him very, very badly," Harith recalled. "He seemed to be in pain. He was gagged-looking. I never saw him walk. He always had to be held up."

Another piece of evidence that may support Habib's story is a set of flight logs documenting the travels of a white Gulfstream V jet—the plane that seems to have been used for renditions by the U.S. government. These logs show that on April 9, 2002, the jet left Dulles Airport, in Washington, and landed in Cairo. According to Habib's attorney, this was around the same time that Habib said he was released by the Egyptians in Cairo, and returned to U.S. custody. The flight logs were obtained by Stephen Grey, a British journalist who has written a number of stories on renditions for British publications, including the London Sunday Times. Grey's logs are incomplete, but they chronicle some three hundred flights over three years by the fourteen-seat jet, which was marked on its tail with the code N379P. (It was recently changed, to N806VX.) All the flights originated from Dulles Airport, and many of them landed at restricted

U.S. military bases.

Even if Habib is a terrorist aligned with Al Qaeda, as Pentagon officials have claimed, it seems unlikely that prosecutors would ever be able to build a strong case against him, given the treatment that he allegedly received in Egypt. John Radaan, a law professor at William Mitchell College of Law, in St. Paul, Minnesota, who worked in the general counsel's office of the C.I.A. until last year, said, "I don't think anyone's thought through what we do with these people."

Similar problems complicate the case of Khalid Sheik Mohammed, who was captured in Pakistan in March, 2003. Mohammed has reportedly been "water-boarded" during interrogations. If so, Radaan said, "it would be almost impossible to take him in a criminal trial. Any evidence derived from his interrogation could be seen as fruit from the poisonous tree. I think the government is considering some sort of military tribunal somewhere down the line. But, even then, there are still constitutional requirements that you can't bring in involuntary confessions."

The trial of Zacarias Moussaoui, in Alexandria, Virginia—the only U.S. criminal trial of a suspect linked to the September 11th attacks—is stalled. It's been more than three years since Attorney General John Ashcroft called Moussaoui's indictment "a chronicle of evil." The case has been held up by Moussaoui's demand—and the Bush Administration's refusal—to let him call as witnesses Al Qaeda members held in government custody, including Ramzi bin al-Shihb and Khalid Sheik Mohammed. (Bin al-Shihb is thought to have been tortured.) Government attorneys have argued that producing the witnesses would disrupt the interrogation process.

Similarly, German officials fear that they may be unable to convict any members of the Hamburg cell that is believed to have helped plan the September 11th attacks, on charges connected to the plot, in part because the U.S. government refuses to produce bin al-Shihb and Mohammed as witnesses. Last year, one of the Hamburg defendants, Mounir Motasasseq, became the first person to be convicted in the planning of the attacks, but his guilty verdict was overturned by an appeals court, which found the evidence against him too weak.

Motasasseq is on trial again, but, in accordance with German law, he is no longer being imprisoned. Although he is alleged to have overseen the payment of funds into the accounts of the September 11th hijackers—and to have been friendly with Mohamed Atta, who flew one of the planes that hit the Twin Towers—he walks freely to and from the courthouse each day. The U.S. has supplied the German court with edited summaries of testimony from Mohammed and bin al-Shihb. But Gerhard Strate, Motasasseq's defense lawyer, told me, "We are not satisfied with the summaries. If you want to find the truth, we need to know who has been interrogating them, and under what circumstances. We don't have any answers to this. The refusal by the U.S. to produce the witnesses in person, Strate said, "puts the court in a ridiculous position." He added, "I don't know why they won't produce the witnesses. The first thing you think is that the U.S. government is something to hide."

In fact, the Justice Department recently admitted that it had something to hide in relation to Maher Arar, the Canadian engineer. The government invoked the rarely used "state secrets privilege" in a motion to dismiss a lawsuit brought by Arar's lawyer against the U.S. government. To go forward in an open court, the government said, would jeopardize the "intelligence, foreign policy and national security interests of the United States." Barbara O'Leary, the assistant legal director of the Center for Constitutional Rights, which is representing Arar, said that government lawyers "are saying this case can't be tried, and the classified information on which they're basing this argument can't even be shared with the opposing lawyers. It's the height of arrogance—they think they can do anything they want in the name of the government with no oversight.

Nadja Dzudarevic is a thirty-year-old mother of four who lives in Sarajevo. On October 21, 2001, her husband, Haji Bouchella, a Muslim of Algerian descent, and five other Algerians living in Bosnia were arrested after U.S. authorities tipped off the Bosnian government to an alleged plot by the group to blow up the American and British Embassies in Sarajevo. One of the suspects reportedly placed some seventy phone calls to the Al Qaeda leader Abu Zubaydah in the days after September 11th. Bouchella and his wife, however, maintain that neither he nor several of the other defendants knew the man who had allegedly contacted Zubaydah. And an investigation by the Bosnian government turned up no confirmation that the calls to Zubaydah were made at all, according to the men's American lawyers, Rob Kirsch and Stephen Oleskey.

At the request of the U.S., the Bosnian government held all six men for three months, but was unable to substantiate any criminal charges against them. On January 17, 2003, the Bosnian Supreme Court ruled that they should be released.
Instead, as the men left prison, they were handcuffed, forced to put on surgical masks with nose clips, covered in hoods, and herded into waiting unmarked cars by masked figures, some of whom appeared to be members of the Bosnian special forces. Boudella’s wife had come to the prison to meet her husband, and she recalled that she recognized him, despite the hood, because he was wearing a new suit that she had brought him the day before. “I will never forget that night,” she said. “It was snowing. I was screaming for someone to help.” A crowd gathered, and tried to block the convoy, but it sped off. The suspects were taken to a military airbase and kept in a freezing hangar for hours; one member of the group later claimed that he saw one of the abductors remove his Bosnian uniform, revealing that he was in fact American. The U.S. government has neither confirmed nor denied its role in the operation.

Six days after the abduction, Boudella’s wife received word that her husband and the other men had been sent to Guantánamo. One man in the group has alleged that two of his fingers were broken by U.S. soldiers. Little is publicly known about the welfare of the others.

Boudella’s wife said that she was astounded that her husband could be seized without charge or trial, at home during peacetime and after his own government had exonerated him. The term “enemy combatant” perplexed her. “He is an enemy of whom?” she asked. “In combat where?” She said that her view of America had changed. “I have not changed my opinion about its people, but unfortunately I have changed my opinion about its respect for human rights,” she said. “It is no longer the leader in the world. It has become the leader in the violation of human rights.”

In October, Boudella attempted to plead his innocence before the Pentagon’s Combatant Status Review Tribunal. The C.S.R.T. is the Pentagon’s answer to the Supreme Court’s ruling last year, over the Bush Administration’s objections, that detainees in Guantánamo had a right to challenge their imprisonment. Boudella was not allowed to bring a lawyer to the proceeding. And the tribunal said that it was “unable to locate” a copy of the Bosnian Supreme Court’s verdict freeing him, which he had requested that it read. Transcripts show that Boudella stated, “I am against any terrorist acts,” and asked, “How could I be part of an organization that I strongly believe has harmed my people?” The tribunal rejected his plea, as it has rejected three hundred and eighty-seven of the three hundred and ninety-three pleas it has heard. Upon learning this, Boudella’s wife sent the following letter to her husband’s American lawyers:

Dear Friends, I am so shocked by this information that it seems as if my blood froze in my veins. I can’t breathe and I wish I was dead. I can’t believe these things can happen, that they can come and take your husband away, overnight and without reason, destroy your family, ruin your dreams after three years of fight . . . . Please, tell me, what can I still do for him? . . . Is this decision final, what are the legal remedies? Help me to understand because, as far as I know the law, this is insane, contrary to all possible laws and human rights. Please help me, I don’t want to lose him.

John Radsan, the former C.I.A. lawyer, offered a reply of sorts. “As a society, we haven’t figured out what the rough rules are yet,” he said. “There are hardly any rules for illegal enemy combatants. It’s the law of the jungle. And right now we happen to be the strongest animal.”

Typically a rendition occurs when the local government, in cooperation with U.S. officials, bundles a suspect on a plane and sends him to another country. In contrast to an extradition, the suspect does not go through the legal system of the country where he is arrested but is instead moved secretly to a foreign country. The local government in the country of arrest may request the accused be extradited, but U.S. officials may pull the suspect off the streets without the cooperation of the host government. For instance, the CIA does not help render suspects without the approval of White House officials and is not bound by extradition laws. Although the Bush administration has regularly used renditions, the CIA does not advise the White House of the renditions it has made. 

According to references in the article, renditions have been used to transfer suspected terrorists to countries like Egypt, Morocco, Jordan, and Syria. These countries are considered central to the war on terrorism and are known for their cooperative stance with the U.S. (e.g., they have U.S. military bases). The renditions also provide a route for non-U.S. citizens to be tried in the U.S. for terrorism-related offenses. Renditions are also used to transfer suspects to countries like the Philippines, Thailand, and Yemen. The renditions are sometimes used as a way to avoid U.S. legal procedures and are therefore controversial. Some critics argue that renditions are a form of torture and constitute a violation of international law. Others argue that renditions are effective in obtaining information and are necessary to combat terrorism. 

The renditions program is under attack today, as critics point to the program's inherent faults, the use of illegal means to obtain information, and the resulting bad publicity for the U.S. The program is being questioned by human rights organizations, the U.S. Congress, and the international community. As a result, there is increasing pressure on the U.S. government to reform the program. 

Chairman Biden, Ranking Member Lugar, distinguished members of the Committee, and Committee staff, I am grateful for this opportunity to speak before you today. My statement first outlines the advantages of the renditions program from a counterterrorism point of view. It then describes the very real costs and faults of the program, some of which are inherent to it and others of which can be reduced. The statement concludes by offering a set of recommendations for how to improve the program and make it more in line with U.S. values and thus more sustainable in the long-run.

Advantages of the Renditions Program

Renditions are a vital counterterrorism tool—so vital, that they must be used today. Renditions can provide an effective method of removing terrorists from our streets. They can also provide evidence that can be used in U.S. courts. The renditions program is part of an ongoing effort to prevent terrorist attacks and deal with the problem of terrorism.

Although the renditions program is under attack, the evidence suggests that it is effective. The U.S. government has been successful in using renditions to remove terrorists from our streets. The program also provides evidence that can be used in U.S. courts. The evidence obtained through renditions has been used to prosecute terrorists and to help prevent future attacks.

The program also helps to deal with the problem of terrorism. Renditions are a key part of our counterterrorism strategy. They are used to remove terrorists from our streets and to prevent them from carrying out attacks. The program also helps to prevent the spread of terrorism by removing terrorists from abroad.

Costs and Faults of the Program

The renditions program has a number of inherent costs and faults. These costs and faults can be reduced, but not eliminated. The costs and faults of the program include the following:

- The program is controversial and is often used as a way to avoid U.S. legal procedures. This can lead to the program being used as a form of torture.
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Renditions are often the only option for interrogating a suspect and bringing him to justice. When extradition is not politically or legally possible. In some countries, the formal court system has no established legal procedures for suspected terrorists who are not U.S. citizens beyond sending them through the U.S. court systems where they are essentially treated as U.S. citizens.

"Any operation in Europe was done with the cognizance, support and approval of the European security services involved."

Zammar quickly discovered, the laws that protected him in Germany did not apply in Syria and Morocco. Probably for similar reasons, U.S. officials detained Maher Ammar, a Canadian citizen born in Syria, when he was arrested in Turkey in 2003. At the time, he was reportedly working repeatedly but received little return on his investments. The problem is not unique to America's European allies. U.S. counterterrorism officials at times find it better to send suspects to the United States rather than bring them home because they are strong democratic governments that have legal systems and codes that are sometimes better equipped to hold a prisoner. A recent example is the case of Leslie Wayne, "Jury Recommends Death for Pakistani," Washington Post, November 15, 1997, p. 9. The United States has no established legal procedures for suspected terrorists who are not U.S. citizens beyond sending them through the U.S. court systems where they are essentially treated as U.S. citizens.

"The government's popularity. Historically, the United States has shielded such cooperative but weak regimes from the adverse publicity associated with extraditions."

Although, the United States supports the rule of law, particularly in allied countries.

Islamic terrorism for decades, and its officials know a remarkable amount about the motivations, worldview, and desires of Islamist terrorists. The United States lacks the necessary legal systems and codes that are often particularly hard for analysts to penetrate in Arabic. Some Middle Eastern countries also can provide a deprogram to "deprogram" terrorists, convincing detainees that their actions are contrary to Islam and will lead them to Hell.

Historically, the United States has shielded such cooperative but weak regimes from the adverse publicity associated with extraditions. Some governments are hostile, not weak, and here renditions become vital. In the spring of 1998, intelligence officials plotted to rend Bin Ladin from Taliban-controlled Afghanistan, an operation made necessary because the Afghan regime supported the terrorist organization. The Afghan government had a legal system. They did not have a formal court system. They did not have a legal standard. Hearsay, rumor, and circumstantial evidence are often the only available intelligence, and information is subject to being leaked. In addition, their legal systems were often not able to hold a prisoner. U.S. officials chose to rend Bin Ladin from Afghanistan because they could not take these suspects off the street. Their own counterterrorism laws were weak, and allowed individuals to recruit and organize with little impunity. In addition, their legal systems were not able to hold a prisoner. U.S. officials chose to rend Bin Ladin from Afghanistan because they could not take these suspects off the street. Their own counterterrorism laws were weak, and allowed individuals to recruit and organize with little impunity. In addition, their legal systems were not able to hold a prisoner. U.S. officials chose to rend Bin Ladin from Afghanistan because they could not take these suspects off the street. Their own counterterrorism laws were weak, and allowed individuals to recruit and organize with little impunity. In addition, their legal systems were not able to hold a prisoner. U.S. officials chose to rend Bin Ladin from Afghanistan because they could not take these suspects off the street. Their own counterterrorism laws were weak, and allowed individuals to recruit and organize with little impunity.
Building a Better Program

The most controversial aspect of renditions is sending suspects to third countries where human rights abuses are common. Under the Clinton administration, renditions required a demand that the recipient country promise to treat the suspect as they would under the U.S. legal system. However, the Bush administration's disregard of international law and respect for the rights of the recipient country was evident.

A number of countries favored for renditions, such as Egypt, Jordan, and Morocco, were not close friends of the United States. A number of countries opposed renditions to them, but the Bush administration went ahead anyway. This approach was followed even in cases where the European Union opposed renditions. For example, the British government strongly opposed renditions to Egypt, Jordan, and Morocco, but the United States went ahead anyway. The Bush administration's disregard for international law and respect for the rights of the recipient country was evident.

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countries where they are wanted under that country's legal system in order to ensure that
a legal procedure of some sort is eventually followed and that the individual will not simply "disappear" within the country's darkest prisons. Americans should not pretend
that Middle Eastern states' legal systems will respect the defendants' rights as would a
U.S. or European system, but having the accused appear at a trial at some point is vital.
Reducing the likelihood of torture is particularly important. Although judging harsh treatment involves discerning shades of gray rather than black and white, the United
States should avoid the worst offenders such as Damascus. Egypt and Jordan, while
often brutal, are far less harsh than is a country like Syria, which should never be the
recipient of a rendered suspect. 

The same logic applies to renditions. Because renditions lie in the gray area between the rule of law and the nation's
security, an honest debate would serve our country well—and thus I particularly welcome
learnings like these, even though the subject matter is grim. Legal voices must answer
questions about the renditions process and the individuals involved. This, in turn, will
help provide the political leadership with a better understanding of the program and allow it to be shaped to protect our
citizens as it should be.
PANEL V:

NATIONAL SECURITY FOR A NEW ADMINISTRATION

MODERATOR:
PROF. JOHN NORTON MOORE
The Inheritance and the Way Forward

By Kurt M. Campbell and Michèle A. Flournoy

The Inheritance and the Way Forward

About the Authors

Kurt M. Campbell is Co-Founder and Chief Executive Officer of the Center for a New American Security and concurrently serves as Director of the Aspen Strategy Group. Previously he served as Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs in the Clinton Administration.

Michèle A. Flournoy is Co-Founder and President of the Center for a New American Security. She served as Principal Deputy Assistant Secretary of Defense for Strategy and Threat Reduction and Deputy Assistant Secretary of Defense for Strategy in the Clinton Administration.

TABLE OF CONTENTS

Executive Summary  3
Introduction: The World We Inherit  9
A Troubled Inheritance  11
The Costs of Iraq  11
Military Overextension  14
Strategic Preoccupation  16
Disregard for the Rule of Law  17
Softening Power and Alienated Allies  18
Public Disillusionment  20
Financial Indebtedness  21
A Divided and Fearful Polity  22
The Enduring Promise and Potential of America  23
The Way Forward  26
Key Principles of a New Approach  26
Actions Speak Louder than Words  28
Transition Out of Iraq  28
Overhaul U.S. Strategy vs. Violent Extremists  29
Reinvigorate the Middle East Peace Process  30
Affirm and Vigorously Enforce U.S. Commitment to the Rule of Law  30
Reject Preventive War  31
Identify and Pursue a Broader Set of Strategy Priorities  33
Reinvigorate U.S. Alliances, Partnerships, and International Institutions  34
Be Proactive in the Use of American Soft Power  35
Restore Fiscal Discipline  36
Revitalize the U.S. Military and Ensure Its Prudent Use  37
Conclusion  40

June 2007
This essay explores the complex nature of the contemporary foreign policy and national security inheritance and offers recommendations for how the next president should begin to chart a new course to restore America’s credibility, influence, and power in the world and, in so doing, strengthen America’s national security.

The United States faces a growing and daunting list of strategic challenges reverting the decline in America’s global standing; protecting America and its interests and allies from terrorist attacks; developing a more effective long-term strategy against violent Islamist extremists; constraining nuclear proliferation; finding a responsible way out of Iraq while maintaining American influence in the wider region; protecting in Afghanistan and Pakistan; rebuilding the nation’s armed forces; restoring the nation’s fiscal health; and sustaining the support of the American people.

Given this daunting inheritance, the next president of the United States will have a number of exceedingly difficult yet absolutely critical choices to make to chart a new course for American national security. The stakes are high, and defining a way forward for American national security will be a consuming preoccupation for the next president and other presidents to follow.

In this essay, we examine the primary elements of the inheritance in depth: the costs of the Iraq War; military overextension; strategic preoccupation, confusion, and distraction; disregard for the rule of law; softening power and alienated allies; public disillusionment; and the enduring promise and potential of America.

Managing this bequest must be the primary task for whoever occupies that lonely office in the West Wing. The stakes are high, and defining a way forward for American national security will be a consuming preoccupation for the next president and other presidents to follow.

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The national security inheritance of the next president is, in fact, a complex mix of challenges and opportunities. In this piece, we explore nine primary elements of the inheritance in depth: the costs of the Iraq War; military overextension; strategic preoccupation, confusion, and distraction; disregard for the rule of law; softening power and alienated allies; public disillusionment; and the enduring promise and potential of America.

Executive Summary

The Inheritance and the Way Forward

June 2007

1. Transition out of Iraq. The only way to begin to limit and recover from the extraordinary damage that the Iraq War has done to U.S. credibility, influence, and power is to begin to limit and recover from the extraordinary damage that the Iraq War has done to U.S. credibility, influence, and power. The next president will have to convince the American people and their representatives in Congress to reject the neo-isolationist impulses that may re-emerge in the wake of the Iraq War in order to build a broad-based coalition of support for a new direction in American foreign policy.

2. U.S. strategy must be grounded in pragmatism rather than ideology. The United States must remain engaged in critical regions around the world. U.S. engagement must be smarter and more selective. Allies and partners are now even more essential given the nature of the challenges we face.

3. Military power is necessary but not sufficient to deal with 21st century challenges; complex problems demand solutions that integrate all of the instruments of our national power.

4. The next president must lead concrete actions. While the full range of interested stakeholders, including the military, foreign policy, economic, and domestic policy communities, will have a role in defining a new way forward for American national security, the new president will have to demonstrate early and clearly that the United States is embracing a new national security strategy and adopting a new U.S. national security environment.

5. The United States has been and will continue to be the preeminent leader in the international community, and we cannot protect or advance our interests in a globalized world if we do not continue to serve in that role. The United States has a unique role in the world.

6. Our nation’s history and power—economic, military, and cultural—give the United States a unique role in the world. The United States has been and will continue to be the preeminent leader in the international community, and we cannot protect or advance our interests in a globalized world if we do not continue to serve in that role. The United States has a unique role in the world.

7. Moving forward, six principles should guide a new U.S. national security strategy:

• U.S. strategy must be grounded in pragmatism rather than ideology.

• The United States must remain engaged in critical regions around the world.

• Military power is necessary but not sufficient to deal with 21st century challenges; complex problems demand solutions that integrate all of the instruments of our national power.

• Allies and partners are now even more essential given the nature of the challenges we face.

• U.S. engagement must be smarter and more selective.

• The United States must play by the rules, exemplifying respect for the rule of law.

• Military power is necessary but not sufficient to deal with 21st century challenges; complex problems demand solutions that integrate all of the instruments of our national power.

These principles must lead to concrete actions. While the next president must ultimately deal with the full range of interested stakeholders, including the military, foreign policy, economic, and domestic policy communities, will have a role in defining a new way forward for American national security, the new president will have to demonstrate early and clearly that the United States is embracing a new national security strategy and adopting a new U.S. national security environment.

8. The next president will have to convince the American people and their representatives in Congress to reject the neo-isolationist impulses that may re-emerge in the wake of the Iraq War in order to build a broad-based coalition of support for a new direction in American foreign policy.

9. The national security inheritance of the next president is, in fact, a complex mix of challenges and opportunities. In this piece, we explore nine primary elements of the inheritance in depth: the costs of the Iraq War; military overextension; strategic preoccupation, confusion, and distraction; disregard for the rule of law; softening power and alienated allies; public disillusionment; and the enduring promise and potential of America.

Managing this bequest must be the primary task for whoever occupies that lonely office in the West Wing. The stakes are high, and defining a way forward for American national security will be a consuming preoccupation for the next president and other presidents to follow.
8. Reprioritize in the use of American soft power:
   
   The next president must take steps to reverse the impression that the United States is insensitive to the strains that have stretched the All-Volunteer Force to the breaking point. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its military. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its allies. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its friends. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its adversaries. The next president must take steps to reverse the impression that the United States is insensitive to the needs of the United States.

   The next president must begin a systematic program of bringing terror suspects into American and other national legal systems as comprehensively as possible. The next president must do so because it is in the interest of the United States to bring terror suspects into American and other national legal systems as comprehensively as possible. The next president must do so because it is in the interest of the United States to bring terror suspects into American and other national legal systems as comprehensively as possible. The next president must do so because it is in the interest of the United States to bring terror suspects into American and other national legal systems as comprehensively as possible.

9. Restore fiscal discipline:
   
   The next president must take steps to reverse the impression that the United States is insensitive to the needs of its fiscal system. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its fiscal system. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its fiscal system. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its fiscal system. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its fiscal system.

10. Revitalize the U.S. military and ensure its prudent use:
    
    The next president must take steps to reverse the impression that the United States is insensitive to the needs of its military. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its military. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its military. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its military. The next president must take steps to reverse the impression that the United States is insensitive to the needs of its military.
likely determine his or her place in history. Most importantly, how he or she manages the inheritance will in large part determine whether U.S. security and influence will wax or wane still further in the years to come.

THE WORLD WE INHERIT

The United States faces a mounting list of strategic challenges. This list is daunting. Reversing the decline in America’s global standing; protecting America and its interests and allies from terrorist attacks; developing a more effective long-term strategy against violent Islamist extremists; constraining nuclear proliferation; finding a responsible way out of Iraq while maintaining American influence in the wider region; persevering in Afghanistan; dealing prudently with global climate change; working towards greater energy security; rebuilding the nation’s armed forces; restoring the nation’s fiscal health; and restoring public trust in all manner of government functions, just to name a few.

In the face of this inheritance, it is remarkable and indeed inspiring that such a talented and diverse group of Americans is running for president in 2008. Yet the strength of the field does not diminish the magnitude of the challenge. The enormity of these myriad concerns is already spurring extensive commentary about what the next president must do to restore America’s place in the world. “We must begin to think about life after Bush—a cheering prospect for his foes, a dismaying one for his fans,” noted one observer.1

As daunting as these challenges are, an honest accounting will also reveal positive trends and powerful advantages that the United States continues to enjoy in international affairs. The armed forces, while under enormous strain, have demonstrated an enduring strength and resilience that will continue to serve the nation well in the years to come. The Bush administration has rightly focused on the long-term nature of the dangers posed by Islamist radicals. Through vigilance and hard work, the American homeland has been spared terrorist attacks since 9/11. President Bush launched a major strategic engagement with India, the world’s largest democracy. Relations with Japan are strong and with China relatively stable. There have been important new initiatives aimed at alleviating global poverty and stemming the spread of HIV/AIDS. The president has also demonstrated true leadership in trying to fashion a bipartisan and comprehensive approach to immigration reform.

The national security inheritance of the next president is, in fact, a complex mix of challenges and opportunities. In this piece, we explore nine primary elements of the inheritance in depth: the costs of the Iraq War; military overextension; strategic preoccupation, confusion, and distraction; disregard for the rule of law; softening power and alienated allies; public disillusionment; financial indebtedness; a divided and fearful polity; and the enduring promise and potential of America. Managing this bequest must be the primary task for whoever occupies that lonely office in the West Wing. The stakes are high and defining a way forward for American national security will be a consuming preoccupation for the next and subsequent presidents.

But history provides few guideposts for the next American president to follow. Not since the early days of the Cold War has the international strategic environment been so uncertain and in flux. Not since the dawn of the nuclear age and the high stakes brinksmanship during the Cuban Missile Crisis has fear so permeated the American body politic. Not since the end of the Vietnam War has the United States confronted the prospect of a searing failure on the international scene. Not since the Carter administration have an array of energy insecurity risen to the level of national policy. And not since the end of the Reagan administration has the issue of an exploding federal

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The Costs of Iraq

A Troubled Request

The Inheritance and the Way Forward

The next president of the United States, no matter his or her political party or particular worldview, will confront a set of global challenges, national security problems, and an enormous national debt. He or she will need to recognize that the United States in recent years has undermined decades of international cooperation to forge broader coalitions and engage its closest allies, and intensify the hostility among our adversaries. Understanding the totality of this global inheritance is among the most important requirements for effective transatlantic new generations of leaders, and crucially, for finding a new way forward.

The next president must offer the beginnings of a plan to restore America's credibility, influence, and power, and, in so doing, strengthen the country's security. This essay explores the complex nature of the national security inheritance of the next president and makes recommendations for how the new leader should take to start the country down the path of a new American security.

The Costs of Iraq

The tragedy and chaos of the Iraq War provide the overarching context for a host of foreign policy and domestic challenges that will require a unique blend of political will and leadership. The decision surrounding the Iraq invasion and the escalating calamities around its aftermath will have a generational impact on the American workforce, the health of our national capabilities, and the ranking of American power around the world. Performance of critical American institutions and the American way of life have been called into question, raising doubts about our ability to function and compete with the world. American leaders have been and will be held accountable for the actions taken and the reasons for the interventions that have led to so much death and destruction.

Dealing with the legacy of Iraq will be immensely difficult for any successor. As after Vietnam, there will be a profound and maturing service for the dead and wounding, a profound national mourning over the deaths of our service members and civilians, and the accompanying pain felt by others who have sacrificed in other ways. In turn, the memory of Iraq is likely to prove exponentially more challenging than the relative ease with which the United States initiated the conflict.

Iraq is through with us. The enduring violence there will likely pose severe challenges to American interests in the region for years — if not decades — to come, regardless of near-term American decisions about troop deployments. And while the war’s outcome remains uncertain, its enormous costs are already evident. The most important of these costs include the people killed and wounded, the financial drain on taxpayers, the strain on our allies and American soldiers, the emboldening of our adversaries, the harmful effects that the failed intervention has had on American attitudes toward the world, and the moral challenges that we will face as a society in the years to come.

By the summer of 2007, over 500 American soldiers, an additional 25,000 physically injured in the line of duty, and 600,000 more suffering from psychological injuries from the constant drain of violence. The average today of more than 1,000 attacks per week has often been described as a war of attrition, but it is not clear whether the United States and its allies have the patience or the will to wear down the enemy. As in Vietnam, the United States will face an unfriendly environment of international frictions, U.S. involvement in two hot wars, and an enormous national debt. Like all leaders, the new president will have to make difficult decisions about the prudence or utility of American intervention in the region, the pace of the withdrawal, and the challenges of handling both near-term difficult calls and long-term implications of national and international policy.

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The Costs of Iraq

The next president of the United States, no matter his or her political party or particular worldview, will confront a set of global challenges, national security problems, and an enormous national debt. He or she will need to recognize that the United States in recent years has undermined decades of international cooperation to forge broader coalitions and engage its closest allies, and intensify the hostility among our adversaries. Understanding the totality of this global inheritance is among the most important requirements for effective transatlantic new generations of leaders, and crucially, for finding a new way forward.

The next president must offer the beginnings of a plan to restore America's credibility, influence, and power, and, in so doing, strengthen the country's security. This essay explores the complex nature of the national security inheritance of the next president and makes recommendations for how the new leader should take to start the country down the path of a new American security.

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The war since May 2003. And for many Americans, the war and Iraq's influence on American psychology and political culture is the war America fought and the war it lost.

The war has also had profound economic consequences. The costs of the war, including the direct costs of military operations, the indirect costs of supporting the war effort, and the costs of stabilizing Iraq and its neighbors, have been substantial. The war has also had significant economic effects on Iraq and its neighbors, including the destruction of much of the country's infrastructure and the displacement of large numbers of people.

The war has also had significant political consequences. The war has led to significant changes in the political landscape of the Middle East, including the rise of political Islam and the emergence of new political actors. The war has also had significant consequences for the United States, including the loss of thousands of lives and the loss of trillions of dollars.

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...
The Inheritance and the Way Forward

Strategic Preoccupation
The Iraq War has indirectly cost the United States far more than lives lost and dollars spent. The preoccupation with Iraq has come at the expense of other important domestic and international issues, if U.S. policy makers were a preschool soccer game in which all the players constantly chased after the ball, leaving entire quadrants of the field empty and ignored. In response to a recent question about how his new Pentagon job was going, Secretary of Defense Robert Gates confessed that he had time for only three issues: “Iraq, Iraq and Iraq.”14 While his quip was apt, the unintended message is of a national security elite consumed by the mess in Mesopotamia. The scarest resource at the highest levels of the U.S. government is the time and attention of its leadership, and by that criterion Iraq has been a virtual black hole for all government focus and attention.

Most evident is the role Iraq has played in distracting the United States from the primary goal of combating the global jihadist movement. As noted in 2003:

[The] conflation of al-Qaeda and Saddam Hussein’s Iraq as a single, undifferentiated terrorist threat...was a strategic error of the first order because it ignored critical differences between the two in character, threat level, and susceptibility to U.S. deterrence and military action. The result has been an unnecessary preventive war of choice against a deterred Iraq that has created a new front in the Middle East for Islamic terrorism and diverted attention and resources away from securing the America homeland against further assault by an undeterred al-Qaeda.15

Tragically, far more al Qaeda operatives are active in Iraq today than during the time of Saddam’s regime. Meanwhile, Osama bin Laden has evaded capture for five years, and many al Qaeda leaders continue to inspire and conspire to direct international terrorist attacks against American allies and interests.

Similarly, even as the Iraq invasion failed to unearth hidden weapons of mass destruction, Iran and North Korea have taken advantage of American preoccupation to consolidate their nuclear gains. Focusing so many American military assets on Iraq has diverted resources that could have helped consolidate the fragile Karzai government in Afghanistan, allowing the Taliban to regroup and regain significant influence in the southern provinces.60 Relations have deteriorated with Mexico and Latin America over issues from immigration to trade, with Venezuela and China attempting to fill the strategic vacuum. Despite shared interests in preventing nuclear terrorism and curbing nuclear proliferation, ties between Russia and the United States have also frayed over many issues.61 Broader problems and transnational threats—such as poverty, the spread of infectious disease, and global warming—have been subordinated to Iraq. Even laudable initiatives such as new funds for HIV/AIDS and the Millennium Challenge Account have suffered from inadequate high-level attention.

Officials in Washington have yet to devote sufficient attention to developing a comprehensive strategy for managing the growing strength and increasing sophistication of the People’s Republic of China.62 In many respects, China has been pursuing its own diplomatic and trade relationships, growth, and regional leadership that at times run counter to U.S. interests.63 Washington’s preoccupation with the war in Iraq has provided an auspicious opportunity for Beijing to expand its influence in the Asia-Pacific region and further afield.64 Rather than seeking to weaken or confront the United States directly, Chinese leaders are pursuing a subtle, multilayered, long-term grand strategy that aims to derive as many benefits as possible from the existing international system while accumulating the economic wherewithal, military strength, and soft power65 resources to reinforce China’s emerging position as at least a regional great power.66 To date, the biggest winners of the American experience in Iraq are Iran and China.

The Middle East is much less stable as a result of the Iraq War, and the conflicts in Lebanon and in the occupied territories have only added to the situation’s precariousness. The lack of energy security is a major issue that has only recently begun to receive sustained attention. This subject will be particularly complex for a new president because it is intertwined with another deferred issue: the environmental and other effects of global climate change.

The price of preoccupation for the United States has been exceptionally high and unforgiving during the course of the Iraq War, and as the conflict continues to monopolize the time and attention of Republicans and Democrats, executive and legislative branch officials, and military and civilian national security experts alike, new threats are gathering and enduring problems are getting worse. Reversing this Middle East myopia in Iraq may well be one of the hardest hurdles for any new president to clear.

Disregard for the Rule of Law
Upon entering the White House, the Bush administration quickly made clear its aversion to any constraints on U.S. foreign policy, unilaterally withdrawing from the Anti-Ballistic Missile Treaty and the Kyoto Protocol. Though President Bush is now working with several countries on these and other issues, his past policies and style have left the indelible impression among many observers that the United States will unilaterally do whatever it deems fit with scant regard for the views of, or consequences for, the rest of the world.

The emphasis on American exceptionalism in recent years has engendered an attitude that the United States should not be expected to abide by various international conventions, treaties, or legal structures, even those our nation played a critical role in negotiating. A prime example is the administration’s unwillingness to alter its treatment of detainees despite worldwide outrage over Abu Ghraib and Guantanamo Bay, the revelation of secret CIA prisons in Europe, and the refusal to abide by the Geneva Conventions with regard to suspected terrorists.

These blatant departures from the rule of law have tarnished the image of the United States as...
Since the survey was taken in May 2005, the U.S. has become less popular worldwide, especially in Europe. In Spain, one of President Bush’s key initial Iraq War allies, the percentage of people who said they had a favorable view of the United States dropped from 41 percent to 22 percent, according to the Pew Research Center’s Global Attitudes Survey. In Germany, the decrease was from 32 percent to 16 percent. In the United Kingdom, which had been a strong supporter of the Bush administration, the percentage of people who said they had a favorable view of the United States dropped from 63 percent to 39 percent.

The June 2006 Global Attitudes Survey conducted by the Pew Research Center found a decline in positive attitudes toward the United States, ranging from 57 percent in Spain to 79 percent in India. The survey found that the United States was viewed more negatively in Europe than in Asia, with the exception of Japan, where the percentage of people who said they had a favorable view of the United States remained at 63 percent.

The survey also found that the United States was viewed less favorably in many countries than in the past. In 2005, the United States had been the world’s leading superpower, with a reputation for economic, military, and political power. However, the survey found that the United States was viewed more negatively in many countries than in the past. The survey found that the United States was viewed less favorably in many countries than in the past. In 2005, the United States had been the world’s leading superpower, with a reputation for economic, military, and political power. However, the survey found that the United States was viewed less favorably in many countries than in the past.

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in 2005, 82 percent ofPakistanis responded that U.S. and U.S.-led forces were their country's most important in forming its overall opinion of the United States.61

These recent episodes of disaster assistance–seeking, U.S.-imposed policies, and so on have contributed to a perceived American indifference toward Asia, the world's fastest-growing region. According to a wide array of foreign policy indicators, the Asia-Pacific region suffered most from the Bush administration's policies toward the United States.

The U.S. government has been the culprit in many of these developments, but it is important to also take into account the role that the United States has played in undermining the credibility and effectiveness of its own policies. For example, the Bush administration's decision to cut funding for international development programs has had a devastating impact on the ability of countries to respond to the needs of the people in their countries. The United States has also been criticized for its lack of transparency in the way it conducts its affairs, which can make it difficult for other countries to trust the United States.

These developments have had a significant impact on the ability of the United States to work with other countries in the region to achieve its goals. The United States has been unable to persuade other countries to follow its lead, and as a result, it has been forced to act alone.

The United States is currently facing a number of challenges, including the need to address the growing threat of terrorism, the need to stabilize Iraq and Afghanistan, and the need to protect and promote American interests around the world. The United States must therefore work closely with other countries to achieve these goals, and it must also be prepared to act alone if necessary.

The United States must also be willing to engage in international cooperation. The United States has a long history of working with other countries to achieve its goals, and it must continue to do so in the future. The United States must also be willing to engage in dialogue with other countries, and it must be willing to listen to the concerns of other countries.

The United States must also be willing to make difficult decisions. The United States has a history of making difficult decisions, and it must continue to do so in the future. The United States must also be willing to take risks, and it must be willing to accept the consequences of its actions.

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The Inheritance and the Way Forward

The next president will likely inherit a domestic environment with a rare consensus on many major issues. Despite their increasing negative feelings toward the Iraq War, the American people are united in their opposition to politicalr uneconomic, and social, but also on the international front. The next president will need to work closely with Congress to achieve any meaningful policy changes.

Large-scale foreign policy issues, such as the war in Iraq and the global war on terrorism, are likely to remain central to the next president's agenda. The Bush administration's approach to the war in Iraq has been controversial, and the next president will need to determine how to proceed. The Bush administration has been criticized for its response to the terrorist attacks on September 11, 2001, and for its handling of the war in Afghanistan.

One of the central challenges for the next president will be to address the economic challenges facing the country. The Bush administration's approach to the economy has been largely laissez-faire, with a focus on tax cuts and reducing government spending. However, the economy has continued to struggle, with high unemployment and slow growth.

The next president will also need to address the fiscal challenges facing the country. The Bush administration has run large budget deficits, and the national debt is expected to continue to grow. The next president will need to decide whether to continue with the Bush administration's fiscal policies or to take a different approach.

In addition, the next president will need to address the growing political polarization in the country. The Bush administration has been criticized for its lack of bipartisanship, and the next president will need to work to bring the country together.

The next president will face a number of significant challenges, but if they are able to effectively address these issues, they will be well on their way to leaving a legacy that will be remembered long after they leave office.
The Inheritance and the Way Forward

foreign policy, such as the public demand for more responsible action in the future. Americans have devoted renewed attention to military readiness and compensation, and there is a widespread sense that ideology cannot be allowed to trump reality in foreign affairs. Un sustainable spending and lack of oversight are no longer ignored by the public, nor by Congress. And one can only hope that the many lessons to be learned from the Iraq War will be taken to heart by future leaders and those who would advise them.

In fact, the legacy of Iraq, while extremely damaging to the global standing of the United States and very costly to our military and society in the near-term, could establish a new basis for American foreign policy in the 21st century. For example, there is bound to be some deep suspicion of ideological crusades in the wake of the war and perhaps a greater appreciation for the role of international institutions and the importance of gaining legitimacy for U.S. actions. Even some of the loudest nonconservative champions of the Iraq War have revised their premises. Some also call for a stronger U.N. or the creation of new institutions like an Alliance of Democrats, to provide greater international capacity and legitimacy. One might also expect a better balance between Congress and the executive branch in the making of foreign policy, with greater legislative oversight and a healthy skepticism of presidential saber-rattling—already illustrated by Congressional warnings about unilateral military action against Iran. When the United States does use force again, there will be higher expectations for “post-conflict” planning and greater public awareness of its importance. In addition, there may be greater political will to bolster other instruments of U.S. power—for instance, by building greater civilian capacity for stabilization missions, strengthening the diplomatic corps, and reforming foreign development assistance.

Perhaps most importantly, there will be more humility about what American power can achieve in the world, particularly alone. With the right leadership, there might even be a greater public willingness to sacrifice in the burdens required to achieve national objectives, rather than putting the full burden on the back of the American military, whose members and families have been the only Americans asked to sacrifice for the Iraq War. In this way, the next president can aspire to repeat the achievement of the current incumbent’s father, George H. W. Bush, who remarked with relief after the 1990-1991 Gulf War that, “By God, we’ve kicked the Vietnam syndrome once and for all.”

Although the global war on terror has consumed enormous resources and intellectual focus, there is still remarkably little consensus on or understanding of the ultimate contours of what we are up against and how to fight it. To begin, the term “global war on terror” is widely considered inappropriate and inexact. New definitions that mix and match terms—such as Salafist, jihadist, Islamist, radical, and extremist—have emerged but not caught on. The British Foreign Office recently took the unusual step of banning the “war on terror” terminology but provided no guidance about what language should be used in its place.

This lack of a tidy moniker reflects a larger deficiency of a national strategy. Then again, how can the United States settle on an appropriate title and grand strategy if it is still unsure of the true nature of the “enemy” it faces? The full range of experts diverge broadly on whether the threat from al Qaeda and similar groups is political, religious, secular, economic, social, or a combination of several or all these factors. Methods of combating the threat also span the spectrum of thought and theory.

At the outset of the Cold War the nation was faced with similar doubts over the nature of the Soviet threat, coupled with an inefficient bureaucracy for the task at hand and serious budgetary pressures. After several years of Cold War competition with the Soviet Union in Europe and elsewhere, President Eisenhower seized this desire for a more systematic approach to decision making, overseeing a broad strategy development exercise called Project Solarium, which convened the nation’s top talent to fully explore what the nation was facing. Three teams hammered out different descriptions of the nature of the Soviet threat, why the situation was as it seemed, the best U.S. policies for these conditions, and the appropriate level of resources to devote to a particular plan of action. From these deliberations and others came a more refined strategy of containment and a new set of international institutions that saw the United States through the Cold War.

The United States will need a similar deep examination of the contours and conditions associated with the jihadist challenge in order to fashion a more sustainable strategy going forward. The good news is that the American record of strategic
Given the alarming analytics and the daunting inheritance, we face a number of exceedingly difficult yet critical challenges in the years ahead. Whether dealing with the terrorist threat, the national security implications of the information revolution, or the global economic implosion, the United States must act firmly and confidently to protect and advance its national interests, preserve its unique role in the world, and renew the moral authority of American leadership.

The Inheritance

The United States must begin by assessing the challenges and opportunities of the new security environment. The next president must grapple with the fundamental paradigm-shifting events that have taken place in the international security environment—such as... The assessment of the challenges and opportunities of the new security environment as well as realistic objectives derived from our national interests.

The Inheritance and the Way Forward

The challenge of restoring America's authority in the world is the greatest any American president has had to face in more than a half century. Restoring America's standing in the world will require not only new rhetoric but, far more important, concrete deeds. The next president must demonstrate early and clearly that the United States is embracing a new national security strategy that sets a new course while reclaiming the best traditions of American foreign policy. The next generation of American leadership will need a deep understanding of the fundamentally changed world in which the United States finds itself.

First, U.S. strategy must be grounded in our national security strategy must be based on a clear understanding of the challenges and opportunities of the new security environment as well as realistic objectives derived from our national interests.

The broad contours of this new approach to the United States' role in the world must be based on several principles. First, the United States must remain the world's preeminent military and economic power. The United States must remain the most powerful, prosperous, and influential nation on earth. Our nation's history, power, and potential are the defining attributes of our national identity. Our nation's preeminence in the world is a matter of national self-interest and self-defense.

Second, in order to protect and advance U.S. national interests and ensure the security, prosperity, and freedom of our friends and allies, the United States must remain a respected and indispensable member of the international community. The United States must be able to use its military and economic might to protect and advance its interests in the world. The United States must be willing to shoulder its share of the burden of defending the international order against threats to our vital interests.

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from transnational terrorism to WMD proliferation to global climate change, the United States cannot deal with them effectively without capable and committed allies and partners. This will require revitalizing and, in some cases, re-conceptualizing our alliances and partnerships to deal with emerging challenges. And we should help allies and partners build their capacity, making these constructive partnerships a national security priority.

Sixth, a new approach should recognize that military power is necessary but not sufficient to deal with 21st century challenges. The United States will continue to need a strong military second to none, but complex problems demand solutions that integrate all of the instruments of our national power. This points to a need for major reform of our interagency processes (which are now essentially ad hoc) and a more balanced investment in national security to enhance capabilities on the civilian side.

Actions Speak Louder than Words

Grappling with the inheritance will be a long-term effort requiring vision, sacrifice, and persistence. The task will be Herculean and will likely be met with no small degree of skepticism on the part of our allies and outright hostility on the part of many others. Any positive steps forward will be viewed with skepticism through the lens of the recent past. The United States will have to prove, over and over again, that it has changed course before global confidence in U.S. leadership is restored.

Yet the daunting nature of the tasks ahead must not deter future leaders from the necessary work of putting American leadership back on track. We must work to overcome the Iraq syndrome — at home and abroad. While restoring the United States’ credibility and international standing will likely take a generation or more, the next president can demonstrate a clear change of policy and direction through a series of concrete actions taken in the first year of his or her term. While these steps do not constitute a comprehensive set of strategies to address every aspect of the inheritance, they are critical steps a new president should take to begin to restore U.S. credibility, influence, and power and start the country down the path of a new American security. The top ten, not necessarily in priority order, are:

1. Transition out of Iraq.
2. Overhaul U.S. strategy for the long struggle against violent extremists.
3. Reinvigorate the Middle East peace process.
4. Affirm and vigorously enforce U.S. commitment to the rule of law.
5. Reject preventive war.
6. Identify and pursue a broader set of strategic priorities.
7. Revitalize U.S. alliances, partnerships, and international institutions.
8. Be proactive in the use of American soft power.
9. Restore fiscal discipline.
10. Revitalize the U.S. military and ensure its prudent use.

Transition Out of Iraq

Nothing has damaged U.S. credibility more in the eyes of the world than the Iraq War. For some, the United States’ decision to go to war against the support of the international community was evidence of a new American penchant for unilateralism and a sign that the United States could no longer be trusted to use its unmatched power with restraint, wisdom, and prudence. For others who initially supported the war subsequent revelations about the manipulation of intelligence and the botched execution of post-conflict operations have undermined our standing as a fair and competent leader in international affairs. And for our adversaries, the Iraq War has been an enormous propaganda boon, strengthening the extremist narrative against the United States and its allies and converting a whole new generation of recruits to their cause.

The only way to limit and recover from this extraordinary damage is to end U.S. involvement in the war. But in doing so, the United States must take great care to avoid precipitous withdrawals that could result in a greater catastrophe for Iraq and the broader Middle East. The United States should begin a phased transition calibrated to protect its most fundamental interests — no al Qaeda safe havens, no regional war, and no genocide — while drawing down the American troop presence over the next few years. Ultimately, the United States should have no permanent bases in Iraq and no permanent military presence in the country. We should forswear any such goal immediately.

Going forward, U.S. strategy in Iraq should have three elements: a “bottom-up” approach to strengthening security at the local and provincial level; a continued “top-down” effort aimed at Baghdad and the Iraqi government; and assertive regional diplomacy as called for by the Iraq Study Group. The objective of bottom-up efforts in Iraq should be to help establish an internal balance of power, where both the Kurds in northern Iraq and the Sunnis in Anbar province provide internal security against al Qaeda; as well as to deter any large-scale incursions by militias or a rogue government force. Helping local and provincial leaders build security forces, gain effective access to American and international aid, and maintain open, constructive communications with U.S. advisors will limit the level of instability that may occur as U.S. forces leave. Top-down efforts in Iraq must aim to maintain robust connections with the central government, encourage and facilitate political reconciliation and negotiation, and increase economic development and the training and advising of national security forces.

To reinforce both the bottom-up and the top-down elements of the strategy, and to pave the way for an ultimate withdrawal of U.S. military forces from Iraq, a balanced strategy must also include robust regional diplomacy. In order to avoid regional war in the next several years, this diplomacy should consider the threat perceptions of other Sunni states in the region, especially Saudi Arabia, and retain a residual U.S. force posture that convinces external actors that genocide of Iraq’s Sunni population will not occur. At the same time, the United States must engage our allies in the region to secure basing and overflight rights needed for a long-term enhanced presence in the Gulf region. Any workable strategy must bring Iraq’s neighbors and the international community together to set the parameters for a diplomatic negotiation over the future of Iraq and the region. Consistent with this strategy, the phased transition of the U.S. military presence in Iraq should begin in 2007 and be completed under the next president.

Overhaul U.S. Strategy vs. Violent Extremists

Conceiving of the United States’ struggle against violent Islamist extremists as a “Global War on Terror” (GWOT) has been both misguided and damaging to U.S. international standing. While the threat of violent extremism is real and must be addressed as a top priority in any new national security strategy, the GWOT framework is counterproductive for several reasons. First, and perhaps most importantly, it plays right into the hands of the jihadists by reinforcing their narrative that this is a “holy war” between Islam and the infidels. Second, it alienates allies and partners who view the threat differently and whose coop-
eration is absolutely critical to our success. Third, it implies that the U.S. military is the primary instrument for dealing with this adversary, when nothing could be further from the truth.

While the U.S. military certainly has critical roles to play in conducting counterterrorism, counter-insurgency, and stability operations, the primary tools of this long struggle will be intelligence and law enforcement, as well as assistance programs that seek to address underlying grievances and drive a wedge between the extremists and the populations from which they draw recruits, resources, and support. The most important long-term element of our strategy is marginalizing groups like al Qaeda from their bases of support. Doing so will require a highly differentiated approach, tailored to local contexts and conditions, using all of the instruments of our national power.

Six years after 9/11, the United States has had some important tactical successes, such as capturing and killing some key members of al Qaeda and a foiling a number of plots before they could be carried out. But the nation still lacks a long-term strategy for reducing the appeal, power, and relevance of violent Islamist extremists. Re-conceptualizing and redefining the “war on terror” as it is in the next term should be a top priority for the next president, both to render U.S. efforts more effective and to communicate to the world that he or she intends to take a fundamentally different and more strategic approach.51

Reinvigorate the Middle East Peace Process

The United States has an indispensable role to play in brokering peace between Israel and the Palestinians. But for much of the Bush administration’s two terms in office, it has been absent from the negotiating table. The lack of a viable Middle East peace process has been exploited on a daily basis by Islamist extremist propaganda, which depicts the United States as insensitive to the plight of the Palestinian people and of Muslims more broadly.

Given this issue’s resonance with the Muslim world and its centrality to creating lasting peace and stability in the Middle East, it is imperative that the peace process once again rises to the level of a top priority for the next president. Unfortunately, reinvigorating the peace process will not be a matter of simply picking up where we left off. Much has changed since the United States was last deeply engaged in brokering the peace process: Hamas is a duly elected entity vying for control of the Palestinian Authority; conflict between Fatah and Hamas in Gaza has raised concerns over a Palestinian civil war; Israel and Hezbollah have engaged in armed conflict across Israel’s border with Lebanon; and both the Israeli and Palestinian politics seem at a loss for how to get out of their current predicament. Nevertheless, the United States must re-engage to help chart a way forward toward the ultimate vision of two viable states, one Israeli and one Palestinian, coexisting in peace.

Affirm and Vigorously Enforce U.S. Commitment to the Rule of Law

The next president should take a number of concrete actions to demonstrate the United States’ renewed commitment to the rule of law. Such a commitment will take years of consistent behavior to prove, but a few bold measures taken early in the next administration could have a profound impact on our image around the world and send a clear signal that the United States intends to return to its former status as a champion of the rule of law.

As a first order of business, the United States should close the detainee facilities at the U.S. Naval Base in Guantanamo Bay, Cuba. The struggle against terrorism requires useful intelligence, evidence admissible in federal and international courts, close collaboration with allies, and a worldwide campaign for hearts and minds. Facilities like Guantanamo that operate in a netherworld of legal ambiguity and in the face of significant international opprobrium do more damage than good to America’s image and security.52 Closure of Guantanamo and transfer of all detainees either to their home countries or to the U.S. legal system would signal to our allies that we intend to prosecute the struggle against violent extremists in a legal, transparent, and democratic manner, within the confines of international laws of war, and signal that the United States still values the provisions of detainees’ justice under common a r ticle three of the Geneva Conventions. Finally, and significantly, closure would deprive al Qaeda of a high-profile “propaganda gift” —one that gives a daily basis through media channels around the world.53

The United States should also renounce the practice of extraordinary renditions. Legally, transferring individuals for the purpose of evading due process is dangerous and unsustainable.54 Many prominent human and civil rights groups have alleged that those detained and rendered under this program are subjected to torture and other cruel and unusual treatment.55 Yet information gathered outside of legal procedures and via torture is usually inaccurate and always inadmissible in court.56 Such abuses of international and national law imperil future attempts to prosecute apprehended terrorists and those who support them, and undermine U.S. credibility with our allies and foreign publics.57

Extraordinary renditions also alienate many whose support we would value, and they promise to grow a vanguard of individuals and their families with grievances against the United States and those who assist us in this program. And even if extraordinary renditions could somehow be divested of all consequences to torture, the detention of individuals outside of judicial review still would be a mitigous under international and domestic law. Because of its detrimental effect on relations with our European allies, its dubious legality, and its ineffectiveness as a method for preventing terrorism, the CIA’s program of extraordinary renditions should be sharply curtailed if not eliminated.

The United States should apply the four Geneva Conventions in the context of the campaign against terrorism, to bring the majority of state counterterrorism activities into the realm of law. The Conventions provide a more than adequate framework for detaining, trying, and protecting most classes of individuals captured and accused of terrorism. This is certainly true for organized groups operating in countries that are parties to the Conventions, as the Bush administration itself admitted by recognizing the Taliban’s right to the treatment guaranteed under the auspices of the

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The Inheritance and the Way Forward

Geneva Conventions. And because the additional protocols also recognize the rights of members of civil insurgencies, detainees from Iraq and Afghanistan cannot be covered under the Conventions.

More broadly, the United States should begin a systematic program of bringing terror suspects into American and other national legal systems as comprehensively as possible. The greatest triumphs of the campaign against terrorism thus far have been the seizures of terrorists before they strike. Pursuit, capture, and prosecution, while less dramatic than war, are used effectively by law enforcement personnel all over the world. Their work requires the vigorous application of binding law to detain and try the world’s most dangerous violent extremists. In addition, this work is and should be carried out primarily by civilian personnel, rather than the military. “Taking the military out of the business of detention” will ease one source of strain on the armed forces and inject more legitimacy into the pursuit and capture of terrorist criminals.

It should not take Supreme Court rulings to persuade the president to follow the law. However, many analysts and members of the current administration have complained that current law does not provide the tools or the latitude to detain suspects of terrorism. While many of these assertions may have been overstated, some changes to the law may be required. Where necessary, the next administration should work with the Congress to ensure more legally expedient ways to detain and question suspected terrorists while still allowing them to remain inside the legal system. As indicated above, international humanitarian law and law of war generally cover the exigencies of the so-called war on terror. However, if the next administration and Congress see deficiencies in the international legal system as well, the United States should convene the international community to address and correct such gaps.

Reject Preventive War

The Bush administration’s articulation of a new doctrine of preemption in its 2002 National Security Strategy report and its subsequent launching of a preventive war against Iraq created the impression that the United States will use force on a unilateral and highly proactive basis, unconstrained by international law.

Presidents have long reserved the right to use force against an adversary in the face of an imminent threat. Indeed, this right is generally understood to be an aspect of self defense as defined in Chapter VII, Article 51 of the U.N. Charter. Customary international law authorizes any state targeted by another to employ military force as necessary to protect itself. The right of self defense is not limited only to instances of actual armed attack. States are permitted to act when the imminence of attack is of such a high degree that a nonviolent response would effectively be meaningless. In such cases, self defense may be taken before actual attack occurs. If an attack appears imminent, if all practical, peaceful means have been exhausted, and if the preemptive military action is consistent with the just war principle of proportionality—that is, limited in intensity and magnitude to what is reasonably necessary for self defense.

In the wake of the 9/11 attacks, the Bush administration departed from this well-established approach to make preemptive action and preventive war centerpieces of U.S. national security policy. Speaking at West Point’s commencement in June 2002, President Bush explained his administration’s new doctrine of preemption: “If we wait for threats to fully materialize, we will have waited too long. [O]ur security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.” This doctrine was used as a rationale for launching the preemptive war in Iraq in the face of what was argued to be a “gathering threat” of weapons of mass destruction in the hands of a ruthless dictator. In the eyes of many war supporters, it also lessened the importance of obtaining a U.N. resolution authorizing (and legitimizing) the war.

To restore U.S. credibility, the next president should openly repudiate the Bush administration’s policies on preemption and preventive war. While he or she should certainly reserve the traditional right to take preemptive action in self defense, it is imperative that the next president clarify that the United States intends to exercise this right only in extreme circumstances, such as in the face of an imminent attack, and in accordance with its obligations under international law.

Identify and Pursue a Broader Set of Strategic Priorities

Since the invasion of Iraq, the United States has suffered from an extreme case of strategic myopia. The war in Iraq has consistently eclipsed every other issue of strategic import for the long-term interests of the United States, such as the rise of China, worriesome developments in Russia, energy insecurity and global climate change, preventing proliferation and use of weapons of mass destruction, and even the war in Afghanistan — our most direct response to the September 11 terrorist attacks. Seen in this light, the costs of Iraq must be measured not only in blood and treasure, but also in terms of strategic opportunity costs to the nation. In international affairs, there is no such thing as a benign neglect.

In January 2009, when the next administration takes office, all of these neglected yet critical issues will be on the new president’s attention. In the face of this onslaught, the next president would be wise to conduct at the outset of his or her administration a National Security Review designed to survey the full range of challenges and opportunities confronting the United States, set clear priorities, and produce a latter-day NSC-68 for U.S. policy and action going forward.

More specifically, the president should designate a senior national security official (most likely the national security advisor) to lead an interagency process to develop a national security strategy and identify the capabilities required to implement it — diplomatic, informational, military, and economic. This review should engage the president...

[Further text not shown]
The next president must confront his issue head on with each of the United States’ key allies in Europe, Asia, the Middle East, and the Americas. For all of them, U.S. leadership is essential to achieving our goals worldwide. This presents an opportunity to conduct a strategic review of U.S. national security policies and capability requirements and redefine a compelling and coherent way forward.

The Review should begin with an interagency assessment of factors affecting our national security environment and the strategies required to implement the strategy and achieve our goals. It should build on the lessons learned from the Bush administration and provide the next administration with a strategic overview of the current threat environment.

The Review should also be an institutional opportunity to develop a national strategy for achieving our goals worldwide. The Review should be designed to foster debate and discussion, and to help shape a new vision for American leadership.

The Review should be structured to foster constructive and open discussion on how to best achieve our goals worldwide. It should provide a forum for leaders to discuss the strategic implications of our national security environment and the strategies required to implement the strategy and achieve our goals.

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Revalorization of the U.S. Military and Ensures Its Prudent Use

The Inheritance and the Way Forward

June 2007

The United States military must be able to conduct the full spectrum of operations—from war-fighting to humanitarian assistance—under the most varied set of demands. The United States military was organized for fight-on-theater wars against conventional armies; it will need to undergo significant changes to meet the future irregular threats. Adapting conventional forces to provide more capability in certain high-demand areas, in addition to educating and equipping the force for a new type of conflict, will help ensure the nation's ability to adapt and succeed in an uncertain future.

The next president must make reducing these strains a priority and help the force to recover its readiness. Current estimates suggest that the Army, and its 33 aviation brigades, will need $13 billion of equipment, and the Marine Corps $5 billion per year to replace all of the equipment that has been lost or damaged in Iraq and other operations. In addition, maintaining the military will require deep changes to the force that will affect the way the military is structured, the equipment it uses, and the training it accrues.

For the past several years, the Congress has been making significant reductions in the size of the Army and the Marine Corps, but it has maintained funding for equipment. While current budget levels are consistent with the Army and Marine Corps's overall requirements, they may not be enough to ensure readiness. The Office of the Secretary of Defense (OSD) has estimated that the Army needs $30 billion annually to maintain full wartime strength and store its strategic war reserve, and the Marine Corps needs $15 billion annually to maintain full wartime strength.

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A particularly important and concrete step the next president and secretary of defense can take early on is to foster a healthy civil-military command climate, one that encourages senior military leaders to offer their best military advice and counsel even if it constitutes dissent, one that holds both civilian and military leaders accountable for the decisions they make, and one that avoids politicizing the senior officer corps. 

CNAS plans to publish a proposed “Terms of Reference” for U.S. civil-military relations in the fall of 2008.

CONCLUSION

Addressing the inheritance will require a fundamental reframing of the U.S. role in the world and the development of a much more integrated approach to national security, one that fully resources and employs all of the instruments of national power. The next president will need to restore public and international confidence in American ability to use its power in responsible ways that enhance U.S. security and promote the greater good. He or she will also need to demonstrate a renewed appreciation of the necessity of alliances, partnerships, and coalitions to address global problems and transnational threats. This will require a more integrated national security strategy that fully utilizes non-military tools that have gathered dust in recent years, such as multilateral diplomacy, economic persuasion, and responsible stewardship of national and international law.

Perhaps the most consequential thing the next president can do to strengthen our national security is to take visible, concrete steps to begin to restore U.S. credibility and influence abroad. This will involve reversing damaging U.S. policies, mending strained diplomatic and institutional relationships, demonstrating a renewed commitment to the rule of law, and taking a series of bold actions to reestablish the United States’ bona fides as the indispensable partner in advancing stability, prosperity, and progress. Managing the inheritance will also require restoring our military and shoring up our economic power.

In the face of skeptical publics at home and abroad, a deeply divided nation and Congress, disillusioned and wary allies, and tenacious and often vicious adversaries, charting this new way forward for America will be a difficult, vexing, and time consuming challenge. It will also be the new president’s most important. It will likely determine his or her place in history. Most important, how he or she manages the inheritance will in large part determine whether U.S. security and influence will wax or wane still further in the years to come.
Presidential Candidates’ Essays on American Foreign Policy, courtesy of FOREIGN AFFAIRS

Renewing American Leadership
Barack Obama

Rising to a New Generation of Global Challenges
Mitt Romney

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Toward a Realistic Peace
Rudolph W. Giuliani

Reengaging With the World
John Edwards


Security and Opportunity for the Twenty-first Century
Hillary Rodham Clinton

An Enduring Peace Built on Freedom
John McCain


For more:
http://www.foreignaffairs.org/special/campaign2008
The American moment is not over, but it must be seized anew. To see American power in terminal decline is to see the well-being of those who live beyond our borders. The mission of the United States is to provide global leadership, grounded in the understanding that the world shares a common security and a common humanity.

To renew American leadership in the world, we must first bring the Iraq war to a responsible end and refocus our attention on the broader Middle East. America was a divisor of the Middle East before the 9/11 attacks, and the successful prosecution of war against terrorists compounds the strategic blunder of 9/11 and its aftermath. We have now lost over 3,300 American lives, and thousands more suffer wounds both seen and unseen.

We have faced a crisis of leadership at home and abroad: a divided executive and legislative branch, an approaching economic downturn, and an ongoing war. A strong military, however, does not guarantee leadership. Our leaders must provide the vision and courage to shape and strengthen American power.

As Roosevelt built the most formidable military the world had ever seen, his Four Freedoms gave purpose to our struggle against fascism. Truman championed a bold new architecture to respond to the Soviet threat -- one that defined America's role as an international foundation of liberal democracy. They came from a warming planet that will spur new diseases, spawn more devastating natural disasters, and catalyze deadly conflicts.

Today, we are again called to provide security and leadership. The United States must forcefully and persistently confront the Islamic Republic of Iran and its aggression. Tough-minded diplomacy backed by the threat of force -- including, if necessary, the use of military force -- is the only way to rouse the Iranians from their illusion that nuclear weapons will protect their regime and only substances that have the potential to create instability and conflict.

Our stewardship of this generation's challenges is built on the foundation of an America secure and free, a world more just and peaceful. That is a commitment I will make.

And they come from a world in shambles. The American people want to know the truth. They want to know what happened. They want to know who is responsible.

The American moment is not over, but it must be seized anew.
We must use our military might to stop the flow of arms to terrorist groups, demobilize and disarm terrorist groups, and protect our citizens and our friends and allies around the world. We must also continue to work to prevent the spread of nuclear weapons and materials.

HALTING THE SPREAD OF NUCLEAR WEAPONS

As George Shultz, William Perry, Henry Kissinger, and I have argued, we must pursue a comprehensive strategy to prevent the spread of nuclear weapons and materials. This strategy includes:

1. Enhancing our diplomatic efforts to prevent the spread of nuclear weapons and materials.
2. Strengthening our nonproliferation regime and working to ensure that all nations abide by their commitments.
3. Investing in research and development to develop new technologies and approaches to prevent the spread of nuclear weapons and materials.
4. Enhancing our intelligence capabilities and sharing intelligence information with our allies.
5. Investing in programs to demilitarize and disarm terrorist groups.

REBUILDING THE PROTECTION OF NUCLEAR Facilities

As Commander in Chief, I will work closely with the Department of Energy and the Nuclear Regulatory Commission to protect our nation's nuclear facilities.

SUPPORTING THE WARRIOR

I will ensure that our troops have the resources and support they need to succeed.

As we lock down existing nuclear stockpiles, I will work to negotiate a verifiable global ban on the production of new nuclear weapons and materials. We must also work to strengthen the Non-Proliferation Treaty and ensure that countries comply with their obligations.

South Africa, China, Russia, and Iran are all working to eliminate their nuclear stockpiles. We must work with these nations to ensure that they do not acquire weapons of mass destruction.

In the Islamic world and beyond, combating the terrorists' prophets of fear will require more than lectures on democracy and human rights. It will require a strong commitment to the security of our citizens and our friends and allies around the world.

As we continue to build our military, we must also ensure that our troops have the support they need to succeed.

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moderation, America must make every effort to exploit opportunities to - access to education and health care, trade and investment - and provide the kind of steady support for political reform and civil society that has enabled the victory of moderate forces in places like Egypt and Indonesia. The American people believe in their heart of hearts that their role in the world is both necessary and possible. And I believe we can - and will - pull this off.

REBUILDING OUR PARTNERSHIPS

To renew American leadership in the world, I intend to rebuild the alliances, partnerships, and institutions that will help us meet the challenges of the 21st century. These include the United Nations, NATO, and the Organization of American States. We need a world that is more inclusive, with a greater role for emerging nations and greater support for institutions like the World Bank and IMF.

Our alliance with Europe is the bedrock of our global power. In the wake of September 11, America and Europe were already coming together to counter the threat of international terrorism. Together we will fashion a world order that recognizes the right of all states to live in peace and security. And as we strengthen NATO and the EU, we must build new alliances and partnerships with other regional powers. As China rises, it is in our interest to approach it as a partner and not as an enemy. Our goal must be to persuade China to play a responsible role as a growing power - to help lead in addressing the common challenges of the 21st century. We will compete with China in some areas and cooperate in others. Our essential challenge is to build a relationship that broadens cooperation while strengthening our ability to compete. And as we strengthen NATO, we must build new alliances and partnerships in other vital regions. As China rises, we will need effective cooperation on issues like climate change, nuclear proliferation, and energy security.

And as we strengthen the trimming stroke, transforming health care in the Philippines, we will forge a more cooperative framework in Asia that gives the United States a voice in the region's affairs. We need a strong partnership with China, to provide economic and political stability for the entire region.

We will also need to work with Russia to address the nuclear proliferation threat in Asia. Russia and China are both nuclear powers, and we must work with them to prevent the spread of nuclear weapons.

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foreign aid if we fail to invest in security and opportunity for our own people. We cannot negotiate trade agreements to help spur development in poor countries so long as we provide no meaningful help to working Americans burdened by the dislocations of a global economy. We cannot reduce our dependence on foreign oil or defeat global warming unless Americans are willing to innovate and conserve. We cannot expect Americans to support placing our men and women in harm’s way if we cannot show that we will use force wisely and judiciously. But if the next president can restore the American people’s trust -- if they know that he or she is acting with their best interests at heart, with prudence and wisdom and some measure of humility -- then I believe the American people will be eager to see America lead again.

I believe they will also agree that it is time for a new generation to tell the next great American story. If we act with boldness and foresight, we will be able to tell our grandchildren that this was the time when we helped forge peace in the Middle East. This was the time we confronted climate change and secured the weapons that could destroy the human race. This was the time we defeated global terrorists and brought opportunity to forgotten corners of the world. And this was the time when we renewed the America that has led generations of weary travelers from all over the world to find opportunity and liberty and hope on our doorstep.

It was not all that long ago that farmers in Venezuela and Indonesia welcomed American doctors to their villages and hung pictures of JFK on their living room walls, when millions, like my father, waited every day for a letter in the mail that would grant them the privilege to come to America to study, work, live, or just be free.

We can be this America again. This is our moment to renew the trust and faith of our people -- and all people -- in an America that battles immediate evils, promotes an ultimate good, and leads the world once more.
While the difficult struggle in Iraq dominates the political debate, we cannot let current polls and political dynamics overwhelm our intelligence, are well known. A growing number of experts question whether we have the capabilities to meet various transnational challenges, ranging from pandemic diseases to international terrorism. And while the United States has stood impotent in the face of genocide in Sudan and has been unable to address Iran's rush to build nuclear weapons, the balance of the world's power has shifted. Nations once united in opposition to the Soviet threat now divide on the question of how to contain nuclear proliferation in Iran. Yet the price of the United States for a failure of leadership in this arena would be too high.

A NEW GENERATION OF CHALLENGES

The current conflict, the al Qaeda threat is the defining challenge of our generation and is symptomatic of a range of new global realities. The jihadist threat is the defining challenge of our generation and is symptomatic of a range of new global realities. The jihadist threat is the defining challenge of our generation and is symptomatic of a range of new global realities. The jihadist threat is the defining challenge of our generation and is symptomatic of a range of new global realities. The jihadist threat is the defining challenge of our generation and is symptomatic of a range of new global realities.
The next president should commit to spending a minimum of four percent of GDP on national defense. Increased military spending is essential to maintaining the United States’ global leadership.

Second, the United States must become energy independent. This does not mean no longer importing or using oil. It means we need a comprehensive energy strategy that empowers the American people. It means we need to build a world where we are not at the mercy of oil-producing states.

We are on the verge of a new energy revolution, one that will transform the way we live, work, and travel. This revolution will require technology that allows us to use energy more efficiently in our cars, homes, and factories.

For example, if we were to develop new and alternative sources of energy, we could reduce our dependence on oil and gas. This would not only benefit our economy, but it would also have significant environmental benefits.

Energizing Civilian Capabilities

Energy independence will require a fundamental change in the way we think about energy. We need to think beyond the traditional avenues of energy production, such as coal, oil, and gas.

We need to initiate a bold, far-reaching research initiative -- an energy revolution -- that will be our generation's equivalent of the Manhattan Project or the mission to the moon. It will be a mission to create new, economical, and efficient sources of energy.

We need to make a long-overdue investment in equipment, armament, weapons systems, and strategic defense. The need to modernize has lagged behind. This is a troubling scenario for the future, and it puts our country and our troops -- present and future -- at risk.

Energy independence will not be achieved overnight. It will require sacrifice from the American people. But I believe America is ready for the challenge. To meet it, we need to:

1. **Rethinking and Energizing Civilian Capabilities**
   - We need to invest in our military's civilian capabilities. This means investing in education, health, banking, energy, commerce, law enforcement, and diplomacy. We need to ensure that our civilian and military infrastructure is capable of supporting our national security needs.
   - We need to develop a clear line of authority. Too often, our resources in education, health, banking, energy, commerce, law enforcement, and diplomacy are not used effectively.

2. **Energy Independence**
   - We need to re-examine our dependence on oil. This does not mean no longer importing or using oil. It means we need a comprehensive energy strategy that empowers the American people. It means we need to build a world where we are not at the mercy of oil-producing states.
   - We need to make a long-overdue investment in equipment, armament, weapons systems, and strategic defense. The need to modernize has lagged behind. This is a troubling scenario for the future, and it puts our country and our troops -- present and future -- at risk.

3. **Leadership**
   - We need to lead the international community and the Palestinian government to deliver. The West Bank should be no surprise given that the group has provided Palestinians with the basic services that neither conflict between Israel and Lebanon broke out last summer? Likewise, the popularity of Hamas in Gaza and the modernization have increased the costs and the uncertainty of our military preparedness. The next president should commit to spending a minimum of four percent of GDP on national defense.

4. **Sacrifice**
   - We need to make a long-overdue investment in equipment, armament, weapons systems, and strategic defense. The need to modernize has lagged behind. This is a troubling scenario for the future, and it puts our country and our troops -- present and future -- at risk.

President Bush has proposed an increase in defense spending for next year. This is an important step, but we need to do more. We need to invest in our military's civilian capabilities, develop a clear line of authority, and make a long-overdue investment in equipment, armament, weapons systems, and strategic defense. The need to modernize has lagged behind. This is a troubling scenario for the future, and it puts our country and our troops -- present and future -- at risk.
Saddam Hussein, in most of our nonmilitary resources seemed stuck in Iraq. Then, just as we were taking casualties and spending over $70 billion on the war, US military authorities were fighting everywhere else, including Afghanistan. Yet, because of the limitations on the current limited approaches to coal for a transformation and true transform our military and diplomatic capabilities, we need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions. The United States has not only failed to build a new global coalition but has also failed to work with our partners in the region to build a new regional coalition.

The new generation of challenges we face may seem daunting. Yet confronting challenges has always made the difference between our current limited approaches to coal for a transformation and true transform our military and diplomatic capabilities, we need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions. The United States has not only failed to build a new global coalition but has also failed to work with our partners in the region to build a new regional coalition.

The challenges we now face – especially terrorism, genocide, and the spread of weapons of mass-destruction – require global networks of intelligence and law enforcement. We need to also look for new ways to strengthen regional cooperation and develop partnerships with responsible actors in order to confront challenges such as the genocide in Darfur. These partnerships should be built on the foundations of democracy, human rights, and the rule of law. We need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions.

Finally, we need to continue to push for the development of new regional coalitions. This will require continued, sustained commitment and the support of our partners in the region. The United States should continue to build on the foundations of democracy, human rights, and the rule of law. We need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions.

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MOYEN FORDWARD

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President Bush is right when he says that we need to work with our partners in the region to build a new global coalition. We need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions. The United States should continue to build on the foundations of democracy, human rights, and the rule of law. We need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions.

In the changing world, we face alliances and engage in collective security against aggression and genocide. The United States should continue to build on the foundations of democracy, human rights, and the rule of law. We need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions. The United States should continue to build on the foundations of democracy, human rights, and the rule of law. We need to fundamentally change the culture of our military and diplomatic institutions to develop new regional coalitions.

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Reengaging With the World

John Edwards

A Return to Moral Leadership

Summary: In the wake of the Iraq imbroglio, we must restore America's reputation for moral leadership and reengage with the world. We must move beyond the empty slogans of "war on terror" and create genuine national security policies that will be embraced by the world.

At the dawn of a new century and on the brink of a new presidency, the United States today needs to reclaim the moral high ground that defined our foreign policy for much of the last century.

Reconstituting the moral high ground that defined our foreign policy for much of the last century will be critical if we are ever to regain the trust and respect of those who seek a stable and prosperous world. At a time of growing global interconnectedness, the United States needs to lead the world through the challenges of the twenty-first century.

The last century saw tremendous advances in human rights, the emergence of a global community, the proliferation of technical and scientific knowledge, and an expanding world economy. These advances have all contributed to a new century of unprecedented opportunities for human fulfillment and progress.

But we must also prepare for a world shaped by new risks: the increasing use of non-state actors to inflict and sustain large-scale violence. And while the world has been shaped by new technologies, it is also facing new threats.

Restoring America's Reputation

A Return to Moral Leadership

Reengaging With the World

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The last century saw tremendous advances in human rights, the emergence of a global community, the proliferation of technical and scientific knowledge, and an expanding world economy. These advances have all contributed to a new century of unprecedented opportunities for human fulfillment and progress.

But we must also prepare for a world shaped by new risks: the increasing use of non-state actors to inflict and sustain large-scale violence. And while the world has been shaped by new technologies, it is also facing new threats.

We need a new path, one that will lead us to the world that we want to see. We need to make the world safer, but we cannot simply send in the military. We need to lead the world through the challenges of the twenty-first century.

The key to achieving this goal is to reengage with the world. We need to reach out to ordinary men and women from around the world, to show them that America is a country built on hope, not fear. We need to reconnect with our history of courage, liberty, and generosity.

The United States needs to lead the world through the challenges of the twenty-first century. But we cannot do it alone. We need to work with our friends and allies, and we need to work with our enemies. We need to reengage with the world.
We also need to renew our commitment to engagement and diplomacy in order to solve problems before they occur, to assist UN and African Union peacekeeping efforts in Darfur. And we must continue to pressure other countries after the military reserves, will consist of at least 10,000 civilian experts who could be deployed abroad to serve in states should also impose a new round of multilateral sanctions on the Sudanese government and freeze the foreign stock-market analysts. In most cases, the help of thousands of such specialists is required. Yet for years, the U.S.

Indeed, new leadership is needed for a broader, more systematic approach to confronting the most dangerous threat of the new century: the proliferation of weapons of mass destruction (WMD). In working toward the goal of a nuclear-free world, the United States must hold the other powers to its rules and rules. We must also strengthen our nation's capacity to identify and respond to WMD threats by reforming the ways the U.S. government, in most cases, the help of thousands of such specialists is required. Yet for years, the U.S.

Our enemies are taking advantage of the United States' declining popularity. According to a recent article by The New York Times, the Bush administration's ineffective policies and has announced plans to expand its nuclear program. Meanwhile, our law enforcement, security, and intelligence professionals are to be congratulated and honored for stopping Iran's nuclear program. The recent announcement by the International Atomic Energy Agency that Iran has continued its nuclear program is a significant setback. We must increase our efforts to identify and respond to WMD threats by reforming the ways the U.S. government, in most cases, the help of thousands of such specialists is required. Yet for years, the U.S.

We must confront these challenges not only through our military but also through diplomacy. Few areas deserve the close attention of U.S. policymakers as much as the nuclear nonproliferation agenda. The United States should use all available tools to prevent the spread of nuclear weapons. This includes strengthening international laws and norms, as well as increasing pressure on countries that are actively pursuing nuclear weapons.

President Bush's recent statement that the United States will continue to build its nuclear arsenal is a clear indication of the Administration's priorities. We must work to ensure that the United States remains a leader in the nonproliferation agenda. This requires a commitment not only to the nonproliferation treaty but also to strengthening the international legal framework that underpins it. We must also work with our allies to ensure that the treaty is effectively implemented.

The United States should also engage with other countries on the nonproliferation agenda. This includes working with Russia to strengthen the nonproliferation treaty and to combat other proliferation threats. We should also work with China to ensure that it fulfills its obligations under the treaty and to address other proliferation threats.

In conclusion, the United States must renew its commitment to engagement and diplomacy in order to solve problems before they occur, to assist UN and African Union peacekeeping efforts in Darfur, and to pressure other countries acting unilaterally. We must also strengthen our nation's capacity to identify and respond to WMD threats by reforming the ways the U.S. government, in most cases, the help of thousands of such specialists is required. Yet for years, the U.S.

RESTORING AMERICA’S MORAL LEADERSHIP

When it comes to reengaging with the world, there is no task more critical than restoring our moral leadership. We must begin by leading the fight to eradicate global poverty and provide universal primary education. At first glance, these areas might not seem directly related to our self-interest. But they are in fact intimately tied to our present and future national security. Unsurprisingly, we see radicalism rising today in unstable countries such as Afghanistan, Pakistan, and Somalia. A central component of our strategy is to build institutions that make it harder for the world’s most vulnerable people to fall prey to the promises of extremists. The military budget itself also needs substantial reform. Today, dozens of agencies perform overlapping tasks. There is no central overall accounting of all the security activities performed by all the relevant agencies. There are wasteful and counterproductive overlaps and gather all of our resources behind a unified strategy.

We will have to continue integrating rising powers into a peaceful international system by constructing them that they can both benefit from and contribute to the system’s strength. This means adapting our most important security policies in the way that we deal with China. China and India, among others, will assert their power and roles. The nation is economically important, and our relationship with the United States is critical to the stability of Asia. China has also offered substantial opportunities for economic growth and prosperity. We must do more to encourage and facilitate this growth, and we must cultivate a shared appreciation of our respective interests. This requires a shift in the way that we structure our trade relationships with China and India. As we open the markets of Asia, we will at the same time constrain our military interventions in the region. The United States needs to work hard to ensure that our interactions with China and India are constructive and open.
Clean water and sanitation are also necessary to improve health, education, and economic prosperity. Women and children bear the burden of poverty and disease in the developing world. Women in the poorest countries have a ten percent chance of dying during childbirth. More than ten million children die each year from preventable diseases. Developing countries suffer enormously from the top three killer diseases: AIDS, tuberculosis, and malaria.

As president, I will concentrate on reversing the spread of these three deadly diseases by guaranteeing universal access to preventive drugs and treatment by 2010. I will also substantially increase U.S. funding for clean-water programs. Finally, I will direct U.S. agencies to lead an international effort to dramatically increase preventive care, beginning with increased vaccinations and the provision of sterile equipment and basic medications.

Despite the urgency of these programs, the same redundancy that plagues our national security activities exists in our foreign assistance programs. Over 50 separate U.S. government entities are currently involved in the delivery of foreign aid. We need to return to President Kennedy's vision. He said in 1961 that the American system was fragmented, awkward, and slow and that improvement was necessary because “the nation's interest and the cause of political freedom require it.” Kennedy reformed the American foreign-aid system, and we need a similar fundamental restructuring today. As president, I will create a new cabinet-level position to coordinate global development policies across the government. I will also replace Kennedy's Foreign Assistance Act of 1961 with a Global Development Act to modernize and consolidate development assistance, and I will ask Congress to improve its oversight and revamp its committee structure so that it can be a more effective partner in this effort. With measures like these, we can reclaim our historic role as a moral leader of the world while at the same time making the world safer and more secure for the United States.

THE WAY FORWARD

In 1945, it would have been easy enough for us to glance at the devastation in Europe and look the other way. But leaders such as President Truman and General Marshall understood that it would require more than the United States' military might to rebuild Europe. Keeping post-World War II Europe safe from tyranny who would prey on poverty and resentment called for our ingenuity, our allies, and our generosity. General Marshall made a momentous decision to engage with the world in order to build a brighter, more hopeful future. In his 1953 speech accepting the Nobel Peace Prize for rebuilding Europe, General Marshall explained that military power was "too narrow a basis on which to build a dependable, long-enduring peace." He was right. Today's peaceful and prosperous Europe is a testament to his wisdom and foresight.

Our nation now stands at the pinnacle of its power, but it also faces serious challenges. Today, we need a national security policy for the twenty-first century that will not only respond to threats but apply all our resources to the critical goal of preventing such threats in the first place. We can be strong, secure, and good, and we can build a more hopeful future. Our national security policy should be designed to reach these goals. We must do everything in our power to reclaim the United States' historic role as a beacon for the world and become, once again, a shining example for other nations to follow.
Toward a Realistic Peace

Defending Civilization and Defeating Terrorists by Making the International System Work

By Rudolph W. Giuliani

Summary: The next U.S. president will face three foreign policy challenges: setting a course for victory in the Middle East, strengthening the international system, and extending America's influence. These goals are consistent with American values, the interests of our allies, and the will of the American people. In Iraq, the U.S. can achieve a political settlement through a long-term commitment to a stable democracy in the Middle East. In Afghanistan, the U.S. can work with allies to achieve a political settlement through a long-term commitment to a stable democracy in the Middle East. The next president can build the foundations of a lasting, realistic peace.

The United States is strong enough to overcome any enemy, but it is not invincible. The next president must be realistic about America’s weaknesses and capabilities. The United States is dependent on allies, and it must rely on intelligence and information to succeed. The United States is vulnerable to terrorism, and it is susceptible to economic shocks. The next president must be realistic about America’s strengths and capabilities.

Winning the First Battles of the Long War

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Winning the First Battles of the Long War

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A STRONGER DEFENSE

For 15 years, the de facto policy of both Republicans and Democrats has been to ask the U.S. military to do increasingly more with increasingly less. The idea of a Post-Cold War Peace Prize that included a "peace dividend," the notion that we could move beyond the conflict years, and thus be less dependent on our military power, was a false promise made to the American electorate. We were warned that the "peace dividend" would not only be smaller than expected, but it is necessary, and the benefits will outweigh the costs.

The U.S. Army needs a minimum of ten new combat brigades. It may need more, but this is an appropriate baseline to protect our allies and our interests with realistic wars. Our allies, in many cases, do not expect that we should hold down our military power. It is our responsibility to protect our allies and our interests with realistic wars. Our allies, in many cases, do not expect that we should hold down our military power. It is our responsibility to protect our allies and our interests with realistic wars.

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The lesson is that we need to talk for the sake of talking and never accept a bad deal for the sake of agreement. The lesson is that we need to talk for the sake of talking and never accept a bad deal for the sake of agreement. The lesson is that we need to talk for the sake of talking and never accept a bad deal for the sake of agreement.
institutions — must be strengthened in the international system, which most of the world has a direct interest in seeing function well. All of us benefit from a deep and productive peace and prosperity. So, too, does the safety and security of the world. It is critical that we find ways to strengthen the institutions that everyone depends on. The United Nations, for example, is often criticized for its ineffective response to crises. Yet it has also saved many lives. The United States should continue to engage with the United Nations, even in its critical current circumstances. We do not have to choose between strong support for the United Nations and the freedom to act independently to protect our interests.

The United States also needs to strengthen our alliances. The North Atlantic Treaty Organization (NATO) is still the most effective collective defense alliance in the world. It is a critical partner in the war on terrorism and has helped to ensure peace and security in Europe. But NATO must continue to adapt to the changing security environment. The United States and Europe must work together to ensure that NATO remains a credible and effective force for peace and security.

Finally, the United States must lead the world in efforts to combat catastrophic terrorism. The United States has made great progress in the war on terrorism since the attacks of September 11, 2001. But we cannot afford to become complacent. The threat of terrorism remains real, and it is crucial that we continue to work together to defeat this enemy.

As important as America's Western alliances are, we must recognize that American power is no longer sufficient to keep the peace alone. We need to work with our friends and allies to ensure that the international system remains strong and effective. This will require a commitment to good governance, economic growth, and democratic development. The United States can play a leading role in promoting these ideals around the world.

In conclusion, the United States must take a broad, long-term view of its interests and the world around it. This will require a commitment to diplomacy, economic development, and defense. The United States must work with its friends and allies to ensure that the international system remains strong and effective. The United States can play a leading role in promoting these ideals around the world.
but never has it been clearer that they work.

Every month, its open to new trade with the world’s most promising markets. And while we must not allow them to become special arrangements that undermine a truly global trading system, the United States must help overcome specific problems. But it does not need to do so to make our point. Because it fits the needs of the decade ahead.

Eisenhower and his successors accepted Truman’s framework, but they corrected course to fit the specific challenges of their own times. America’s next president must also craft policies to fit the needs of the decade ahead. But times and challenges change, and our nation must be flexible. President Dwight D. Eisenhower made the case in 1959:

Fundamentally, change in U.S. strategy since President Harry Truman reoriented American foreign and defense policy at the outset of the Cold War. But times and challenges change, and our nation must be flexible. President Dwight D. Eisenhower made the case in 1959:

"Even as the nation stays on the offensive against the terrorist threat, we must be ever mindful that the greatest threat to our security comes from within, not without. The challenge is to maintain social cohesion and to ensure that our democratic institutions remain strong and vibrant."

We must be ever mindful that the greatest threat to our security comes from within, not without. The challenge is to maintain social cohesion and to ensure that our democratic institutions remain strong and vibrant. The United States did similar work, and with great success, in Germany, Japan, and Italy after World War II. But even with the rich civic traditions in these nations, the process took a number of years. We must learn from our past if we want to win the twenty-first century.

In this decade, for the first time in human history, half of the world’s population will live in cities. I know from personal experience that when security is reliably established in a troubled part of a city, normal life rapidly reestablishes itself: shops open, people move back in, children start playing ball on the sidewalks again, and soon a decent and law-abiding community returns to life. The same is true in world affairs. Disorder in the world’s bad neighborhoods tends to spread. Tolerating bad behavior breeds more bad behavior. But concerted action to uphold international standards will help peoples, economies, and states to thrive. Civil society can triumph over chaos if it respects the distinctiveness of their local cultures but is consistent with the global marketplace. Today, we need a similar type of exchange with the Muslim countries that we hope to plug into the global economy.

Economic investment and cultural influence can also have a positive impact. Yemen is a country that has been torn by conflict and instability. But the United States has invested in education and cultural exchange programs, and Yemen is now becoming a beacon of hope in the region. And Saudi Arabia, which was a frequent target of Western criticism, has become a key partner in the war on terror. We must continue to build on these successes.

Economic development and cultural influence keep the wolf away and history shows that some countries have been able to move away from the path of violence and into the path of stability. But we must be careful not to oversimplify the situation. The spread of democracy is not a panacea. It is a long and difficult process that requires sustained effort and commitment.

In this decade, the way forward is clear: we need to build on the successes of the past and continue to work towards a world in which people live in peace and prosperity. The United States must lead the way.

But we must also be aware of the challenges we face. The world is becoming more interdependent, and the threats we face are becoming more complex. We must be prepared to face these challenges and to work with our international partners to find solutions.

In conclusion, we must remain vigilant and determined in our pursuit of a world in which people live in peace and prosperity. The United States must lead the way, and we must work with our international partners to find solutions to the challenges we face. The world is becoming more interdependent, and the threats we face are becoming more complex. We must be prepared to face these challenges and to work with our international partners to find solutions.

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We should aim to lead our friends and allies in building a world of security and opportunity. America has long been will rebuild our power and ensure that the United States is committed to building a world we want, rather than simply defending against a world we fear.

Stand for and live up to our values. The values that our founders embraced as universal have shaped the aspirations benefits to improve people's lives. The Bush administration's policy in Iraq has temporarily given democracy a bad strength have inspired the world for the last century.

To reclaim our proper place in the world, the United States must be stronger, and our policies must be smarter. The To avoid false choices driven by ideology, the Bush administration has presented the American people with a series of fake choices driven by avarice, unilateralism, and hubris. These have propelled us to war in Afghanistan and Iraq and put our financial system under siege. For example, the war in Iraq has been an avoidable tragedy. The tragedy of the last six years is that the Bush administration has squandered the respect, trust, and confidence of America.

Leadership requires a high level of strategy, persuasion, inspiration, and mobilization. It is based on respect more than fear. America's founders wrote the Declaration of Independence to explain our actions to the world out of a decent willingness to look at the facts on the ground and make decisions based on evidence rather than ideology.

Using our power for good, and working with others, our values will attract adherents of goodwill, and they will stand up for their values where they can. The Bush administration has presented the American people with a series of false choices driven by ideology, unilateralism, and hubris. These choices have propelled us to war in Afghanistan and Iraq and put our financial system under siege. For example, the war in Iraq has been an avoidable tragedy. The tragedy of the last six years is that the Bush administration has squandered the respect, trust, and confidence of America.

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WINNING THE REAL WAR ON TERROR

A STRONGER AMERICA

Ending the war in Iraq, the first step toward restoring the United States' global leadership. The war is sapping our military strength, absorbing our strategic assets, diverting attention and resources from Afghanistan, alienating our allies and eroding our credibility.

We must withdraw from Iraq in a way that brings our troops home safely, reduces their exposure to danger, and allows us to focus on the post-9/11 mission of defending America from terrorism. We cannot afford to keep our troops in Iraq while maintaining large forces in Afghanistan.

This responsibility must be the top priority of the next administration. As president, I will work to bring our troops home, starting within the first 100 days of my administration, while leaving behind a strong and capable Iraqi military that can protect its citizens and defend its borders.

In the region, our goal must be to help the most vulnerable and at-risk cities prepare for an attack. We must improve health-care delivery systems in areas that could become breeding grounds for radicalization. We must strengthen our partners in the war on terror the world over, and help them expand their counterterrorism capabilities.

Finally, we must address the root causes of extremism and radicalization, including poverty, inequality, and lack of opportunity. We must work with our allies to develop programs that enable women to play a larger role in society. We must support the people of the Middle East who are seeking a better future, and help them achieve a stable and prosperous region.

SECURITY THROUGH STATESMANSHIP

The forgotten frontline in the war on terror is Afghanistan, where our military must be engaged. The fight against al Qaeda and the Taliban is not just a war of weapons, but a war of ideas and values.

President Bush's policies have not only failed to contain the Taliban and al Qaeda, but they have also weakened the United States' position in the region. We must take bold and decisive action to restore our credibility and leadership in the region.

We must also strengthen our allies and partners in the war on terrorism. We must improve intelligence sharing, and we must help them expand their counterterrorism capabilities. We must also support the people of the Middle East who are seeking a better future, and help them achieve a stable and prosperous region.

As we redeploy our troops from Iraq, we must not let down our guard against terrorism. The war is sapping our military strength, absorbing our strategic assets, diverting attention and resources from Afghanistan, alienating our allies and eroding our credibility.

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GETTING OUR FORCES HOME

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It is important to prevent our adversaries from obtaining nuclear weapons, and we must ensure that our allies are secure. As we work to strengthen our alliances, it is also crucial to engage our adversaries. We must recommit to diplomacy, not just to show that we are willing to negotiate, but also to demonstrate that we are committed to finding solutions. Diplomacy is our best tool for achieving our goals.

In Pakistan, the United States must work with our partners to counter the threat posed by al Qaeda and the Taliban. We must support the government of Pakistan in its efforts to fight terrorism and extremism. We must also work with our allies in the region to develop a common strategy to address the challenges we face.

In Afghanistan, the United States must continue to support the Afghan government and its efforts to build a democratic and open society. We must work with our partners to develop a strategy to address the threat posed by the Taliban and other extremist groups. We must also support the efforts of the Afghan government to develop a sustainable economy and to improve the lives of its citizens.

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In Syria, the United States must work with our partners to address the threat posed by the regime of Bashar al-Assad. We must also work to support the efforts of the Syrian people to build a democratic and open society.

In Iran, the United States must continue to support the efforts of the Iranian people to build a democratic and open society. We must also work with our partners to address the threat posed by the regime of Mahmoud Ahmadinejad.

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before they finish grade school. By failing these children, we sow the seeds of lost generations. As president, I will press for quick passage of the Education for All Act, which would provide $10 billion over a five-year period to train teachers and build schools in the developing world. This program would channel funds to those countries that provide the best plans for how to use them and rigorously measure performance to ensure that our dollars deliver results for children.

The fight against HIV/AIDS, tuberculosis, malaria, and other dreaded diseases is both a moral imperative and a practical necessity. These diseases have created a generation of orphans and set back economic and political progress by decades in many countries.

These problems often seem overwhelming, but we can solve them with the combined resources of governments, the private sector, nongovernmental organizations, and charities such as the Bill and Melinda Gates Foundation. We can set specific targets in areas such as expanding access to primary education, providing clean water, reducing child and maternal mortality, and reversing the spread of HIV/AIDS and other diseases. We can strengthen the International Labor Organization in order to enforce labor standards, just as we strengthened the World Trade Organization to enforce trade agreements. Such policies demonstrate that by doing good we can do well. This sort of investment and diplomacy will yield results for the United States, building goodwill even in places where our standing has suffered.

We must also take threats and turn them into opportunities. The seemingly overwhelming challenge of climate change is a prime example. Far from being a drag on global growth, climate control represents a powerful economic opportunity that can be a driver of growth, jobs, and competitive advantage in the twenty-first century. As president, I will make the fight against global warming a priority. We cannot solve the climate crisis alone, and the rest of the world cannot solve it without us. The United States must reengage in international climate change negotiations and provide the leadership needed to reach a binding global climate agreement. But we must first restore our own credibility on the issue. Rapidly emerging countries, such as China, will not curb their own carbon emissions until the United States has demonstrated a serious commitment to reducing its own through a market-based cap-and-trade approach.

We must also help developing nations build efficient and environmentally sustainable domestic energy infrastructures. Two-thirds of the growth in energy demand over the next 25 years will come from countries with little existing infrastructure. Many opportunities exist here as well: Mali is electrifying rural communities with solar power, Malawi is developing a biomass energy strategy, and all of Africa can provide carbon credits to the West.

Finally, we must create formal links between the International Energy Agency and China and India and create an "E-8" international forum modeled on the G-8. This group would be comprised of the world's major carbon-emitting nations and hold an annual summit devoted to international ecological and resource issues.

The world we want is also a world where human rights are respected. By surrendering our values in the name of our safety, the Bush administration has left Americans wondering whether its rhetoric about freedom around the world still applies back home. We have undercut international support for fighting terrorism by suggesting that the job can not be done without humiliation, infringements on basic rights to privacy and free speech, and even torture. We must once again make human rights a centerpiece of U.S. foreign policy and a core element of our conception of democracy.

Human rights will never truly be realized as long as a majority of the world's population is still treated as second-class citizens. Twelve years ago, the UN convened a historic conference on women in Beijing, where I was proud to represent our country and to proclaim that women's rights are human rights. Since then, women have been elected heads of state in countries on nearly every continent. Thanks to the United States, many, but not yet all, Afghan women have been liberated from one of the most tyrannical and repressive regimes of our day and are now in schools, in the work force, and in parliament.

Yet progress in key areas has lagged, as evidenced by the continuing spread of trafficking in women, the ongoing use of rape as an instrument of war, the political marginalization of women, and persistent gender gaps in employment and economic opportunity. U.S. leadership, including a commitment to incorporate the promotion of women's rights in our bilateral relationships and international aid programs, is essential not just to improving the lives of women but to strengthening the families, communities, and societies in which they live.

REVIVING THE AMERICAN IDEA

Seasoned, clear-eyed leadership can take us far. We must draw on all the dimensions of American power and reject false choices driven by ideology rather than facts. An America that rebuilds its strength and recovers its principles will be an America that can spread the blessings of security and opportunity around the world.

In 1825, 50 years after the Battle of Bunker Hill, the great secretary of state Daniel Webster laid the cornerstone of the Bunker Hill Monument that stands today in Boston. He exulted in the simple fact that America had survived and flourished, and he celebrated "the benefit which the example of our country has produced, and is likely to produce, on human freedom and human happiness." He gloried not in American power but rather in the power of the American idea, the idea that "with wisdom and knowledge men may govern themselves." And he urged his audience, and all Americans, to maintain this example and "take care that nothing may weaken its authority with the world."

Two centuries later, our economic power and military might have grown beyond anything that our forefathers could have imagined. But that power and might can only be sustained and renewed if we can regain our authority with the world, the authority not simply of a large and wealthy nation but of the American idea. If we can live up to that idea, if we can exercise our power wisely and well, we can make America great again.

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quickly develop into a regional conflict and even genocide; a decisive end to the prospect of a modern democracy in the twenty-first century. Our armed forces are seriously overstretched and underresourced. As president, I will be focused on building an enduring global peace on the foundations of freedom, security, opportunity, prosperity, and hope.

Since the dawn of our republic, Americans have believed that our nation’s purpose and strength come from the world and defend our way of life. We believe in universal principles of the Declaration of Independence. By overcoming threats to our nation’s survival and to our prosperity, we have changed the world.

Now it is this generation’s turn to restore and replenish the world’s faith in our nation and our principles. President Harry Truman once said of America, “God has created us and brought us to our present position of power and strength for some great purpose.” In his time, that great purpose was to erect the structures of peace and prosperity. We have understood our duty to serve a cause greater than self-interest and to keep faith with the eternal and universal principles of the Declaration of Independence. By overcoming threats to our nation’s survival and to our prosperity, we have changed the world.

In the face of new dangers and opportunities, our next president will have a mandate to build an enduring global peace on the foundations of freedom, security, opportunity, prosperity, and hope.

Defeating the terrorists who already threaten America is vital, but just as important is preventing a new generation of extremism that is tearing Muslim societies apart. My administration, with its partners, will help friendly Muslim ideological tool at our disposal to aid moderate Muslims -- women’s rights campaigners, labor leaders, lawyers, journalists, teachers, tolerant imams, and many others -- who are resisting the well-financed campaign of religious fundamentalism that has spread from the Middle East and North Africa to other parts of the world.

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increase the size of the U.S. Army and the Marine Corps from the currently planned level of roughly 750,000 troops to 900,000 troops. Enhancing recruitment will require more resources and will take time, but it must be done as soon as possible.

Along with more personnel, our military needs additional equipment in order to make up for its recent losses and to restore our capacity to fight. In addition, our military needs to develop the new technologies and systems that we will need to defend ourselves in the future. One of the most important of these new technologies is the F-35 Joint Strike Fighter, which will provide a significant technological advantage over our adversaries.

The United States must also work with our allies and partners to build a more effective global security system. We must be willing to shoulder our share of the burden in international affairs, and we must be willing to take on the responsibility of leading the world.

We must also revitalize our public diplomacy. In 1998, the Clinton administration and Congress mistakenly agreed to abolish the U.S. Information Agency and move its public diplomacy functions to the State Department. This was a mistake, and it is time for us to reverse this decision and restore the U.S. Information Agency to its proper role as the primary instrument of American public diplomacy.

As we increase our military capacity, we must also enhance our civilian capacity. We must also improve our ability to provide humanitarian assistance and reconstruction in the aftermath of conflict. This requires new investments in foreign aid and development, and it requires new investments in our own capacity to provide quick and effective assistance.

As we face the challenges of the 21st century, the United States must be a good ally. We must be willing to work with other nations to solve global problems, and we must be willing to contribute our share of the burden in international affairs.

The United States must also be a good leader. We must be willing to set an example for the world, and we must be willing to lead by example.

Finally, we must also be willing to take risks. We must be willing to take risks that our bureaucracies today rarely consider taking. We must be willing to take risks in order to achieve our goals and to protect our interests.

The United States must be a good ally, a good leader, and a good risk-taker. We must be willing to shoulder our share of the burden in international affairs, and we must be willing to take on the responsibility of leading the world. Only then can the United States ensure a safer, freer, and more prosperous world for all people.
...Africa's problems—poverty, corruption, disease, and instability—purely on their own merits. Less discussed is the promise offered by democracy to so many countries on that continent. Many African nations will not meet their true potential without fundamental political change to ensure a greater share of the continent's resources and a political process that can adequately protect the rights of all its citizens. I believe that, in a world of new leadership, African citizens deserve a say in their future. And I'm committed to working with African leaders to contemplate that promise.

For our part, America must assume our responsibilities. The United States and its friends are laying the groundwork for a new era of U.S.-African relations. We must facilitate the growth of democratic institutions. We should help Africa spread the benefits of free trade and oppose protectionist efforts to block it. We should support the efforts of African countries to combat HIV/AIDS and other diseases of poverty. And, of course, we must address adequately the challenge of terrorism and the threat it poses to our security. Now I believe that the United States has the capacity to contribute to the region's progress and to our own public good. But in order to act, as is the case today, there should be an automatic suspension of nuclear assistance to states that the agency cannot guarantee are in full compliance with safeguard agreements. Finally, the IAEA's effort to enroll Iran and North Korea in the Nonproliferation Treaty (NPT) will make our world safer.

The nuclear nonproliferation regime is broken for one clear reason: the mistaken assumption behind the Nuclear Nonproliferation Treaty (NPT) that nuclear technology can spread without nuclear weapons eventually following. The nuclear regime is so weak that it has failed to stop countries with three spendable warheads. The United States should take the lead in the nuclear nonproliferation regime to stop such provocative acts. When China threatens democratic Taiwan with a massive arsenal of missiles and warlike rhetoric, the United States and its friends should be an unequivocal and diplomatic voice for a peaceful resolution of the conflict.

We must also work together to counter the propaganda of demagogues who threaten the security and prosperity of our friends and allies, from Egypt to South Africa. We must continue to provide military assistance to states such as Burma, Sudan, and Zimbabwe, tension will result. When China proposes regional forums and economic arrangements designed to exclude America from Asia, the United States will react. As president, I will stand up for America's interests, speak with one voice, and act with speed and purpose to protect our values and our people.

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Americans see globalization and the rise of economic giants such as China and India as a threat. We should reform our job training and education programs to more effectively help displaced American workers find new jobs that take advantage of trade and innovation. But we should continue to promote free trade, as it is vital to America's prosperity. Americans will thrive in a world of economic freedom because our products and services remain the best and because our country draws strength from the forces shaping the new global economy, ranging from inflows of foreign investment to new businesses created by highly skilled immigrants. Americans can be confident that a world of economic and political freedom will sustain our global leadership by promoting our values and enhancing our prosperity. To unite us with friends and allies in a common prosperity, as president I will aggressively promote global trade liberalization at the World Trade Organization and expand America's free-trade agreements to friendly nations on every continent.

American leadership has helped build a world that is more secure, more prosperous, and freer than ever before. Our unique form of leadership -- the antithesis of empire -- gives us moral credibility, which is more powerful than any show of arms. We are rich in people and resources but richer still in ideals and vision -- and the means to realize them. Yet today much of the world has come to challenge our actions and doubt our intentions. Polls indicate that the United States is more unpopular now than at any time in history and increasingly viewed as pursuing its narrow self-interest. The people who hold these views are wrong. We are a special nation, the closest thing to a "shining city on a hill" ever to have existed. But it is incumbent on us to restore our mantle as a global leader, reestablish our moral credibility, and rebuild those damaged relationships that once brought so much good to so many places.

As president, I will seek the widest possible circle of allies through the League of Democracies, NATO, the UN, and the Organization of American States. During President Ronald Reagan's deployment of intermediate-range nuclear missiles and President George H. W. Bush's Gulf War, the United States was joined by vast coalitions despite considerable opposition to American policies among foreign publics. These alliances came about because America had carefully cultivated relationships and shared values with its friends abroad. Working multilaterally can be a frustrating experience, but approaching problems with allies works far better than facing problems alone.

Almost two centuries ago, James Madison declared that "the great struggle of the Epoch" was "between liberty and despotism." Many thought that this struggle ended with the Cold War, but it did not. It has taken on new guises, such as Islamist terrorists using our technological advances for their murderous designs and resurgent autocrats reminiscent of the nineteenth century. International terrorists capable of inflicting mass destruction are a new phenomenon. But what they seek and what they stand for are as old as time. They are part of a worldwide political, economic, and philosophical struggle between the future and the past, progress and reaction, liberty and despotism. Our security, our prosperity, and our democratic way of life depend on the outcome of that struggle.

Thomas Jefferson argued that America was the "solitary republic of the world, the only monument of human rights, and the sole depository of the sacred fire of freedom and self-government, from hence it is to be lighted up in other regions of the earth, if other regions of the earth shall ever become susceptible of its benign influence." Since that time two centuries ago when the United States was the "solitary republic of the world," more people than ever before have come under the "benign influence" of liberty. The protection and promotion of the democratic ideal, at home and abroad, will be the surest source of security and peace for the century that lies before us. The next U.S. president must be ready to lead, ready to show America and the world that this country's best days are yet to come, and ready to establish an enduring peace based on freedom that can safeguard American security for the rest of the twenty-first century. I am ready.
November 16th:

Keynote Speaker:


Deputy Judge Advocate General, United States Air Force
**Lawfare in Modern Conflicts**

**Brigadier General Charlie Dunlap, USAF**

The following is a transcript of remarks given by Brigadier General Dunlap at the Kwanza Leadership Summit on 3 October '09. Minor editing was performed prior to publishing.

Ladies and Gentlemen, it's a great honor to be here speaking at this first of its kind JAG Corps Leadership Summit. I am here to discuss a different way of thinking about the role of law in modern war. It is changing, and today I want to offer you a new architecture in which to consider the role of law and war.

The legal aspects of armed conflict have become increasingly important. One of the things in Dr. Thomas Barnett's presentation with which I actually agreed was the impact of globalization. Globalization has a lot to do with war because it has increased the "legal consciousness" of the world through the need for contracts, and so forth, in global commercial transactions. That has bled over into other aspects of human existence, including war. In important respects the way wars are fought is very different today.

In an interview with Parade Magazine in January 2003, General James L. Jones, the Supreme Allied Commander, Europe and the Commander of the United States European Command, stated, "It used to be a simple thing to fight a battle... in a perfect world, a general would get up and say, 'Follow me, men, and everybody would say, 'Aye, aye,' and run off. But that's not the world anymore... Now you have to have a lawyer or a dozen. It's become very legalistic and very complex." Today in air war and counterinsurgency you go to war they really do take a dozen lawyers or more. They also provide the kind of protection that those lawyers. That's the way we deploy and it works.

The important thing to understand is that three set leaders have not suddenly fallen in love with lawyers; it's not just the case. Rather, their hard-earned expertise teaches them to the impact of law on their operations in many different dimensions. We all have to start thinking a little bit differently about the role of law in war. It's especially important for us wearing blue suits because air power gets more focus and is more central than some other kinds of battlefield fires. This frustrates a lot of your air commanders. When the Army uses a weapon, such as the multiple rocket launch system, nobody seems to comment much: however, when one of our bombs goes wrong, it's front-page news. This is a bit of an issue of our own making. We have advertised our technology so much that there's the perception that airpower is much more controllable than other weapons. This is what makes James Baker's quote so interesting (Fig. 1). We've raised expectations, so when it doesn't work exactly as advertised, it gets more focus and creates more controversy.

Sanctions are another legal methodology. They actually had an effect on the Iraqi Air Force's capability during Operation Iraqi Freedom (OIF). In fact, at Air Combat Command I had the opportunity to listen to an Iraqi general about the impact of sanctions on their ability to stay current and fly.

We're going to have to think about this as we consider arguments about whether or not the United States should be part of the International Criminal Court or other kinds of international legal bodies. If leaders are they subjected to these processes. Interpreting, our national defense strategy that just came out a few months ago recognizes that judicial processes have the potential to be used as ways of limiting or constraining U.S. power.

Other forms of Lawfare don't necessarily rely upon our judicial processes. They look at the psychological dimension of war and, in this respect, it is very Clausewitzian. Clausewitz talks about his "remarkable triflity." This is the synergistic effect of the people, the military, and the government, on the ability to wage war. In the United States and in many other Western nations, we focus on trying to destroy the military capability to wage war. It's often called a strategy of denial.

Our adversaries, however, are not waging that kind of war. They are trying to separate the people from the government and the military. It has a very strong psychological dimension—one to reduce our capability to just to wage war. One of the ways they do this is through the exploitation of actual perceived legal or ethical violations. In the Chicago Journal of International Law, Professor Bill Richardson stated, "Knowing that our society respects the role of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of these plans as contrary to the law of war. Our vulnerability here is what philosopher of war, Karl von Clausewitz would term our "center of gravity." Today, law really is a center of gravity. In other words, our adversaries are trying to make a positive value of our presence to the enemy against them. We use it as a weapon to try to manipulate us and to undermine the support that a democracy needs to wage war.

Sometimes we think about adherence to the law as being strictly a moral issue. It also has a very important legal dimension, which is useful to emphasize with our clients. The consequence of adhering to the law is different than the same as a legally imposed defeat. What General Ricardo Sanchez, the former commander of U.S. forces in Iraq, said about Abu Ghraib being "clearly a defeat" was exactly right.

One of the things that I believe is very important for us as judge advocates and paralegals and civilian attorneys and support personnel is we ought to take time to read some of those reports about Abu Ghraib. The perpetrators did not start by leading prisoners around on a leash. It started out as small things—steering the uniform the wrong way, not saluting, calling each other by their first names. It was a breakdown of discipline that began with very minor offenses. So when people ask about the role of military justice, we should answer...
that it’s a critical operational matter: it’s the “control” problem. We need to be able to articulate to our clients there are lots of people in the Air Force today who don’t connect the dots between the role of discipline and success in combat.

The ultimate aim of our adversary is to replicate what we call the “Viscous Effect.” In other words, they can lose every battle, but still win the war, if they undermine our will to fight. We use the fact or perception of those illegitimacies to do that. Again, in wagging lawfare they’re going to exploit things that we do wrong. It becomes propaganda which is operationalized into having a real effect on the strategic outcome.

Even when we actually comply with the Law of Armed Conflict (LoAC), we can still have issues. (Fig. 2). Do you remember in the first Gulf War when we attacked the Al Firdos bunker? We thought it was a command and control facility and it did have some command and control capability, but the spectacle of those bodies being dragged out of there because it was also being used by the Iraqis as a bomb shelter for the families of high Iraqi officials actually had an operational effect, even though that attack was legal and moral. I think our adversaries are going to see this incident and try to orchestrate similar events because it’s easier to stop the U.S. Air Force if you can create this kind of effect than it is to try to build an F/A-22 or some other high-tech system.

**Perceptions of LoAC Violations**

> Perceptions of LoAC violations can have real operational effects. Another example from GW I:

> "The Al Firdos raid had accomplished a major LoAC legal defense could not.
> downtown Baghdad was to be attacked sporadically, if at all." -General A. Tucker, The General, May, 1994

![Fig 2](image)

Another example is the “Highway of Death” from the first Gulf War. (Fig. 3). It was a legal and moral use of force. In reality not that many Iraqis’s died. Those of you that have been to Kuwait know that’s one road that goes north of Kuwait into Iraq. When the Iraqis saw what was happening, they got out of their trucks and ran into the desert and survived the air attack. There were two or three hundred that were killed, but it wasn’t the massacre it looked like on television. Nevertheless, the perception was we were doing something wrong actually had an operational effect.

Future adversaries will try and replicate this, even if it means killing their own people. They are going to try and get us into situations where they can get their kind of photographs on international television because they know what the operational effect could be.

We’ve seen this in OIF. Do you remember when the Iraqi’s would use the white flag to get close to our troops and then blow themselves up? Yes, part of this was to kill some Americans, but I think it was as much to create a mindset where we would overreact. Time Magazine really understates the idea of this being a military strategy; our adversaries devised to try and get us into overreacting in a retaliatory kind of response. (Fig. 4). We need to start thinking about the role of law and compliance with the role of law because our adversaries are exploiting it as a strategy.

So there are a lot of challenges for senior leaders. This is what I tell them: there is a legal dimension of LoAC, and there is responsibility and potential accountability. Recent events show that people who violate the law of war can be prosecuted. And there is a moral dimension. I don’t know if many of you remember, but I think it was a year or two ago, there were a number of Israeli pilots who refused to fly missions in the Gaza Strip because they thought it was legal and immoral. So, in other words, maintaining the morale of our forces does depend on their confidence that what they’re being asked to do is both legal and moral.

What I want to underline again is the pragmatic, strategic dimension of LoAC. A great article in Air Force Magazine talked about this very subject, calling adherents to LoAC “a ‘strategic imperative.’ It’s not just something we do because we’re Americans and we always want to do the right thing. It’s also because we will not win the conflict if we don’t comply with the law of war. Presenting LoAC in this manner is a good way to get access to our clients because there are a certain number of clients out there that tend to just turn off anything to do with law because they automatically—and often erroneously—assume it’s going to be a constraint. Even assuming it is a constraint, they need to understand it because if they don’t comply, they are not qualified for the war in Iraq. They are not going to win battles or wars for this country because law has strategic impact that cannot be ignored.

How do we counter abusive Lawfare? Again, I want to emphasize that Lawfare and the role of the law of war generally are not negative. Law is a weapon that can be used positively or negatively. But what we’re seeing with our adversaries is this psychologically abusive use of law. If we lay the groundwork before the fact, I think we can address this is through what I call “Legal Preparation of the Battlespace.” We do this in order to diminish the adversary’s opportunity to exploit real or perceived violations of the law.

Now, how do we do that? One way to prepare is to train audiences through training. Not long ago, training for senior leaders and senior war-fighters, like the Combined Forces Air Component Commanders (CFACC), was almost nonexistent. If you get anything, it was often simply very basic computer-based training. For about the last four years, however, we’ve presented rather sophisticated training.

Training addresses the really controversial issues: that military objectives and dual-use targets; international agreements to which the United States is not a party to but which most allies are; human shields; attacks on radio and television facilities; and cluster munitions. We emphasize pragmatic advice, not just the law. For example, attacking electrical grids is very controversial. Again, we try to give them practical advice. In this case, can you attack an electrical grid? Yes, it’s not an off-limits target, but you have to do your proportionality analysis and so forth. But what we really want them to do is make a data-driven decision. Make sure that they know what the consequences of that attack will be.

So, in other words, the simple recitation of what the law is—that’s not going to make it. That’s not going to be sufficient for the kinds of conflicts that we have now. Each one of us has the obligation to educate ourselves about these same issues. Questions may not always arise at a LoAC briefing; it may be at the bar or at the Club. We need to be preaching these kinds of approaches at every opportunity—to our key client base.

Let me just talk with you about one technology-generated issue that you may have heard about—it involves the Predator. Technology like this has really enhanced our ability to comply with LoAC, but there are some limits. Some of you may have heard about a controversy during OIF. There was an article in New Yorker Magazine that basically asserted that we would have killed Mullah Omar, but for a JAG’s advice. Because of a JAG, Mullah Omar, a key terrorist, escaped. Well, it really didn’t go down that way.

For those of you who have never seen these kinds of pictures, this is what you see out of a Predator. (Fig. 5). You see how hard the decisions were that Colonel Amy Beachill and Colonel Ed Mourman, and so forth, had to make.

### What’s Your Call?

1. Taliban/Al Qaeda?
2. Civilians?
3. CNN?
4. NGOs?
5. Allies?
6. Special Forces?
make on a daily basis. So, what are you looking at when you look up at the sky, or is it a cheat nit? Is it CNN? Now, when I got to this point, most of the opera-
tions and strategies I can think that the important thing here is that
simply looking at a Predator video can be very con-
fusing: are they non-governmental organizations, who they are and what they’re doing? It is very difficult to distinguish them. Remember, during OIF our allies looked a lot like the enemy. They might have a little dif-
erent language Graff says it, but that looks identical to the enemy. What about Special Forces? You can’t tell with
these guys anymore since they don’t always wear tradi-
tional uniforms.

I think the use of Predator video for targeting is fas-
tinating for us as lawyers and paralegals because whole
books are written on the fallibility of eyewitness iden-
tification. Sometimes if your mind is ready to see some-
thing, you’re going to see it. I think much of the “eye-
ewitness identification” literature applies to Predator
videos. I often say that visual identification is not always
the same as positive identification. You have to take
into account the totality of the circumstances. I use this
as just one illustration of the kinds of technology chal-
enges that we’re facing as we apply the law and in-
grate the law into operations. It truly underlines the
importance of JAGs and paralegals understanding the
technology.

One of the things that we’re doing now is to try to
ensure that every JAG who goes to a Combined Air Op-
eration Center (CAOC) attends the Formal Training Unit
at Fort Sill Field in Pilbara. They go through the same
course as everyone who works in the CAOC. It’s not a
law course, it’s about how to use the CAOC’s informa-
tion technology. Our people are often honor graduates,
and the better performers in the course.

Addressing the internal audience is important, but
it’s also important to address external audiences—the
people in larger, more magnified audiences. Now I think
that before OIF and OEF, we did some good things that
we had not done previously. For example, U.S. Central
Command (CENTCOM) published a lot online on the Web about
how targeting is done and what things are done to limit
collateral damage.

In addition, there were a lot of people who gave inter-
views, me included, as to exactly how our targeting pro-
cedures were to avoid LONC violations. It seems that our
domestic audiences during OIF were convinced of the
legitimacy of our efforts. As the war went on and the public got to know about the efforts we made to avoid
collateral damage, they actually wanted us to get more
aggressive in the use of our weaponry.

Of course, countering abusive lawyers requires us-
using tactics and methodologies that avoid incidents in
the future. We can only do that to the extent that we start talking about tactics. Let me just give you a very simple example: you can limit collateral damage just by changing the axis of attack. It is incredibly important for JAG personnel to educate
themselves on the strategies, the doctrine, and the ex-
citing tactics. So that you can offer alternatives. You
can then work with the planners and the targeting in a
way that achieves the commander’s objectives, but at
the same time doesn’t take an unnecessary Lawfare risk
and also allows the law enforcement planners to keep
back those ground guidelines.

Technology is a big part of the solution: psychological op-
erations and targeting presents is in the information
environment. But guess what? All of our adversaries out-
there are looking for ways to disrupt our precision ca-
pability, including jamming global positioning satellites,
for example. Regardless, the main problem today is not
the precision capability of weapons or the platforms; it’s
really about getting good intelligence. I think that’s go-
ing to be true for the foreseeable future.

Of course, countering abusive lawyers requires the
involvement of the JAG in the Air Operations Center
(AOC). Why do we have JAGs there? Well, Portland 1 to the
Geneva Conventions says it’s important. If nothing else.
What must commanders ensure they do? Chairman of
the Joint Chiefs of Staff Instruction 58 (A-1) states,
“Commander shall ensure that all operations plans . . .
concept plans, rules of engagement, executive orders,
deployment orders, policies, and directives are reviewed
by the command legal advisor to ensure compliance
with domestic and international law.” It basically re-
quires the JAGs to review everything about an opera-
tion. Remember the discussion in a previous presenta-
tion about time-sensitive targeting, and compressing the
“kill chain”? They’re getting it down to minutes. You
have to make a legal judgment in literally minutes on
imperfect information. That’s why it’s so important to
get schooled up before you find yourself in that posi-
tion—having to make those very quick decisions.

Do JAGs pick targets? In Defense Weekly in January
2004, Michael Haas stated, “Military leaders have consis-
tently determine every weapon of war. Every bomb that is
dropped and every target chosen during a fight.” While
at Brandon sounds great, it sends the wrong message.
This is what some people believe, and it is an incorrect
reconstruction of what actually happened. Actually JAGs
and commandos are the decision makers. This is what you will see in the Chairman’s instruc-
tions, as well as in our own Air Force doctrine.

General Russel Rials makes this point in an article
that he wrote for the Journal of the War College (Fig. 6).
He underlines to commanders that they hold the
responsibility. With that said, we also have our own

JAGs are advisors

The command needs to remain a risk
taker. The legal advisor can inform him of the
rules and let him know what the law is, but
the commander must make the final de-
take the risk. . . . Some of these decisions,
though legal, are going to come under
fire.” —General Russel Rials

Fig. 6

Kievetrov Edition 99

100 The Reporter

CSAF View of the Role of the JAG

CSAF, in his role as the nation’s top military
and legal leader, established the CSAF Legal
and Administrative Task Force to improve the
management of legal, administrative and
training issues. The task force, which included
members from across the Joint Staff, the
Joint Staff, and CENTCOM, identified several
key areas for improvement:

1.Law enforcement: improving the

2. Legal training: developing a

3. Legal support: improving the

Fig. 7
one of the key counter Lawfare techniques that we can use in the future. Now let me tell you, we've got more work to do. We need to build interdisciplinarity cells in the CAGOC to address collateral damage allegations when they arise. This was done on an ad hoc basis during OIF, but we need to formally embed it in our doctrine and processes. General Clark made the observation in his book "Waging Modern War" that the enemy always knows more about collateral damage than you do because it's in his territory. He can begin fashioning his story very quickly. To get inside the news cycle, we've got to be able to react very rapidly and an interdisciplinarity team is the way to do it.

When we did the Tarrand Farms friendly fire investigation, and in another investigation that Colonel Mahannah and Colonel Rockhold and I were involved in, it was a hard thing to try to capture what happened. Now you might think, "Well how can that be? Don't you look at all these computer systems?" Well none of them were built to archive information for investigations. And when 2,000 bombs a day are being dropped, and you're trying to figure out why one was dropped in a certain place and what might have gone wrong, it's an incredibly complex challenge. So, when you hear about this lagging of metadata and so forth, this is one of the utilizations that we have to be able to do with it. In the near term, what we're looking at is trying to identify what information we have to archive, how long we have to archive it, and how we can access it.

Let me make a couple of concluding observations. You will hear this all the time: "Well, the enemy is not playing by the rules, so why should we? We're at a disadvantage." Well guess what? Contrary to an earlier speaker, I happen to think that China is a potential threat. They have the nuclear capability to threaten the existence of this nation.

There's a book out there written by Chinese officers that actually says something to the effect that China is not going to obey the law of war because the law of war is a Western concept designed to keep China down. You may hear a lot of people talk about this and become very concerned about it, that we're going to be at some kind of disadvantage.

Well, a couple of things here. One, it doesn't change the reality for us because in the Western way of war, in modern popular democracies, even a limited armed conflict requires a substantial degree of public support. That support can erode or even reverse itself rapidly no matter how worthy the political objective, if the people believe that the war is being conducted in an unfair, inhumane, or illegitimate way.

We now have a new strategic challenge. In Walter Boyne's book "Beyond the Wild Blue," he talks about the manner in which we kill the enemy is important. How many of you do you kill? These issues are important because of the changing social dynamics in which the 21st Century war is waged. Does this mean that we're at a disadvantage? No, because despite what some people think—that history has no value—it has a lot of value. Victor Davis Hanson wrote on this issue in his controversial book "Carnage and Culture.

The bottom line here is: the more a society adheres to ethical norms, democratic values, and individual rights, the more successful a war-fighter that society will be. It's counter-intuitive. You'd think a totalitarianism has an advantage, but history does not demonstrate that. In fact, Caleb Carr, in his book "The Looming Tower," makes the point that there are entire civilizations that don't exist anymore because they chose to wage war against civilians, as opposed to against other warriors. So I think when you actually look at the data, it does support the concept that adherence to legal and ethical norms is actually a pragmatic war-winning formula. We need to be educating ourselves and being prepared to send that message to our clients and to the public at large.
LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS

COLONEL CHARLES J. DUNLAP, JR., USAF

INTRODUCTION

Is warfare turning into lawfare? In other words, is international law undercutting the ability of the U.S. to conduct effective military interventions? Is it becoming a vehicle to exploit American values in ways that actually increase risks to civilians? In short, is law becoming more of the problem in modern war instead of part of the solution?

Some experts seem to think so. In his Foreign Affairs review of General Wesley Clark's fascinating book on the Balkan wars, Professor Richard K. Betts laments the role law and lawyers played in the Kosovo campaign as well as military interventions generally. He asserts that the "hyperlegalism applied to NATO's campaign made the conflict reminiscent of the quaint norms of premodern war." Further, he alleges that lawyers "constrained even the preparations for decisive combat" and declares:

One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations - to a degree unprecedented in previous wars.... The role played by lawyers in this war should also be sobering - indeed alarming - for devotees of power politics who deride the impact of law on international conflict....NATO's lawyers...became in effect, its tactical commanders.

International lawyers David Rivkin and Lee Casey express a somewhat different but darker view in a recent National Interest article. They contend that a "new" kind of international law is emerging that is "profoundly undemocratic at its core" and "has the potential to undermine American leadership in the post-Cold War global system." With respect to armed interventions, Rivkin and Casey argue that the "American military is particularly vulnerable" because of the "unrealistic norms" - especially in relation to collateral damage - propounded by the advocates of this new international law. "If the trends of international law are allowed to mature into binding rules," they state, "international law may become one of the most potent weapons ever deployed against the United States."

Professor Betts, and perhaps to a lesser extent Meares. Rivkin and Casey, will find support in my conclusions about Operation Allied Force. I believe the air campaign against Kosovo and Serbia may represent something of a high-water mark of the influence of international law in military interventions, at least in the short term. The aftermath of that conflict, along with the repercussions of the terrible events of September 11th, seem to have set in motion forces that will diminish the role of law (if not lawyers themselves) far beyond the hyperlegalisms to which Betts objects. Explaining why I make this prediction is a prime purpose of the following discussion.

The essay first examines the rise of law in modern military interventions. Next, it contends that "lawfare," that is, the use of law as a weapon of war, is the most recent feature of twenty-first century combat. The paper then describes how law and lawyers are

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* Colonel Charles J. Dunlap, Jr., USAF, Staff Judge Advocate, Air Combat Command, Langley AFB, VA 23665-2774. The views and opinions expressed are those of the author alone, and do not necessarily represent those of the U.S. Government or any of its components.
integrated into the planning and execution of air operations conducted by the United States. The essay surveys debates that have arisen with regard to emerging weapons technologies. It concludes by making some observations about the future of law and war in the new millennium.

Although academic fashion favors the term “international humanitarian law” (IHL), this paper will not adopt it. There is really no universally accepted definition of the phrase, and in practice it too often appears to embrace not just treaties with specific obligations and accepted norms of customary international law, but also a collage of other (often amorphous) agreements, non-binding resolutions, unilateral declarations, and political statements. Instead of IHL, the paper will rely upon the descriptor “law of armed conflict” (LOAC). While many of the same objections might be raised about it as with IHL, far greater consensus exists as to its scope – if not its interpretation – in specific situations.

This essay offers several broad themes for consideration: 1) law is not, and can never be, the vehicle to ameliorate the horror of war to the extent its advocates hope and, indeed, seem to expect; 2) although not yet fully institutionalized, the role of law and lawyers in American military interventions is surprisingly pervasive for practical, warfighting reasons as much as altruistic, human rights-oriented ones; 3) advocates of international law during armed conflict are often ill-informed by the realities of military strategy and technologies; and 4) there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.

How did international law become so important in military interventions? A number of rather disparate factors coalesced to give it the prominence it enjoys today. Basic to them is the long-standing desire of the world community (and especially the West) to use law to prevent conflict altogether or, failing that, to make the conduct of war as humane as possible. The appalling experience of World War II gave new impetus to the latter idea, resulting in the Geneva Conventions of 1949 that today form LOAC’s nucleus.7

A principle focus of that effort – and one that is very prominent today – was to spare noncombatants the adverse effects of war. Parenthetically, however, the record shows that the ratio of civilians to military personnel killed in armed conflicts has, in fact, increased since the Conventions of 1949.8 This illustrates the limits of law as a mitigator of the suffering intrinsic to war.

More recently, LOAC indirectly benefited from a much larger international phenomenon: globalization. Globalization heightened the status of law generally if for no other reason than the need for certainty in international commercial transactions. Worldwide trade requires international administrative and judicial forums to resolve contract, claims, intellectual property, and similar disputes. Where law is absent, so are investors and others needed for economic development. Even otherwise repressive societies recognize that they must embrace law in their relations with other countries if they hope to gain the benefits of modernity.
The effect of globalization is especially felt in Europe where, coincidentally, many LOAC initiatives originate. In order to obtain the economies of scale needed to succeed in an extremely competitive business environment, Europeans progressively abandoned elements of their sovereignty in ways unthinkable to Americans. They are acculturated to binding themselves in their everyday life (as Americans have consciously not done) to a multitude of rules and regulations imposed externally.

Herein, perhaps, lies the genesis of some of the division we see in LOAC interpretations with our European colleagues. Europeans are comfortable, for example, obeying the dictates of the European Parliament, essentially a foreign legislature vis-à-vis the citizens of any individual country; Americans fought a revolution so as never to do so. For this and other reasons the respective mindsets are different, and this is reflected in contrasting approaches to international law.9

Europeans also appear to be more accepting of the increasing number of nongovernmental organizations (NGOs) that involve themselves in LOAC matters. Many NGOs are wonderful, philanthropic groups that perform selfless, difficult work in dangerous places. However, Americans are inclined to be wary of those NGOs who purport to speak – literally – for the “world” on political issues, including LOAC. Too often NGO positions look like political agendas. With respect to LOAC, it must always be kept in mind that NGOs are not political entities equivalent to sovereign nations; rather, they are no more than self-selected, idiosyncratic interest groups that are not accountable to any ballot box. This perspective is sometimes ignored, to the detriment of LOAC development and interpretation.

There is an undeniable element of anti-Americanism in international law as it is developing today. Rivkin and Casey argue quite persuasively that “the impetus in international law today stems from both our allies and our adversaries, who have chosen to use it as a means to check, or at least harness, American power.”10 This may be the real reason for the incessant criticism of U.S. positions that marks so much of the debate in the international legal community.

One factor influential to the rise of LOAC is the revolution in information technology. It has spawned high-tech global news organizations that rapidly deliver information – including graphic images of war – to publics everywhere. This is particularly important when considered in conjunction with another attribute of the information age: the spread of democracy.11 Shaped by raw news footage, public perceptions of how conflicts are fought significantly affect military interventions. Professors W. Michael Reisman and Chris T. Antoniou state:

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.12

The velocity of today’s communications capabilities presents real challenges to democracies as well as to those governments that, if not truly democratic, nevertheless depend upon support from constituencies that have access to globalized information sources.13 When television airs unfiltered, near real-time footage of what appear to be LOAC violations, complications result.14

General Clark found during the Kosovo operation that “[t]he new technologies impacted powerfully at the political levels. The instantaneous flow of news and especially imagery could overwhelm the ability of governments to explain, investigate, coordinate, and confirm.” Increasingly, foes of the United States see this development as a vulnerability
to be exploited. No longer able to seriously confront – let alone defeat – America militarily, they resort to a strategy that can be labeled “lawfare.”

Lawfare describes a method of warfare where law is used as a means of realizing a military objective. Though at first blush one might assume lawfare would result in less suffering in war (and sometimes it does), in practice it too often produces behavior that jeopardizes the protection of the truly innocent. There are many dimensions to lawfare, but the one increasingly embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather than seeking battlefield victories, per se, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. A principle way of bringing about that end is to make it appear that the U.S. is waging war in violation of the letter or spirit of LOAC.

In this sense, lawfare has a firm basis in Clausewitzian analysis. Karl von Clausewitz, the great military theorist, spoke of a "remarkable trinity" of the people, the government, and the military whose combined energies produce victory in war. Belligerents attempt to impose the converse on their adversaries, that is, the deconstruction of Clausewitz's trinity. The traditional U.S. approach to accomplishing victory -- and the one LOAC endorses -- focuses on the military element and seeks to diminish the enemy's armed strength. America's challengers focus on the people element and seek to diminish the strength of their support for the military effort.

Evidence shows this technique can work. The Vietnam War -- where U.S. forces never suffered a true military defeat -- is the model that today's adversaries repeatedly try to replicate. Of course, they hope to use the vastly accelerated news cycle to achieve success far more rapidly and at much less cost than did the Vietnamese. If they can make the
American electorate believe, as Reisman and Antoniou put it, that the “war is being conducted in an unfair, inhumane, or iniquitous way” necessary public backing might collapse. Even if U.S. public opinion is unwavering – as it appears to be with respect to the current war on terrorism – the cooperation of coalition governments nevertheless might weaken if their people become disenchanted with the way armed force is being used. This is especially problematic for the Air Force if it results in the denial of vital basing and overflight rights.

As Reisman and Antoniou point out, sometimes the mere perception of LOAC violations can significantly impact operations. The Gulf War provides two examples of situations where LOAC was not violated yet the perception that it may have been had clear military consequences. The first concerned the attack on the Al Firdos bunker in Baghdad that was believed by the allies to be a command and control node. Some experts concluded that the post-attack pictures of the bodies of family members of high Iraqi officials (who evidently used the bunker as a bomb shelter) being excavated from the wreckage achieved politically what the Iraqi air defenses could not do militarily: rendering downtown Baghdad immune from attack.

Worried coalition leaders put the city virtually off-limits to avoid a repetition of like scenes reaching their peoples. Similarly, fears about the impact on coalition constituencies of the images of hundreds of burnt out vehicles along the so-called “Highway of Death” following an air attack on retreating Iraqi forces was a significant factor in the early termination of hostilities. That left the Republican Guard intact to slaughter Kurds and helped keep Saddam Hussein in power to this day.

America’s enemies, who study such cases, may draw lessons from them, and callously capitalize on collateral damage incidents. As already suggested, their goal is to gain political leverage by portraying U.S. forces as insensitive to LOAC and human rights.

Unfortunately, opponents unconstrained by humanitarian ethics now take the strategy to the next level, that of orchestrating situations that deliberately endanger noncombatants. Ironically, by overselling precision weapons and other high-tech capabilities, the U.S. Air Force may have unwittingly made itself vulnerable to this very strategy.

There are several ways opponents wage lawfare against U.S. forces. One technique is to use civilians as involuntary (and sometimes voluntary) human shields. In addition, adversaries place military assets in noncombatant facilities such as religious structures and NGO compounds in the hopes of either deterring attacks, or if attacks do take place, producing collateral damage media events that serve their cause. The Taliban, according to media reports, employed this tactic. Specifically, U.S. News & World Report says, “[h]eavy weaponry is being sheltered in several mosques to deter attacks. The Taliban has even placed a tank and two large antiaircraft guns under trees in front of the office of CARE International….” The use of NGO facilities to deter legitimate air attacks creates the potential for tension between the NGOs and the armed forces, and raises questions about NGO responsibilities during conflict.

In any event, I have found that most senior U.S. military leaders, and certainly those in the Air Force, recognize that the fact or perception of LOAC violations can frustrate mission accomplishment. They are also aware of the rising number of post-conflict investigations – both formal ones like the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) examination of the Kosovo operation – as well as those conducted by NGOs, academics, and others.

For military leaders, real frustration arises when international lawyers assert as irrefutable truths principles that are unmistakably wrong. A good example is one of the most controversial air attacks of the Kosovo conflict. On April 23, 1999, Radio Television Serbia (RTS), the state-run media station in central Belgrade, was bombed by coalition
aircraft. As a result of this attack, sixteen people were killed, and another sixteen injured. International lawyers, news organizations, and NGOs criticized the attack.\textsuperscript{35} Typical of the rationale for the complaints is the Human Rights Watch report that asserted that RTS made "no direct contribution to the military effort" and that the "risks involved...grossly outweigh any perceived military benefit."\textsuperscript{36}

Apparently relying on evidence that indicated that RTS broadcasts whipped up ethnic hatreds for years,\textsuperscript{29} Air Commodore David Wilby, a NATO spokesman, insisted, "Serb radio and TV is an instrument of propaganda and repression.... It is...a legitimate target in this campaign."\textsuperscript{30} His statement is consistent with U.S. legal thinking.\textsuperscript{31} The RTS strike was subsequently the subject of a review by the ICTY\textsuperscript{32} (and a lawsuit before the European Court of Human Rights\textsuperscript{33}). Although the ICTY accepted NATO's later explanation that the facility was being used for military communications, it made it clear that but for that circumstance, strikes against the broadcasting stations were likely unlawful. Specifically, the ICTY contended:

While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the "concrete and direct" military advantage necessary to make them a legitimate military objective.\textsuperscript{34}

This is a rather startling statement in a military sense because even a passing familiarity with Clausewitz and other strategists - not to mention America's own experience in Vietnam - make it plain that "undermin[ing] the government's political support" does offer a very "direct and concrete" military advantage especially in today's world.\textsuperscript{35} It makes it appear that some international lawyers fail to appreciate that popular support is a "center of gravity"\textsuperscript{36} in contemporary military interventions, and information age technologies like radio and television are instrumental in shaping that support.

In fact, a recent RAND study confirms that concerns about Serb popular will were a key reason Milosevic decided to settle when he did.\textsuperscript{37} When interpretations of LOAC look as if they are disconnected to humanitarian values, support for the law inevitably wanes. Specifically, to military professionals it is absurd - and even duplicitous - to contend, as the ICTY report seems to do, that it is somehow preferable to slaughter masses of enemy troops to achieve victory - in lieu of merely destroying a propaganda organ propping up a perverse regime (at the price of small, albeit regrettable, numbers of civilian casualties).

Therefore, knowing the legal challenges they will face, savvy American commanders seldom go to war without their attorneys. Along these lines, Michael Ignatieff, who has written extensively about the role of law and lawyers in the Balkan conflict, provides real insight into the thinking of many senior officers. He observes: "[Lawyers] provide harried decision-makers with a critical guarantee of legal coverage, turning complex issues of morality into technical issues of legality, so that whatever moral or operational doubts a commander may have, he can at least be sure he will not face legal consequences."\textsuperscript{38} In short, the predominance of law and lawyers in U.S. military interventions is as much a concession to the verities of modern war as it is an altruistic commitment to human rights. Unsurprisingly, a significant number of military lawyers and paralegals were deployed for Operation Enduring Freedom\textsuperscript{39} to supplement those already serving in the region.\textsuperscript{40}
Until Operation Just Cause, the successful 1989 intervention that dethroned Panamanian strongman Manuel Noriega, compliance with international law wholly depended upon the knowledge and disposition of commanders and their planners. Military lawyers taught LOAC classes—which rarely progressed much beyond the basics—and prosecuted those who violated it, but were rarely found advising commanders on the legal aspects of combat operations.

Beginning with Just Cause, however, that changed—perhaps in recognition that after-the-fact prosecutions would not undo the political damage LOAC violations could inflict. During the Gulf War, judge advocates (JAGs) vetted targets, worked rules of engagement (ROE) matters, and advised on other warfighting issues, all to favorable comment from senior military leaders. Since then military lawyers have made their way into command posts and planning cells in order to prevent the kind of incidents that could derail a military operation.

In U.S. operations the requirement for legal advice is embedded in specific military instructions. For example, the Chairman of the Joint Chiefs of Staff directs that “all operation plans...concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are [to be] reviewed by the command legal advisor to ensure compliance with domestic and international law.” This provides the formal authority for JAGs to insert themselves into the planning and execution processes of combat operations.

In practice this is done in a rather ad hoc fashion with the precise methodology much dependent upon the individual personalities involved.

Although this system has worked reasonably well over the years, the Air Force is now engaged in developing specific doctrine to institutionalize and standardize the role of lawyers in the air operations center (AOC) - the nerve center for the application of airpower in military interventions. This effort builds upon the lessons learned since 1989, the most critical being the importance of involving JAGs in each stage of the air tasking order (ATO) cycle that produces the master air attack plan (MAAP). Knowing exactly when and how to most productively provide legal advice is essential to a JAG's success in an AOC.

For example, raising legal objections after the MAAP is built is problematic because it is very difficult to re-target or re-weaponeer a particular sortie at that late stage. If the legal objection is serious enough, the sortie may be lost entirely. To avoid such situations, JAGs in the AOC work around the clock with action officers as they develop strategy and select targets, weapons, and employment tactics, all of which can play into the overall legal assessment. Military lawyers also help write the ROE chapter of the Special Instructions (or SPINS in Air Force parlance) that become the aircrews' operational bible.

Pre-planned targets in the MAAP ordinarily have a “BE” number that reflects its designation in what is called the “basic encyclopedia.” JAGs review the target folders associated with each BE. They evaluate the imagery and other intelligence products that show the target's military purpose as well as its potential for collateral damage. The quality and quantity of the intelligence can vary, but usually there is enough to make an informed judgment. The folder’s data is used to apply what is known as a “tiered” analysis technique that results in an assessment of the collateral damage risk. The technical process takes into account specific weapons’ characteristics to include their precision capabilities and fragmentation patterns. The analysis for certain targets—especially in cities—may include
elaborate evaluations of the blast effects on the kind of buildings found near the weapon's estimated impact point. The results are interpolated with known population distributions to make casualty projections.

Computerized decision-support systems exist to help make collateral damage assessments. While useful tools, they cannot (and should not) substitute for the considered judgment of lawyers or, for that matter, commanders. Warfighting remains an art, not a science reducible to the sterile algorithms of electronic data processing. Military history is littered with examples – Doolittle's Raid on Tokyo, McArthur's landing at Inchon, and, indeed, the American Revolution itself – for which no computer would predict success.

However, when applied to collateral damage forecasts, automated assessments produce what might be considered “evidence.” In other words, if a commander chooses to pursue an attack in a way a machine tabulates as possibly causing unnecessary noncombatant losses, he or she may some day be called to account. Commanders are wise, therefore, to make some sort of contemporaneous record of the thinking that led to their decisions. Admittedly, it could be difficult to articulate the rationale (especially if the reason is mainly the commander’s instinct honed by years of experience) but increasingly it may be necessary to try – and the JAG can assist in that process.

Computerized systems notwithstanding, much of the intellectual heavy lifting remains subjective and fact-specific. In my experience, JAGs very rarely are presented with questions that have straightforward answers in the law. The targeteers and planners are too well trained anymore to even think about proposing obviously illegal options. More often JAGs deal with ‘gray’ areas, just like the commanders they serve. How certain is the intelligence? Exactly how many civilians do we think might be hurt? How critical is the target? Do we have the right weapons available? These are the questions that are hashed out during the long hours of ATO development.

Some of the thorniest issues entail dual-use targets, that is, those involving assets – mainly infrastructure elements - that both civilians and military forces draw upon. Dual-use targets can be contentious for two reasons:

First, determining the extent that they make a “concrete and direct military contribution” to the enemy’s war effort, as required by LOAC, is sometimes difficult and controversial. This is another area where U.S. practice is not always coterminous with that of coalition partners. Americans tend to take a more holistic approach to an enemy’s war-making capability than do many other countries. The U.S. view readily appreciates that seemingly disparate parts of the civilian infrastructure collectively form indispensable components to the ability to conduct modern, high-tech war.

Second, assuming the proposed target does make the direct contribution LOAC requires, it still must be demonstrated that the anticipated military gain from the bombing outweighs the expected collateral damage. Complicating the calculations is the fact that often there are few immediate casualties from an attack on a dual-use target. The adverse effect on civilians or infrastructure loss may only manifest itself over time.

Electrical grids are an oft-cited example of a dual-use target. Contemporary societies, especially in urbanized settings, are dependent upon supplies of electricity, as are their militaries. An Air Force study shows that because of the availability of alternate electricity sources for military sites, the utility of attacking the grid itself is often less than many airmen assume. The issue is very fact-specific, and can vary widely from operation to operation. Nevertheless, interrupting the electrical flow despite the existence of backup systems can still yield significant military benefits. Doing so injects friction into the adversary’s military machine as he frantically tries to switch to temporary power sources that themselves may be of uncertain reliability. When possible, the Air Force employs
means that disrupt electrical supplies (and other dual-use assets) without permanently destroying infrastructure.

An ancillary problem arises when the inherent ambiguity of dual-use targets is combined with the need to protect intelligence sources and methods. Although not an Air Force operation, the 1998 cruise missile attack on a Sudanese pharmaceutical factory illustrates the hazards. This facility was alleged to have been involved in the manufacture of compounds intended for terrorists’ chemical weapons. Initially, there was a reluctance to disclose the intelligence information supporting the strike. Unfortunately, this led to the questioning of the attack’s legitimacy by many nations, including some of America’s strongest allies. The lesson is that the U.S. must be prepared to prove its case in the “court of world opinion” in addition to more conventional forums. Thus, if the intelligence information is so sensitive that it cannot be disclosed, decision-makers must carefully consider whether the target should be struck at all, especially if the purpose is mainly a psychological one.

Psychological or “message” targets sometimes present perplexing challenges. These are strikes aimed at bona fide military objectives but whose intended effect is primarily psychological. Legally, they are subject to the same analysis as any other target; nevertheless, they raise some interesting issues. For example, following the Gulf War, Air Force lawyers were criticized (unfairly in my view) for questioning the propriety of a proposal to strike a statue of Saddam Hussein. That case aside, the real sticking point in these situations is whether or not enough objective data exists to conclude that the desired psychological effect will result. The evaluation becomes skewed when an American bias is applied to the psychology of another culture. General Charles Horner, the air commander during the Gulf War, discussed this problem in the context of the bombing of the Baath Party headquarters:

In terms of bombing the Baath Party headquarters, we looked at Saddam Hussein and the Baath Party as one. We wanted to show weakness in the Baath Party and thus weakness in Saddam Hussein. We wanted to embarrass him in front of his people as well as limit the loss of life. But what we didn’t realize was that it doesn’t matter what the people think. In the final analysis, we looked at it through American eyes, which was wrong.

Somewhat ironically, JAGs spend a great deal of time not, as one might expect, trying to prevent LOAC violations, but rather explaining to targeteers, planners, and even commanders that the law is not the war fighting impediment they tend to think it is. In some instances this is the result of an incomplete understanding of LOAC. For example, during Desert Fox’s 1998 strikes against Iraq, a young targeteer expressed concern that bombing a Republican Guard barracks at night (when it presumably would be occupied) somehow violated the concept of proportionality. Of course, proportionality in a LOAC sense seeks to weigh the military advantage against potential noncombatant casualties, not combatants like the Republican Guard. Indeed, killing them was the military basis for the strike in the first place.

A related issue engages the whole notion of collateral damage. Some military people believe that a prediction of high collateral damage ipso facto makes an attack unlawful. This is simply wrong. Anticipating high collateral damage merely means that the military value of the target must be great enough to justify the unintended losses. Savvy political reasoning might counsel against hitting a particular target solely out of fear of high civilian casualties, but that is altogether different from saying the law prohibits the attack.

A more debatable proposition relates to the status of voluntary human shields such as those Serb civilians who deliberately occupied bridges in Belgrade during the Balkan war. They hoped to deter NATO attacks by presenting a vexing quandary for military planners:
how to attack the bridges without killing the “noncombatant” protesters. This issue is politically complex, but not— in my view—legally difficult. In attempting to defend an otherwise legitimate target from attack— albeit by creating a psychological conundrum for NATO— the bridge occupiers lost their noncombatant immunity. In essence, they made themselves part of the bridges’ defense system. As such, they were subject to attack to the same degree as any other combatant so long as they remained on the spans.

As convoluted as these issues may appear, “time sensitive targeting” (TST) presents a markedly more difficult challenge. This process relates to targets of opportunity (usually mobile ones). In certain cases this can require re-directing (“reflowing”) a sortie from a preplanned target to an unplanned one. Because of growing pressure to minimize the sensor-to-shooter time, TST is a part of the air operations’ process that probably is most vulnerable to incurring unintended collateral damage. By its very nature, the TST dynamics do not allow for the studied examination of target folders that the preplanned process permits. This is yet another reason JAGs must be physically present in the AOC at all times to be available to work with the controllers when these “opportunities” arise.

TST sometimes allows the JAG only a split-second to formulate advice involving life and death. He or she may be obliged to do so based on much less than perfect data. Mistakes can happen, both in terms of unexpected collateral damage as well as—conversely—missed opportunities to damage the enemy. Indeed, TST issues in Enduring Freedom generated media reports critical of JAGs. It is impossible at this time to verify the accuracy of those stories, but they do highlight an important issue applicable to all operations. What, exactly, is the JAG’s authority? Does the JAG sit as some kind of legal strapp with ultimate power over a commander’s actions?

The short answer is “no.” A good JAG asks the hard questions, plays devil’s advocate, and demands the best of the intelligence assets and operational processes. In the end, however, the decision to attack belongs to the commander. If the commander directs what appears to be a LOAC violation despite clear legal advice—something, incidentally, I have never seen—the JAG is obliged to report the incident to a superior command who, in turn, must conduct an inquiry. If that avenue is unavailable or inappropriate under the circumstances, by law a JAG can bypass the chain of command and communicate directly with any supervising JAG, including the Judge Advocate General of the Air Force. In short, there are multiple ways of ensuring that an alleged LOAC violation is surfaced and investigated.

Concluding that a command action amounts to a breach of LOAC responsibilities is an extremely serious matter, and very different from merely disagreeing with the wisdom of a particular decision. It is important, therefore, that the JAG carefully and explicitly distinguish between an opinion as to prudent war fighting, and his or her formal, legal judgment on a LOAC matter, that is, one to be followed under pain of otherwise being considered (and reported as) a war criminal. Legal assessments of particular targets are generally the province of the JAGs in the AOC, not that of military or civilian lawyers at higher levels. Lawyers in the upper chain of command do review the overall operations plan, rules of engagement, broad target categories, and even certain highly sensitive sites. However, those attorneys would not ordinarily provide real-time advice about targets of opportunity.

That said, Information Age capabilities present challenges for everyone involved in air operations, the legal function being only one of those affected. The technology now exists for persons far from the area of operations to receive much of the same data as is available in the AOC. This may suggest to some that the viewpoint of those distant from the battlefield is equally valid—especially in air operations—as those deployed forward. In my judgment this is a mistake. As I argued previously, war fighting is an art, and one that still very much depends upon human interaction. Even the most advanced communications
systems do not replicate the intangible value of direct human interface. Person-to-person contact injects an important element of humanity into what can easily become an impersonal and potentially inhumane enterprise.

Serving in command centers does require the assigned JAG to acquire and maintain technical proficiency with the AOC's specialized communications and computer systems. Most AOGs employ the Theater Battle Management Core Systems (TBMCs). JAGs - like everyone else working in the AOC - must complete a specified course of study in order to master it. JAGs also receive focused instruction in operations law, and many have advanced (post-law school) degrees in international law from the nation's premier civilian institutions.

Equally important is the lawyer's knowledge of purely military matters. Access to decisionmakers is ephemeral and can be instantly forfeited if credibility is lost for any reason. For the JAG this means he or she must maintain an in-depth understanding of military history, equipment, strategy, and more. Senior Air Force leaders have high expectations in this regard, as General Hal M. Hornburg, a veteran of many combat operations and currently the Commander of Air Combat Command, noted in a June 2001 address:

[JAGs] need to understand the big picture. I was in the CAOC during Desert Fox. Who do you think was standing right behind me? It was my JAG. That person needs to know the law and the rules of engagement, but he or she also needs to understand things bigger than just the law. They've got to understand combat.

To ensure they do "understand combat," JAGs selected to work in AOGs are all uniformed officers who, by and large, are graduates of exactly the same stiff schools and war colleges as any other officer. In fact, JAGs are routinely top graduates of professional military education (PME) institutions, and they are known to garner a disproportionate share of the academic prizes.

In my experience, the U.S. practice of deploying military lawyers as advisors for combat operations is not widely shared by coalition partners. Except for a smattering of British, Canadian, and Australian JAGs, non-U.S. lawyers of any kind are rarely found in command centers. In their absence, some contingents simply accept the legal interpretations given by American JAGs. Of course, this can present problems - to include ethical ones - where, for example, the U.S. is not a party to a LOAC-related treaty that a coalition partner has ratified.

When a coalition partner does deploy a JAG to work with his or her American counterparts, productive synergies can result. During Bright Star 99/00, a multinational exercise that took place in Egypt in 1999, the AOC legal cadre included a British JAG. Working together from the desert command post, the coalition JAG team used legal research software and U.S. communications capabilities to obtain the actual text of British law related to anti-personnel landmines. Properly interpreted, this allowed U.K. forces to play a tangential but useful role in an operation involving American air-delivered munitions that contained anti-personnel mines.

Unhappily, such productive exchanges are all too uncommon. Many contingents look for legal guidance from civilian lawyers in their ministries of defense hundreds or thousands of miles away. (Protocol I of the Geneva Conventions does require legal advisors to be available at all levels of command, although it does not specify what "available" means in physical terms.) This creates practical problems in terms of delays, as well as more substantive ones. The inability to communicate directly with legal advisor counterparts makes it extremely difficult to insure that all the facts and circumstances so critical to legal assessments are properly conveyed. In my judgment, more nations need to develop a
trained cadre of military lawyers to support combat operations in the field. The emphasis on “military” is purposeful and is based on two key factors:

First, in addition to attendance at PMEs described above, it takes years of full-time immersion in the military environment at the tactical level to have the necessary familiarity with the weapons and their delivery systems to properly advise the commander-client. Successful lawyering in the AOC requires the ability to offer operational alternatives when LOAC issues arise, and few civilian lawyers have the right background to do that. In addition, legal issues should be couched whenever possible in operational terms that are meaningful to the military commander, and this requires first-hand military experience. In my opinion, professional warrior-lawyers working side-by-side with fellow officers are the best means to ensure legal considerations are taken into account during military interventions.

Second, there is an aspect to dealing with military leaders that is subtle but very real. Specifically, it is unlikely that any civilian lawyer (and especially one distant from the area of operation), can really penetrate the culture of the armed forces, however well trained and knowledgeable he or she may be. In my view, to have the necessary access, credibility, and trust the lawyer must be part of the officer corps. It is a mistake, as historian John Keegan observes, to assume that a connection between a civilian and a military occupation (in this instance, the legal profession) equates to “identity or even similarity” with members of the military caste.99 Frankly, it is difficult enough for a commissioned officer, who is a member of a profession as unpopular as law, to gain the acceptance and confidence of the operators; it would be near impossible for a civilian to do so.

Too often it seems that civilian lawyers and/or humanitarian actors suffer from an insufficient understanding of the military consequences of their legal positions. This can lead to situations that serve to make the law an object of disdain to many in uniform. Consider the desire among international law activists to eliminate or control the emerging technologies of war. Many military leaders view technological change as inevitable, and, regardless of efforts to limit or ban such technologies, believe they will eventually appear on the battlefield.

Much of U.S. military thinking is rooted in the axiom that “technology has permitted the division of mankind into ruler and ruled.”100 The U.S. is always looking for ways to substitute machines for manpower — and has enjoyed great success in doing so. As Harry Truman once remarked, “we have won the battle of the laboratories.”101 Compared to many allied populations, U.S. taxpayers have borne more than their share of the cost of the development of expensive technology (e.g., precision weapons) that reduces casualties on both sides.102 Accordingly, no one should be surprised that Americans and their armed forces are reluctant to welcome proposals that seem to limit the development and use of technology in war fighting.

Focusing LOAC efforts on technology seems more than a little ironic given the history of recent conflicts. Most people consider the machete-based slaughters in Rwanda, the deliberate amputation of the limbs of children in Sierra Leone, as well as the horrific genocide and rape that took place in the Balkans, as examples of the worst atrocities of late twentieth-century conflicts.103 Each case employed decidedly low-tech means; in fact, it is
generally the intervention of high-tech forces of the U.S. and the West that finally brought a halt to the conflicts.

Nevertheless, efforts to limit or ban altogether certain technologies persist, and they often catch the fancy of international celebrities. The classic illustration is the campaign to ban antipersonnel landmines. The tragic death of Britain's Princess Diana, one of the movement's most enthusiastic supporters, served to propel the adoption of what is known as the Ottawa Convention.²⁷ Virtually every major nation has ratified the Convention, the U.S. being one of the conspicuous exceptions. It is true that landmines have caused death and injury to hundreds if not thousands of innocent civilians in recent years. It is equally true, however, that landmines used as they should have been under pre-existing agreements have not caused many casualties. Nor have many innocent people been victimized by any of the new generation of self-neutralizing devices now available.

The Ottawa Convention illustrates two nagging problems in international law: 1) What is to be gained by expanding the scope of prohibitions when there is every expectation that existing bans are - and will be - ignored by those most responsible for the problem the new agreement is supposed to remedy?; and 2) What are the unintended consequences of trying to limit high-tech implements of war in an era when rapid technological change creates uses that were not (and could not be) envisioned or accounted for when the agreement was drafted?

Regarding the first concern, one must reject out of hand the argument that because some violate the law, there is no point in following the law in the first place. Nonetheless, very often - as in the case of landmines - the key causes of noncombatant suffering are already prohibited. For example, Protocol II to the 1980 Conventional Weapons Treaty (the U.S. and most other nations are parties to the relevant provisions)²⁸ bans the indiscriminate use of mines, and requires the marking of minefields and their post-hostilities removal so as to limit noncombatant casualties. If a party were disposed to ignore the requirements of the 1980 agreement, how would the Ottawa Convention deter them? Second, by prohibiting the production of advanced self-neutralizing mines, those who want to use the weapons are more likely to resort to crude varieties instead of ones that render themselves harmless over time.

It also is possible that the ban could produce unintended consequences that result in more, not less, human suffering. One legitimate - and humane - military use is attacking a weapons-of-mass-destruction site thereby rendering it unusable until it can be brought under control by friendly forces. Rather than use a high explosive that might scatter pollutants into the atmosphere, one might douse the installation with hundreds or even thousands of highly sophisticated landmines.

Another similarly practical use of mines is against infrastructure targets. Consider airfields. From the military perspective, all that is often needed is to block the enemy from using the site, sometimes only temporarily. One way is to blow up the aircraft, tower, runway, support buildings, and so forth. Another way would be to shower the runway with a variety of landmines that make it impossible for aircraft to land or takeoff.²⁹ The advantage of the latter course is that once you enter the post-conflict stage, instead of a hopelessly destroyed asset you have recoverable infrastructure upon which to build the necessary postwar economy. This is the kind of real world problem that military and civilian decision-makers face today.

Some organizations³⁰ want to apply the landmine ban to cluster munitions. Although not designed as landmines, the failure rate of a cluster bomb's submunitions can leave some unexploded ordinance in enemy territory. Unwary noncombatants are in peril if they come in contact with the devices. However, this relatively rare situation does not explain the weapon's humanitarian virtues. Specifically, because each bomblet contains
only a small amount of explosive, they are not as destructive as other weapons, and this can save lives. For example, where an enemy places military equipment such as an anti-aircraft system on something like a dam, cluster munitions can attack the site without risking the catastrophic destruction of the dam itself.

It is easy to conjure up similar examples. Banning cluster munitions invites adversaries to wage lawfare by placing military objects on or near facilities whose destruction by other weapons (e.g., high-explosives) puts civilians and their property at risk. This is especially a problem with the European Union’s proposal to prohibit the use of cluster bombs in what it defines as urban areas. The EU policy could suggest to adversaries that they should locate themselves in urban areas to escape the weapon. Experience shows that fighting in cities inevitably causes far more adverse effects on more civilians than any cluster bomb submunitions. Furthermore, the law should not be indifferent to the specific context of and rationale for the weapon’s proposed use. Deputy Secretary of Defense Paul Wolfowitz responded to criticisms of cluster bomb use in Enduring Freedom by pointing out that the U.S. had lost thousands of civilians in a single day, and would “use the weapons we need to win this war.”

What makes bans on technology so problematic is the sheer unpredictability of future applications. Weapons expert and retired Army colonel John B. Alexander makes this point quite forcefully in the summer 2001 issue of the Harvard International Review. Alexander contends that nonlethal technologies have great potential to minimize combatant and noncombatant casualties alike, but their development is blocked by what he charges are “emotionally based and broadly worded treaties.” Essentially, he contends that the agreements were established at a time when no one envisioned that various chemical and biological agents “could actually be used to reduce casualties.” Although he overstates his case somewhat (nonlethal riot control agents were banned as a method of warfare in the 1993 Chemical Weapons Convention), his essential point is correct: “Technologies do not cause bad behavior. It is people who use technologies for evil purposes that demonstrate bad behavior.”

Even the most horrific weapons can have humanitarian value depending upon how they are (or, perhaps more properly, are not) used. Nuclear weapons – probably the subject of more intense international negotiation than any other weapons’ technology in the history of man – have a remarkable record that supports Alexander’s thesis. Military historian Martin Van Creveld makes the interesting observation that “in every region where [nuclear weapons] have been introduced, large-scale interstate war has as good as disappeared.” The idea is not to advocate the spread of nuclear weaponry, but just to point out that limiting the technologies of war is not an unqualified virtue.

Another interesting “values” issue is raised by the international campaign against blinding lasers as a means of warfare. No one would seriously debate the proposition that blindness is a gravely debilitating affliction. It is still difficult to understand why it is a more unfortunate condition than traumatic amputation, paralysis, or any other similar injury that occurs in war. Assuming a laser is used under circumstances where one could lawfully kill an opponent, it seems indisputably more humane to blind him than to slay him. In advocating the ban, however, the International Committee of the Red Cross (ICRC) appears to draw a different conclusion. The ICRC, evidently unaware of the philosophical implications of what it was saying, in essence argued that adversaries would just use other weapons to finish off/blinded combatants. Again, this is the illogical argument that presumes that since a belligerent will break existing law (i.e., kill wounded hors de combat), enacting more law will somehow improve the situation.

Looking ahead, it will be interesting to see how the international legal community approaches the issue of unmanned and other robotic combat systems. These technologies are rapidly gaining acceptance in high-tech militaries like that of the U.S. There are
questions, however, as to how they should be employed. As one analyst notes, "[p]eople are generally more comfortable with somebody being in the loop when things are being shot and decisions are being made." Nevertheless, as these weapons are considered, the focus should not be on how they achieve their results, but rather the degree to which their impact honors LOAC and humanitarian values. A more difficult and problematic issue is presented by the military challenges occasioned by Operation Enduring Freedom. The safest and most effective means, for example, of rooting enemy fighters out of caves may be to employ flamethrowers. This controversial weapon is not currently in the U.S. inventory, but press reports have mentioned its possible use.  

The events of September 11th will have a profound effect on the role of law in military interventions. The psychological impact of savage attacks on the American homeland, along with fears raised by the anthrax incidents, radically diminish the public's desire for what Professor Betts might describe as hyperlegalistic processes. Recognizing the dimensions of the new threat, Americans have supported legislation giving law enforcement authorities vastly greater powers at the expense of what heretofore were accepted individual rights. Considering Americans' willingness to sacrifice their own legal protections, they are unlikely to be overly demanding about the supposed legal rights of foreign belligerents.

Americans are much more concerned about finding and stopping the perpetrators of violence than they are about the niceties of international law. Despite the president's statements to the contrary, many pundits called for the outright killing of those responsible, and derided the notion of trying to bring the perpetrators to justice in a criminal court. Unlike international law devotees, many Americans are exasperated with the law, especially when traditional applications have proven to be an inadequate guarantor of basic security on September 11th. Stewart Baker, the former general counsel of the National Security Agency, concludes "[w]e have judicialized more aspects of human behavior than any civilization in history, and we may have come to the limit of that." Consequently, in security matters, contemporary American discourse is pervaded by the notion that "[t]he time for legal maneuverings, extraditions and trials is past."
While reports of civilian casualties in Enduring Freedom cause disturbances among allied populaces, the support of the U.S. electorate for the military intervention remains strong. This is not a sign of callous indifference, but rather of a growing acceptance in the body politic that war inevitably causes unintended tragedies. Additionally, the public is becoming better educated as to how adversaries are manipulating civilian casualties to wage warfare. I believe they are much less prone to assume from media reports that U.S. forces are waging war "in an unfair, inhumane, or iniquitous way." I also sense that the continued public support is an expression of the people's conviction that the U.S. military — which for years has topped the polls as the institution in which Americans have the most confidence — is doing everything it can to minimize the impact on noncombatants.

To those in the military, the persistent criticisms by some international lawyers, NGOs, academics, and others regarding U.S. and coalition air operations in Iraq, the Balkans, and Afghanistan have been extremely counter-productive. In too many instances, the criticisms appear alternately uninformed or patently politicized. Following Operation Allied Force, the allegations that the altitudes flown during combat sorties caused unnecessary civilian casualties were especially infuriating to airmen. The accusations did not seem to appreciate that the armed forces of democracies at war are properly guided by and subordinate to policies set by elected leaders, not the desires of those in uniform. That is the way the rule of law is supposed to work in free countries. Furthermore, some reports were wildly inaccurate — even Human Rights Watch could point to only one instance where high-altitude attacks might have caused unnecessary civilian injuries.

Indeed, it is impossible to find examples in human history where so much combat power was applied as discreetly as in the aforementioned air operations. With respect to Operation Enduring Freedom, White House spokesman Ari Fleischer observed, "I don't think you'll ever witness a nation that has worked so hard to avoid civilian casualties as the United States has." That is exactly what military leaders at every level believe. They are convinced that they are doing everything they can to comply with LOAC.

While one would always hope for perfection in any human endeavor, in practice, I cannot see how the adherence to LOAC and the humanitarian values it represents can significantly improve in future military interventions. It should be kept in mind that the recent conflicts took place under circumstances where U.S. forces were not in extremis. This allowed time for comparatively extensive and systematic evaluations of targets and strategies. We may not have that relative "luxury" in rapidly evolving future conflicts, and the warfighters know it.

By demeaning the sincere efforts of those tasked to use armed force in pursuit of national objectives, the critics put respect for the law itself in jeopardy. They unnecessarily alienate the very audience LOAC most needs to prosper in the proverbial "real world." I do not mean to imply that the armed forces are disposed to act in an illegal or immoral fashion, but rather to suggest that the seeming impossibility to satisfy the self-styled legal authorities encourages military leaders to pursue a more politically-oriented approach that searches for legal loopholes and technical compliance as opposed to a more expansive philosophical commitment. Put concisely, subjective measures of public tolerance might tend to replace reliance upon rigorous readings of LOAC as the principal guide. As much as popular support is critical to a democracy's ability to fight, the transient and often emotionally charged politics of a nation at war do not always reflect the enduring human rights principles that underlie LOAC. All too easily, this approach can devolve into Kriegsraison writ large.

Will international law, and specifically LOAC, become, as Rivkin and Casey predict, "one of the most potent weapons ever deployed against the United States?" Perhaps their hyperbole goes too far, but the point is an important one. It is not in the interest of anyone
concerned with humanitarian values to unnecessarily handcuff the United States — or any democracy — when force is required to restore and safeguard human rights generally. We must remind ourselves that our opponents are more than ready to exploit our values to defeat us, and they will do so without any concern about LOAC. Consider this disquieting statement from Chinese military leaders: “War has rules, but those rules are set by the West...if you use those rules, then weak countries have no chance...We are a weak country, so do we need to fight according to your rules? No.”

We should expect to see unscrupulous antagonists engage in ever more sophisticated versions of lawfare. In Colombia, insurgents use sensitivity to human rights abuses to attempt to decapitate the nation’s military leadership, thus jeopardizing South America’s oldest democracy. The Wall Street Journal reports that “by intimidation and bribery” rebels force peasants to use the “courts to press false charges — anonymously — against the most capable military leaders.” At the same time the guerrillas are blaming others for human rights abuses they commit themselves. Even Human Rights Watch is disillusioned: “We’ve come to the conclusion that they’re using international humanitarian law as just part of a P.R. campaign.” It is vital for the preservation of human rights to be concerned about developments such as this. If international law is to remain a viable force for good in military interventions, lawfare practitioners cannot be permitted to commandeer it for malevolent purposes.

This essay critiques aspects of LOAC as currently practiced, but it is not meant to denigrate its fundamental importance. Americans would not be Americans if they waged war unconstrained by the ethical values LOAC represents. Rather, this paper is intended as a reminder that those interested in promoting law as an ameliorator of the misery of war are obliged to ensure it does not become bogged down with interpretations that are at odds with legitimate military concerns. LOAC must remain receptive to new developments, especially technological ones that can save lives, even if that means breaking old paradigms.

We also must forge stronger links between those knowledgeable of military affairs and those civilian experts in LOAC. Only productive cooperation can achieve the critical mass necessary to sustain international law as a guiding element in military interventions. We should encourage other nations to develop a robust cadre of uniformed lawyers ready to provide insightful advice to commanders in the field. Finally, we must not allow thoughtless, ill-informed, and politically motivated accusations to trivialize LOAC’s fundamental principles. If it does, LOAC will lose its credibility with the very people — and the very nation — it most needs to make certain it is observed and, more importantly, preserved.
Notes

2. Ibid., 129, 130.
4. For information about Operation Allied Force, see Dept of Defense, Operation Allied Force, June 21, 1999 Accessible at http://www.defenselink.mil/pressreleases/pr990621.htm (last visited 21 November 2001). They assert that "lawfare replaces warfare and the duel is with words rather than swords"; this captures a key theme of lawfare as used in this essay.
5. But see note 104, supra, & accompanying text.
7. Geoffrey Parker, Cambridge Illustrated History of Warfare (Cambridge University Press, 1995), 365 ("The majority of the approximately fifty million people killed in war [since 1945] have been civilians.")
9. Rivkin and Casey, note 3, supra.
12. "The free flow of broadcast information in open societies has always had an impact on public opinion and the formulation of foreign policy. But now the flow has increased in volume and shortened news cycles have reduced the time for deliberation." Joseph Nye, Redefining the National Interest, Foreign Affairs, July/August 1999, 22, 26.
14. See note 5, supra.
15. For example, the U.S. used law to deny hostile uses of commercial satellite imagery. See Michael R. Gordon, "Pentagon Corners Output of Special Afghan Images," New York Times, October 19, 2001, reprinted in Dept of Defense, Current News Early Bird, 19 October 2001 (discussing the U.S. strategy of "buying all the rights to picture of Afghanistan taken by the world’s best commercial satellites").
20. Ibid., 476-477. See also Colin Powell, My American Journey (Random House, 1995), at 520 ("The television coverage...was starting to make it look as if we were engaged in slaughter for slaughter’s sake.")
21. See, Liberia to Form Shield at Suspected Arms Plant, Baltimore Sun, May 17, 1995, at 14 (reporting a Libyan threat to surround a suspected chemical weapons plant with a human shield composed of millions of Muslims).

By shifting soldiers and military equipment into civilian neighborhoods and taking refuge in mosques, archaeological sites and other nonmilitary facilities, Taliban forces are confronting U.S. authorities with the choice of risking civilian casualties and destruction of treasured Afghan assets or forgetting attacks.


28. According to the DoD General Counsel, "[w]hen it is determined that civilian media broadcasts are directly interfering with the accomplishment of the military force’s mission, there is no law of war objection to using minimum force to shut it down.

29. See note 25, supra, at para IV, B. iii.
31. See note 17, supra, & accompanying text.
32. Centers of gravity are "[t]hose characteristics, capabilities, or localities from which military forces derive freedom of action: physical strength, or will to fight." See Chairman of the Joint Chiefs of Staff, Joint Publication (Joint Pub) 1-02, DoD Dictionary of Military and Associated Terms 23 March 1994 as amended 29 June 1999 accessed 6 September 1999 at http://www.dtic.mil/doctrine/jel/doddir/jt/01075s.html.
34. Michael Ignatieff, Virtual War (Metropolitan Books, 2000), at 199.
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PANEL VI:

CAN CONGRESS REGULATE INTELLIGENCE? MUST THE PRESIDENT COMPLY? – A CONSTITUTIONAL AND POLICY CONVERSATION

MODERATOR:
SUZANNE SPAULDING
The Legacy of the Church Committee

M.E. Bowman

Mr. Bowman currently serves in the Senior Executive Service of the Federal Bureau of Investigation. The thoughts expressed here do not necessarily represent those of the FBI. However, some of the matters discussed herein are gleaned from public testimony of the author presented on behalf of the FBI on July 31, 2002 before the Senate Select Committee on Intelligence. For the underlying facts presented in that testimony, the superb group of Intelligence Operations Specialists at the FBI are to be credited.

"He alone reads history aright, who, observing how powerful circumstances influence the feelings and opinions of men, how often virtues pass into vices, and vices into virtues, learns to distinguish what is accidental and transitory in human nature, from what is essential and immovable." —Machiavelli

A quarter of a century has passed since the "Senate Select Committee on Study Governmental Operations With Respect to Intelligence Activities," better known as the "Church Committee," released its multi-volume critique of the intelligence community. The findings of the Committee were nothing short of sensational, and the reaction of both the Executive and Legislative branches of government produced intense philosophical and practical changes in the intelligence community. These changes remain with us today and generally define the parameters within which the American public accepts secret government activities. Yet, those who actually remember the Committee, and the reasons it so profoundly affected a diverse community, are today more likely than not to be retired. The passage of time begs the question of whether the lessons of that era are remembered and even whether they remain applicable in a world where the threats are vastly different from those that spawned the activities investigated by the Church Committee.

Intelligence needs today are markedly different from those perceived in the era of Bolshevism, Fascism and Nazism and even from more recent history of Cold War mutually assured destruction. The threats to national security today revolve, for the most part, around economics and terrorism, and to a significant extent, are bound up in the stability of third-world nations as the world community becomes ever more interdependent. Still, it is good to reflect, from time to time, on the lessons of history to determine whether hard-learned lessons remain useful. The Church Committee produced so much written critique, about so many different activities, that it would be irresponsible not to pay an occasional visit to their ruminations.

Committee Findings

A fair summary of the Committee's findings is that the intelligence community was largely unregulated, inefficient and out of step with growing social values of the American people. It found unlawful and inappropriate activity in virtually every aspect of the community, both civilian and military. The Committee found multiple shortcoming in intelligence operations, adverse effects of secrecy, failure by Congress to oversee intelligence agencies, and alleged unlawful actions. They found duplication, waste and inerts. Most commonly, however, they found that activities of the intelligence community had violated individual privacy.

The Committee determined that secret government activities, while necessary to the effectiveness of government, were, nevertheless, a threat to democratic society. The Committee believed control and accountability were lacking and that covert actions had been both excessive and a means of circumventing the democratic process. Most importantly, they determined that intelligence efforts had violated the Constitution and that the reason was lack of legislation. The remedy, they asserted, was to have Congress prescribe rules for intelligence activities.

The Church Committee proposed charter legislation for intelligence agencies that would have regulated covert action and imposed a statutory ban on assassination. The Committee also reported a compendium of series of recommendations that would have regulated virtually the entire gamut of intelligence activity and proposed that any legislation implementing their recommendations be specifically styled as the exclusive means of regulating the subject. Although the Committee's recommendations were intended to protect the public, the methodology proposed, legislation could easily have resulted in wooden, inflexible options.

A Climate ripe for abuse

Until the twentieth century, the United States had been an unfettered nation, only occasionally challenged by foreign powers and certainly well protected by its vast oceans. However, by the early 1930's the world had grown smaller and ideas became more significant, and as potent, as armies. Bureaucratic threats from totalitarian ideologies posed issues for which the nation had little experience. As a result, diverse and fragmented elements of the Executive Branch began to meet the foreign threats with tactics that, while probably not improper in the beginning, eventually would lead to the abuses studied and exposed by the Church Committee. The downward spiral started innocently enough. As good a place as any to start is in the administration of Woodrow Wilson which awakened slowly to the nuances of national security.

National security threats in the era of the First World War, both real and imagined, drove a variety of initiatives and presidential authorities were given, or assumed, for a variety of purposes. As example, with the threat of international carnage on the horizon, Presidential authority was employed to wiretap the German and Austro-Hungarian illegations. Fracturing international law, a German military attaché with diplomatic immunity was seized and searched.

Most telling was a spy scare that swept the nation near war's end, overwhelming the Justice Department's four hundred Bureau of Investigation agents with investigative requirements. Reacting to this problem, Attorney General Gregory accepted an offer of help from an army of unpaid volunteers of the American Protective League (APL). Each volunteer was given a badge similar to a police shield and the APL then waged a zealous campaign against dissloyalty in any form. Acting without police powers, they conducted arrests, searches and seizures, tapped telephones and conducted "lacker raids" to root out draft dodgers.

At war's end an uneasy truce between labor and management came to an end. Inflation soared and labor began to strike to recoup their war year losses. The image of Bolshevism blossomed with strikes and was bolstered when bombs began to explode in a terrorist campaign aimed at capitalism. The Justice Department organized the "Radical Division" under J. Edgar Hoover to compile intelligence on political radicals. Soon re-christened the General Intelligence Division (GID), Hoover's organization compiled dossiers on sixty thousand "radically inclined" individuals.
within one year.\footnote{Within one year.}

The military was also involved. The Army intensively monitored its activities and maintained domestic counter-subversion files on U.S. persons. As defenses about an imminent attempt to overthrow the government, continued, army intelligence agencies engaged in raids on suspected groups and conducted surveillance of a wide array of citizens.

One army officer requested that law enforcement pass along to him information on elements hostile to the government, such as the American Federation of Labor and other indisputably anarchical or revolutionary organizations.\footnote{Other indisputably anarchical or revolutionary organizations.}

Soon, the Belostok "menace" captured national imagination and a vigorous anti-Red campaign arose, targeting Communists and Communist labor parties across the United States.\footnote{Across the United States.} Thousands of individuals were arrested without probable cause in raids at least tacitly approved by the President.\footnote{Tacitly approved by the President.} Protestors existed, but they were few and largely ignored because the perceived threat loomed larger than life.\footnote{Larger than life.}

Extra-legal processes were employed with confidence, but in the climate of the day, they surely seemed less a governmental excess than they would today.

Foreign-based fear, having continued to evolve, caused L. Edgar Hoover to make two visits to the White House in 1936, during which Roosevelt charged him to gather information on Fascism and Communism.\footnote{Charged him to gather information on Fascism and Communism.} The FBI understood its presidential mandate to be the investigation of all individuals engaged in activities detrimental to the national security of the United States. The resulting direction to FBI field offices around the nation was:

\begin{enumerate}
\item[1] A list of all possible sources information concerning subversive activities being conducted in the United States by Communists, Fascists, and representatives or advocates of other organizations or groups advocating overthrow or replacement of the government of the United States by illegal means.
\end{enumerate}

This was the only beginning. Soon, the policy direction became open-ended, expanding beyond threats that could be categorized as "foreign." The Church Committee explained it this way:

\begin{enumerate}
\item[2] In the wake of�
\end{enumerate}

\begin{enumerate}
\item[3] The executive orders upon which the Bureau had based its intelligence activity in the decade before World War II were vague and conflicting. By using words like "subversion," a term which was never defined, and by permitting the investigation of "potential crimes," and matters "not within the specific provisions of prevailing statutes," the foundation was laid for executive intelligence-gathering about Americans.\footnote{Laid for executive intelligence-gathering about Americans.}

Beginning in 1940, President Roosevelt authorized the Attorney General to approve electronic surveillance where "grave matters involving defense of the nation"\footnote{Defense of the nation.} were at stake. The Attorney General was to "secure information by listening devices (directed at the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."\footnote{Spying.}

The concession to personal liberty was to "limit these investigations so conducted to a minimum and to limit them to specific as possible to aliens."\footnote{Specific as possible to aliens.}

This license of the President quickly gained expansive parameters. By 1954, the Bureau could enter private property for the purpose of installing electronic surveillance devices, without regard for surreptitious entry and without prior authorization from the Attorney General. Such surveillance was authorized simply because it was in the "national interest."\footnote{National interest.}

Reminiscent of the era that brought on the Alien and Sedition Acts, things foreign became inherently suspect. Congressmen called on constituents to hunt down "internal enemies," and the State of Georgia issued a declaration of war against aliens.\footnote{Declaration of war against aliens.}

By the early 1950s, several Soviet spy rings had been uncovered in the United States, the communists had overrun China and Americans were dying in Korea. During this time, the now infamous House Un-American Activities Committee and the Smith Act emerged.\footnote{House Un-American Activities Committee and the Smith Act.}

Once again the nation was willing to accept extraordinary measures in the name of national security. Foreign threats were targeted, but so was a domestic fifth column of Americans who might be a threat to the national security.\footnote{Domestic fifth column.}

Technology added to what would eventually become a legal and social problem. During the war cryptanalysts had been responsible for significant battlefield successes to the Government. They had taught the means to continue to receive foreign communications in order to maintain the cryptanalytic skills acquired in wartime. Arrangements were made with major cable companies to gain access to all overseas cables to, and from, foreign embassies and consulates, and from U.S. persons and commercial firms. Assurance were sought by the companies, and given by the government, that the activity was vital to national security and that they would not be prosecuted for their cooperation.\footnote{Prosecuted for their cooperation.}

As early as 1928, Justice Brandeis presciently noted that technological changes permitted the government to employ more subtle and expansive means of invading privacy. By the early 1960s, electronic media displaced paper communications, permitting computers to look for words of interest.\footnote{Look for words of interest.}

With this technological advance, "watch lists" of names were developed without reference to foreign or domestic interests. This intelligence effort was soon turned to non-foreign threats as Attorney General Robert Kennedy employed the watch lists against major crime figures.\footnote{Major crime figures.}

A spin-off called Operation Minaret specifically targeted both cables and telephone calls for information about possible foreign influence on civil disturbances in the U.S. related to the Vietnam conflict.\footnote{Vietnam conflict.}

The possibilities for the new technologies were virtually endless, and the result, naturally, was a massive collection of information on U.S. persons.

The Climate Changes

To this point in time Congress had not taken an active interest in intelligence matters. In 1956, Senator Leverett Saltonstall explained congressional inactivity this way:

\begin{enumerate}
\item[4] It is not a question of reluctance on the part of CIA officials to speak to us... it is a question of our reluctance... to seek information... on subjects which I personally, or a member of Congress and an average citizen, would rather not have...\footnote{Reluctance.}

\item[5] Now, however, Congress began to take an interest in intelligence affairs as never before. By the mid-70s the political climate had markedly changed. With this change came the War Powers Resolution, the Hughes-Ryan and Boland amendments,\footnote{Boland amendments.}

\item[6] and intelligence oversight committees in Congress, the latter clearly a spawn of the activities investigated by the Church Committee.\footnote{Activities investigated by the Church Committee.}

At the same time that new surveillance technologies emerged to emerge, changing threats to national security slashed with the civil libertarian backlash against surveillance of citizens during the Civil Rights movement and Vietnam War. The Supreme Court first confronted these tensions between national security and individual freedoms in 1972. United States v. United States District Court (Keith)\footnote{United States v. United States District Court (Keith).} arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property. One defendant was also charged with the\footnote{Charged with the}
Amendment rights through a surreptitious entry and physical search of his office. There was no accusation that Ellsberg or his psychiatrist had any relationship to a foreign power.

The second incident became so famous that it is a part of the American lexicon—Watergate.* The August 26, 1974, resignation of the Fielding break-in, John N. Mitchell, was subsequently sent to prison for perjury and conspiracy in connection with efforts to cover up the burglary of the Democratic National Committee headquarters at the Watergate in Washington. President Richard M. Nixon was named an unindicted co-conspirator in the same affair.

What had begun decades earlier as a series of efforts by the Executive to protect against foreign influence had spread at the edges. National security is more clearly more than just foreign threat, but as the years had passed, and threats had evolved, so had the social climate evolved. Americans, by the mid-70s, were more confident of national survival, more assured of their own rights, and more demanding of the government. The largest permitted of government in an era when the national security was far more fragile would no longer be tolerated. That was the political and social climate into which was born the Church Committee.

The Social Backlash

Not all the remediation of the era can be traced to the Church Committee, but there is a clear consistency of thought process in the Privacy Act, the Freedom of Information Act, the Foreign Intelligence Surveillance Act and similar legislation. There is also consistency in Executive Branch actions, notably the Ford, Carter, and Reagan Executive Orders regulating the Intelligence Community, and in the implementing regulations of the affected agencies. Acting separately, but with a similar focus, all the branches of government engaged on a mission to ensure an open government, protection of the privacy of its citizens and adequate, measured, tools to protect the national security. In accord with Executive Order requirements, the military and intelligence communities adopted new measures to protect the rights of U.S. persons.

By trial-and-error both the Executive and Congress sought to find a legislatively solution to the issue of warrantless search and surveillance. In 1976, President Ford submitted a bill to the Senate that would have codified existing executive branch practices, and Attorney General William S. Baxter and Edward Levi pledged their cooperation to work with the Congress to create legislation to regulate electronic surveillance. Debate and discussion concerned the questions of inherent executive authority and whether the traditional criminal law standard should be included in the legislation.**

Senator Kennedy proposed restrictive legislation that would have expressly eliminated congressional recognition of inherent executive authority and whether the traditional criminal law standard should be included in the legislation.** Senator Kennedy proposed restrictive legislation that would have expressly eliminated congressional recognition of inherent executive authority and whether the traditional criminal law standard should be included in the legislation.**

The Church Committee, under the direction of its chairman, the late Sen. Barry Goldwater, R-Ariz., gathered facts, heard testimony, and produced a massive report that included recommendations that remain the supreme legal foundation for electronic surveillance in the United States. The Church Committee's report, released in 1976, provided a comprehensive analysis of the issues surrounding electronic surveillance and recommended a number of measures to improve the oversight and regulation of such activities. Among its key recommendations were the establishment of an independent review board to oversee electronic surveillance programs and the creation of a public right of access to information about such programs.

The report also included a number of other important recommendations, such as the requirement that electronic surveillance be authorized by a judge and the establishment of a presidential task force to study the issue of electronic surveillance. The Church Committee's work helped to establish a foundation for future legislative efforts to regulate electronic surveillance, and its recommendations continue to be influential in shaping current policies and practices. The Church Committee's report has been praised for its thorough examination of the issues surrounding electronic surveillance and its recommendations for improving the oversight and regulation of such activities.
as well, has adapted to the needs of secrecy without compromising fundamental rights. The intelligence agencies, except for the FBI, are restricted, with narrow exceptions, to their foreign missions and the Department of Defense remains a military and intelligence force abroad, employing its massive logistical strength and immense manpower domestically only in humanitarian and supporting roles.

After the September 11 crisis, Congress passed the Patriot Act which broadened many intelligence authorities. It is important to keep in mind, however, that what Congress did, for the most part, was to legislate in the margins. Intelligence tools were generally made consistent with tools that law enforcement already had. Some artificial distinctions imposed twenty-five years ago, in recoil to the abuses of the past, were modified.

However, the most striking change was attitudi
al, but as had been the case with the Church Com-
mittee, it was only largely unstated. The need to assess and collate information was at the heart of the Act and Congress sounded a call for the Executive Branch to meet that need, granting expanded authorities to gather and share information. Importantly, however, none of the protections of USP information were diluted. Agencies could more easily gain and share information but the requirements to protect USP information were unchanged. No oversight was sacrificed and the military and the intelligence community, except for the FBI, remained focused abroad.

What we have seen thus far in the war on terror is unlike any other domestic crisis in our history. Authorities have been broadened to meet the new challenges, but there have been no concessions of USP rights. Authority to gather information affecting USP rights is slightly broader, but the responsibility to protect it and use it responsibly is unchanged. Criticism has been leveled at some actions, but even a casual review shows that most of the criticism was aimed at administrative action taken in enforcement of immigration laws to which scant attention had been paid in the past. The crisis is not yet over, and the public is not yet safe. Yet, what we have seen is a calm determination to meet the challenge within the rule of law and to continue the successful system of Executive Branch self-restraint. Even if there had been the only lessons learned from the Church Committee they would have been lessons worth all the pain and anguish induced throughout the investigation, as well as the soul-searching aftermath in a quest for procedures that are both socially and legally acceptable.

ENDNOTES

1. [For details of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-753 (1975) [hereinafter Church Committee].]
2. Id. at 1-14, 143-59.
4. The Committee found multiple abuses, but it is important to bear in mind that not all the criticism directed by the Committee was directed at unlawful activity. Much of it was leveled at activities that challenged privacy interests of U.S. persons—interests that, at that point in time, not only USP information but also the protections that today we consider only natural.
6. See, MELVIN DODD, WE SHOULD BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 361-62 (1969). From if no law existed to punish "dissident" acts, APL volunteers were often able to continue activism to pass for other reasons. One person, for example, was arrested and sentenced to 90 days confinement for saying that the President is a "darned fool."
7. WHITFIELD, supra note 9 at 38. One operation in the New York metropolitan region involved 35 Bureau agents, 2,000 APL agents, 1,313 distributors, and 1,000 tailors. Over three days, tens of thousands of laborers, most of whom simply worked their draft card, were rounded up and headed into public buildings for questioning.
9. In 1950, General Pershing became the head of MIO and, within a few months, he rescinded all orders allowing army surveillance of U.S. personnel and ended all investigations of the Justice Department. MIO's name was changed to CJS-2 and, although its formal role in surveillance ended, abuses continued, kept underground out of concern for public opinion. CJS-2 was still reported on alleged communists and activities of labor groups.
12. See, ROGER MURPHY, AND SCARE, A STUDY IN NATION'S FUTURE, 1910-1920, 190-222 (1955). Lists were drawn up. Then, on the morning of January 2, 1950, some 4,000 people were rounded up and jailed under CJS-2. There was no search or arrest warrants. This, reportedly, was the catalyst that launched the American Civil Liberties Union.
13. See, G.I.A. O'DOLO, HOMELAND TERRORISM: A HISTORY OF U.S. INTELLIGENCE, EXAMINED, AND COUNTERFACED FROM THE AMERICAN REVOLUTION TO ITS CIA CITE 317, 328 (1999) [hereinafter FRANKENBERG]; The President's Own Eyes Only at 63-66 (1995). CJS-2 and unlisted interrogations were set up to hold those mistrusted off the streets. Departments were ordered on agents who were members of the Communist Party until a federal judge stopped the practice.
15. 6 Church Committee at 566-567. Presumably this directive could be interpreted as agitating violence against the com- mune itself. As time passed, however, it appears to have been more broadly interpreted.
16. 2 Church Committee at 24.
22. 18 USC § 2255 (1969) allowing illegal to advance the overthrow of the government or to belong to a group which did.
23. The Code of Federal Regulations continues to direct the FBI to "carry on, as a non-AG.
25. See id. at 315-36, 386, 387
26. Id. at 315-17.
27. Id. at 320-24.
30. 22 U.S.C. § 2422, repealed Aug. 14, 1991, Pub. L. No. 102-88, Title VI, 105, 165 Stat. 441. This amendment to the Foreign Assistance Act of 1961 was intended to prohibit the expendi-
32. 22 U.S.C. § 2422, repealed Aug. 14, 1991, Pub. L. No. 102-88, Title VI, 165 Stat. 441. This amendment to the Foreign Assistance Act of 1961 was intended to prohibit the expendi-
34. Id.
36. Id. at 2-3.
38. See, Federal Bureau of Investigation, TERRORISM, RESEARCH AND ANALYTICAL CENTER, NATIONAL SECURITY DIVISION, TERRORISM IN THE UNITED STATES 7 (1994).
39. For example, Usama bin Laden's organization, al-Qaeda, has no head honcho, lacks a significant hierarchy, has considerable financial backing, and is capable of evading the strictures for carrying out terrorist threats around the world. On the Bin Laden organization, see, Kevin Whiteman and Logan Kitof, An Inside Look at Terror, Inc., U.S. News & Wkly Report, Oct. 9, 1998, at 34; Stephen Emerson, Inside the Clinton Bin Laden Investigation, JOURNAL OF CONTEMPORARY.
The reason is simply the nature of the threats. They aggressively target their actors. These and other threats generate a requirement to prevent harm. Worse, however, increasingly we find linkages between all of these, either between parties or in adoption of society. Two threaten both global and national economies, nurture international corruption and undermine global stability.

Contemporary threats are not. Today, economic espionage, organized crime and terrorism are threats that eat at the heart of society. During Shamrock operations, the concerns of the Shamrock era, the Red Menace, fifth columns, etc. were ephemeral – technology associated with private communications, which now are possible in a proliferating variety of media. Technology has driven increasingly sharper analysis and interpretation of the Fourth Amendment – primarily geared toward non-intelligence targets. These lists included both crime figures and dissidents engaged in speech otherwise protected by the First Amendment. Technology had enabled an expansion of invasive activities that came to an end only when congressional concern in intelligence activities began to focus on privacy issues. The most prominent of these Congressional foci came from a Senate governmental affairs committee spearheaded by Senator Frank Church of Idaho.
National security threats, such as terrorism, are unlike common crime and often arise in the context of a nation’s struggle against foreign threats. The government’s efforts to protect national security are necessarily focused on identifying and countering these threats. The law is as much a part of our culture as is the social dimension, but technology challenges our legal methodologies. In the criminal case, the law’s role is to enhance the use of its existing powers. In this climate, protection of the public will require that law enforcement and intelligence officers will have to be more proactive, more aggressive, and more efficient. The law’s role in national security is to enhance the use of its existing powers, not to create new ones.

ENDNOTES

1. Mr. Bowman is a retired naval officer who served for ten years as Senior Counsel for National Security Affairs at the FBI. He is currently Director, Intelligence Issues Group at the FBI, responsible for intelligence policy, information sharing and community relations.

2. 381 U.S. 479 (1965).


4. 277 U.S. 438 (1928).

5. See generally United States v. United States District Court (Keith v. United States Intelligence Surveillance Court). For national security issues, probable cause must relate to status – i.e., a foreign power or an agent of a foreign power. As Justice Powell noted in what has become the seminal case for this arena,


7. The Right to Privacy, 10 HARV. L. REV. 193 (1890).

8. 4 HARV. L. REV. 193 (1890).

9. See generally United States v. United States District Court (Keith v. United States Intelligence Surveillance Court). For national security issues, probable cause must relate to status – i.e., a foreign power or an agent of a foreign power. As Justice Powell noted in what has become the seminal case for this arena,


Mr. Chairman, thank you for inviting me to testify on the constitutional limitations that apply to domestic surveillance. The committee provides an important public service in exploring the issues raised by the “Terrorist Surveillance Program” (TSP), authorized by the administration after 9/11 and conducted by the National Security Agency (NSA). I begin by summarizing what happened in the 1960s and 1970s with domestic surveillance. Two basic points. First: intelligence agencies were willing to violate the Constitution, including the First and Fourth Amendments. Second: federal courts rejected the theory that the President has “inherent” constitutional authority to engage in warrantless domestic surveillance.

I. Lessons of Domestic Surveillance

Illegal eavesdropping by the executive branch surfaced as a prominent issue in the 1960s and 1970s, after it was publicly disclosed that U.S. intelligence agencies had been monitoring the domestic activities of Americans. In 1967, when the U.S. Army wanted the NSA to eavesdrop on American citizens and domestic groups, the agency agreed to carry out the assignment. NSA began to put together a list of names of opponents of the Vietnam War. Adding names to a domestic “watch list” led to the creation of MINARET: a tracking system that allowed the agency to follow individuals and organizations involved in the antiwar movement. NSA thus began using its surveillance powers to violate the First and Fourth Amendments. From mid-1969 to early 1970, the White House directed the FBI to install without warrants 17 wiretaps to eavesdrop on government officials and reporters. Newspaper stories in 1974 revealed that CIA had been extensively involved in illegal domestic surveillance, infiltrating dissident groups in the country and collecting close to 10,000 files on American citizens. CIA Director William Colby later acknowledged the existence of this program while testifying before a Senate committee.

The Huston Plan

On June 5, 1970, President Richard M. Nixon met with the heads of several intelligence agencies, including the NSA, to initiate a program designed to monitor what the administration considered to be radical individuals and groups in the United States. Joining others at the meeting was Tom Charles Huston, a young aide working in the White House. He drafted a 43-page, top secret memorandum that became known as the Huston Plan. Huston put the matter bluntly to President Nixon: “Use of this technique is clearly illegal; it amounts to burglary.” His plan, which Nixon approved, directed the

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2 Id. at 428-29; James Bamford, The Puzzle Palace 333-34 (1983 ed.).
3 Richard E. Morgan, Domestic Intelligence: Monitoring Dissent in America 6 (1980).
NSA to use its technological capacity to intercept -- without judicial warrant -- the domestic communication of U.S. citizens using international phone calls or telegrams.¹

Under pressure from FBI Director J. Edgar Hoover and Attorney General John Mitchell, Nixon withdrew the Husho Plan.² Placed in a White House safe, Husho's blueprint became public in 1973 after Congress investigated the Watergate affair and uncovered documentary evidence that Nixon had ordered the NSA to illegally monitor American citizens.³ To conduct its surveillance operations under such programs as SHAMROCK (in operation from August 1945 to May 1975), NSA entered into agreements with U.S. companies, including Western Union and RCA Global. U.S. citizens, expecting that their telegrams would be handled with the utmost privacy, learned that American companies had been turning over the telegrams to the NSA.⁴

Judicial Reaction

A 1972 decision by the Supreme Court involved the government's use of warrantless electronic surveillance to prevent what the government feared was an attempt by domestic organizations to attack and subvert the existing structure of government. As the Court framed the issue, it needed to balance both to "the Government's right to protect itself from unlawful subversion and attack" and "the citizen's right to be secure in his privacy against unreasonable Government intrusion."⁵

In district court, defendants prosecuted by the government requested all records of warrantless surveillance directed at them and asked for a hearing to determine whether any of the evidence used to indict them was tainted by illegal actions. The district court held that the warrantless electronic surveillance was not justified on the ground that certain domestic organizations were engaged in subverting the government, and that the government had to make full disclosure to the defendants of illegally monitored conversations. It ordered an evidentiary hearing to determine taint.⁶ The court did not accept the government's argument that the Attorney General, "as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security."⁷ The court expressly rejected the claim of "inherent" presidential power.⁸ The President was "still subject to the constitutional limitations imposed upon him by the Fourth Amendment."⁹

The district court's decision was affirmed by the Sixth Circuit, which examined the government's claim that the power at issue in the case "is the inherent power of the President to safeguard the security of the nation."¹⁰ The Sixth Circuit found that argument unpersuasive, in part because the Fourth Amendment "was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III."¹¹ The Constitution was adopted "to provide a check upon 'sovereign' power," relying on three coordinate branches of government "to require sharing in the administration of that awesome power."¹² The Sixth Circuit further noted: "It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign."¹³

A unanimous ruling by the Supreme Court affirmed the Sixth Circuit. Inherent in the concept of a warrant issued under the Fourth Amendment "is its issuance by a 'neutral and detached magistrate.'"¹⁴ Fourth Amendment freedoms "cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."¹⁵ Executive officers charged with investigative and prosecutorial duties "should not be sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."¹⁶

The government advised the Court that the domestic surveillances at issue in this case were directed primarily at collecting and maintaining intelligence about subversive forces, rather than an effort to gather evidence for criminal prosecution. Moreover, the government insisted that courts lacked the knowledge and expertise to determine whether domestic surveillance was needed to protect national security.¹⁷ To the Court, those arguments did not justify departure from Fourth Amendment standards.¹⁸

Finally, the Court held that Section 2511(3), enacted as part of the Omnibus Crime Control Act of 1968, merely disclaimed congressional intent to define presidential powers in matters affecting national security and did not grant authority to conduct warrantless national security surveillance.¹⁹ The Fourth Amendment required prior judicial approval for the type of domestic security surveillance involved in this case. The Court carefully avoided the question of surveillance over foreign powers, whether within or outside the country.²⁰

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¹ Bamford, Body of Secrets, at 430.
² Emery, Watergate, at 26-27.
³ Id. at 438-39; Morgan, Domestic Intelligence, at 75-76. For further details on domestic surveillance during the 1960s and 1970s, see recent testimony by Frederick A. D. Schwarz, Jr., "Ensuring Executive Branch Accountability," before the Subcommittee on Commercial and Administration Law of the House Committee on the Judiciary, March 29, 2007, at 4, 10-11.
⁶ Id. at 1076.
⁷ Id. at 1077.
⁸ Id. at 1078 (citing District Judge Ferguson in United States v. Smith, 321 F. Supp. 424, 425 (C.D. Cal. 1971)).
¹⁰ Id. at 655.
¹¹ Id.
¹² Id.
¹³ United States v. United States District Court, 407 U.S. at 316.
¹⁴ Id. at 316-17.
¹⁵ Id. at 317.
¹⁶ Id. at 318-19.
¹⁷ Id. at 320.
¹⁸ Id. at 302-08.
¹⁹ Id. at 302-08.
Congressional Action

The Court’s decision in 1972 put pressure on Congress to develop statutory guidelines. In part, Congress responded by setting up the Church and Pike Committees to study the scope of executive branch illegality and propose a system of effective legislative and judicial checks. From those hearings and reports came the creation of new intelligence committees in the House and the Senate to closely monitor the agencies, followed by the landmark Foreign Intelligence Surveillance Act (FISA) of 1978. In congressional hearings, Attorney General Edward H. Levi testified in support of legislation that would require "independent review at a critical point by a detached and neutral magistrate."[24] FISA established a special court, the Foreign Intelligence Surveillance Court (FISC), to assure a judicial check on executive activities and established a Court of Review to hear appeals by the government from FISC denials of applications to engage in electronic surveillance. Moreover, it clearly stated that the procedures of FISA for electronic surveillance within the United States for foreign intelligence purposes "shall be the exclusive means" of conducting such surveillance.

At today’s hearing we face issues that were studied extensively and carefully in the 1970s and supposedly remedied by legislation. Once again Congress is in the position of insisting that federal agencies adhere to the rule of law, respect constitutional and statutory limits, and protect fundamental rights of individual privacy and civil liberties.

The balance of my statement focuses on three points: (1) the legal justifications offered by the administration for the TSP; (2) the lack of access by the Judiciary Committees to briefings on the TSP conducted by the executive branch and to records and documents withheld from them; and (3) observations about the implications of the TSP for congressional control, the rule of law, and individual rights and liberties.

II. The Administration’s Legal Defense

On January 19, 2006, the Office of Legal Counsel (OLC) in the Justice Department released a 42-page white paper justifying the legality of the TSP.[25] It offered two principal arguments, one statutory, the other constitutional. The first interpreted the Authorization for Use of Military Force (AUMF), enacted after 9/11. The second explored the President’s authorities under Article II of the Constitution, with special emphasis on the availability of "inherent" powers.

219

The AUMF

OLC argued that in passing the AUMF "Congress by statute has confirmed and supplemented the President’s recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland."[26] The statute authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks" of September 11 in order to prevent "any future acts of international terrorism against the United States."[27] To OLC, history "conclusively demonstrates that warrantless communications targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF."[28]

“All necessary and appropriate force” does not mean whatever the President decides to do, particularly when a selected instrument of force conflicts with statutory law. In FISA, Congress established a set of procedures to be “exclusive” for domestic surveillance. If Congress after 9/11 wanted to modify those procedures and permit the President to engage in national security surveillance without a judicial check, it knows how to amend a statute. Either it brings up the bill in whole to debate changes, with all Members of Congress aware of what they are doing, or adopts a free-standing amendment with FISA clearly and specifically in mind, such as debating language that states: “notwithstanding the provision in Title II, Section 201(b), Subsection (f), of the Foreign Intelligence Surveillance Act, the President is hereafter authorized to engage in the following warrantless surveillance.” In floor debate, lawmakers must expressly know that the bill language under consideration covers warrantless surveillance and that the judicial check in FISA is to be waived.

Amendments to statutory law must be explicit and evident, with clear understanding by all lawmakers as to what is at stake. Amendments are not made by implication, with Members unaware of what they are voting on. There is no basis for finding in the debate of the AUMF that Members of Congress understood that they were setting FISA to the side to allow the President warrantless surveillance over domestic matters. It is quite true, as OLC said, that FISA “also contemplates that Congress may authorize such surveillance by a statute other than FISA.”[29] Congress is always at liberty to adopt a future statute that modifies an earlier statute. But when it acts, it does so expressly and consciously, in full light of the changes made and their significance, not by vague implications. OLC would have Congress legislate in the dark. It is my impression that the administration no longer seriously argues that the AUMF is legal justification for
the TSP, and that it relies essentially on some form of “inherent” powers under Article II (or perhaps even outside the Constitution).

Inherent Powers

OLC argued that NSA’s activities under what became known as the TSP “are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States.” Let me unpack each of these key words: well-recognized, inherent, Commander in Chief, and “sole organ.”

1. Well-recognized? Federal courts have made many observations about the President’s powers in foreign affairs and his duty to gather intelligence for national security. Language appears at times in the decisions, just as frequently remarks are made in dicta that is extraneous to the issue before the court. Some rulings encourage a broad reading of presidential power; others are much more restrictive. The record is quite mixed and does not reflect the existence of any settled, “well-recognized” position in the federal judiciary.

The same indefinite position applies to Members of Congress. Some are persuaded of independent and inherent presidential power in foreign affairs; others flatly reject legal doctrines that assert such a sweep of executive authority. There is no “well-recognized” view in Congress regarding the claim that OLC makes. In FISA, in fact, Congress expressly left no room for inherent and independent power by the President to conduct warrantless surveillance.

Similarly, the academic community has never developed a “well-recognized” position on the President’s inherent constitutional authority as Commander in Chief to conduct warrantless surveillance. Existing studies demonstrate a wide variety of opinions and judgments.

2. Inherent? Any claim of “inherent” power for the President must be approached with extreme caution and wariness. First, it is only a claim or an assertion, not fact. Second, it has a self-serving motivation, for it comes from the branch claiming the authority. Third, the word has an indefinite and indefinable quality that leaves the door open to illegal, unconstitutional, and extra-constitutional powers. Fourth, there should be heightened concern because the claim of “inherent” authority has been used in recent years to justify military commissions, torture memos, indefinite detention of U.S. citizens designated as “enemy combatants,” extraordinary rendition, and the TSP. To appreciate the dangers of “inherent” power, compare three words we use to determine the source of constitutional power: express, implied, and inherent.

The first two words preserve and protect constitutional government. Express powers are there in black and white. They can be seen in print and analyzed, usually accompanied by extensive meaning from history and framers’ intent. Implied also has a definite quality, because an implied power must be reasonably drawn from an existing express power. For example, the President has an express power to see that the laws are faithfully executed. If a Cabinet official prevents the discharge of a law, the President has an implied power to remove the individual pursuant to his constitutional duty to assure compliance with the law. From the express power to legislate, Congress has an implied power to investigate, issue subpoenas, and hold executive officials in contempt. Express and implied powers are consistent with a constitutional system of limited government.

The same cannot be said of “inherent.” The word is defined in some dictionaries as “an authority possessed without its being derived from another . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers.” If not in the Constitution, either by express or implied powers, what is the source of authority? In other definitions, “inherent” may be a power that “inheres” in an office or position, or something that is “intrinsic” or “belonging by nature.” Those concepts are highly ambiguous. The purpose of a constitution is to specify and confine government powers to protect rights and liberties reserved to individuals. That objective is undermined by claims of open-ended authorities (such as “inherent”) that are not easily defined or circumscribed. Vague words invite political abuse and endanger individual liberties. In the context of this hearing, claims of “inherent” presidential power directly threaten the prerogatives of Congress. Anything that weakens congressional power weakens democracy and popular sovereignty. The claim of inherent presidential power moves the nation from one of limited powers to boundless and ill-defined executive authority. Such assertions do substantial damage to the doctrine of separation of powers and the crucial system of checks and balances.

3. Commander in Chief? It is analytically meaningless to merely cite three words from Article II as though the case for presidential power is self-evident and needs no further argument. One has to explain what those words mean. Closer scrutiny eliminates any notion of plenary power for the President as Commander in Chief. First, the President is Commander in Chief “of the Militia of the several States, when called into the actual Service of the United States.” As is clear from Article I, Congress does the calling. Second, the President is Commander in Chief of the Army and Navy of the United States, but as Article I again demonstrates, Congress has ample authorities to raise and support armies and navies, to make rules for the regulation of the land and naval forces, and to provide for organizing, arming, and disciplining the militia. The

\footnote{OCG Study at 1.}

\footnote{E.g., see the March 2007 Special Issue of Presidential Studies Quarterly, which is devoted to inherent presidential power (37 Pres. Stud. Q. 1 (2007)); Deciding to Use Force Abroad: War Powers in a System of Checks and Balances (The Constitution Project, 2002); David Gray Adler and Larry N. George, eds., The Constitution and the Conduct of American Foreign Policy (1996); and Gary M. Stern and Morton Halperin, eds., The U.S. Constitution and the Power to Go to War (1994).}


\footnote{Id.}
appropriations power of Congress is broadly available to direct and limit military operations. Third, the Constitution does not empower the President as Commander in Chief to initiate and continue wars. Those powers existed for English kings and in the writings of William Blackstone, but the framers deliberately rejected that form of government. Fourth, the President is Commander in Chief for unity of command, but the President’s authority to bring unity of purpose in military command does not deprive Congress of its own independent constitutional duty to monitor war and decide whether to restrict or terminate military operations. Fifth, the President is Commander in Chief to preserve civilian supremacy over the military. As explained by Attorney General Edward Bates in 1861, whatever soldier leads U.S. armies “he is subject to the orders of the civil magistrate, and he and his army are always ‘subordinate to the civil power.’” Congress is an essential part of that civil power. Just as military officers are subject to the direction and command of the President, so is the President subject to the direction and command of Members of Congress as representatives of the sovereign people.

4. “Sole Organ”? In the history of American constitutional doctrines, there is probably nothing as shallow, empty, and misleading as the OLC claim that the President as “sole organ” in foreign affairs is granted some type of exclusive, plenary power. The phrase comes from a speech by Cong. John Marshall in 1800, when he said that the President “is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” In his decades of distinguished federal service, as Secretary of State, Member of the House, and Chief Justice of the Supreme Court, Marshall at no time advocated an independent, inherent, or exclusive power of the President over external affairs. The purpose of his speech in 1800 was merely to state that President John Adams had a constitutional duty under the Take Care Clause to see that an extradition treaty with Britain was faithfully carried out. That was all. The context of his speech makes it clear that he was speaking of presidential power to execute the policy of Congress, whether expressed in statute or treaty. Marshall never implied any authority of the President to act independent of statutes or treaties, much less in opposition to them. For example, Chief Justice Marshall ruled in 1804 that when a presidential proclamation in time of war conflicts with a statute passed by Congress, the statute prevails. What OLC does is to take Marshall’s speech not as it was given, and not as it was meant, but as it was misinterpreted and distorted by Justice Sutherland in United States v. Curtiss-Wright (1936). How did Sutherland misuse the speech? First, the case had nothing to do with presidential power. It had to do with the power of Congress to delegate certain discretionary authority in the field of international affairs. In exercising authority given to him in 1934 to impose an arms embargo in South America, President Franklin D. Roosevelt relied solely on statutory—not inherent—authority. Second, Sutherland’s misuse of Marshall’s speech appears in dicta, not in the decision. Third, the dicta is bad dicta, as has been pointed out repeatedly in scholarly studies. Sutherland promoted misconceptions not only about Marshall’s speech but also about the concept of sovereignty, inherent presidential power, extra-constitutional powers, the distinction between internal and external affairs, and the competing powers of Congress. To the extent that Curtiss-Wright suggests that foreign affairs are outside the Constitution and not subject to congressional control, the Supreme Court has not followed it.

III. Briefings and Consultation

After 9/11 and the initiation of the TSP, the administration gave regular briefings about the surveillance program to the “Gang of Eight” and to the chief judge of the FISA court. The Gang of Eight includes the leadership of each house and the chair and ranking member of each Intelligence Committee. Lawmakers who were briefed were directed by executive officials not to take notes or share what they heard with colleagues or with their staff. Not being part of the Gang of Eight, the Judiciary Committee chairmen and ranking members were not briefed as part of this process. Several issues emerge.

First, it is constructive for the executive branch to brief and consult Members of Congress provided that the program is legal, constitutional, and in harmony with statutory law. Briefing Members about an illegal program does not make it legal. It would be as though executive officials briefed the chair and ranking member of the two Appropriations Committees that funds had been withdrawn from the Treasury without an appropriation. With or without the briefing, the action would be unconstitutional.

Second, was the Gang of Eight the proper procedure to follow? My understanding of the Gang of Eight is that it was established as a means of informing the congressional leadership and the top levels of the Intelligence Committees about a pending covert action (50 U.S.C. Section 413(b)(2)), which is an activity “to influence political, economic, or military conditions abroad” (50 U.S.C. Section 413(b)(6)). In my judgment, the Gang of Eight was not the right procedure to brief members about the TSP, which has nothing to do with destabilizing or altering a foreign country.

Third, what duty falls on a member of the Gang of Eight in being briefed about a program that waives FISA and dispenses with independent judicial checks? Are they bound by some vow of secrecy insisted on by the executive officials doing the briefing? No. Members of Congress who receive confidential briefings from executive officials belong to a separate branch with separate institutional responsibilities, including the duty to assure that the executive branch complies with the law. After being briefed, lawmakers may reach out to colleagues, top staff, and to the leadership of the Judiciary.

40 Littell v. Berene, 2 Cr. (6 U.S.) 170, 179 (1804).
41 OLC Study at 1, 6-7, 14, 30.
Committees to receive their legal and constitutional analysis. Members of Congress take an oath to the Constitution, not to the President. They have a special obligation to protect the powers of their institution.

Fourth, what duty falls on a chief judge of the FISA Court after being briefed about a program that waives FISA and dispenses with independent judicial checks? The primary duty of the chief judge is not to remain silent but to inform the other ten judges on the Court. They must then decide what to do, because it is their duty to see that the law is obeyed, including the judicial check that Congress placed in FISA.

Fifth, the Judiciary Committees (at least the chairmen and ranking members) needed to be informed about the TSP because of their jurisdiction over FISA. Generally speaking, the Intelligence Committees will focus more on policy and programmatic issues, while the Judiciary Committees will place greater emphasis on legal and constitutional issues and the integrity of FISA.

IV. What Does “Legal” Mean Today?

NSA’s surveillance program raises elementary questions about the constitutional duty of Congress to make law. In the Steel Seizure Case of 1952, Justice Robert Jackson eloquently summarized our constitutional principles: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.” Simple words but so profound. The Executive is under the law, not above it. The law is made by Congress.

The TSP represents a direct challenge to our system and form of government. Under the guise of “inherent” power, the executive branch claims the right to ignore statutory law in order to give preference to executive-made law, all done in secret. Other countries have adopted this approach, at great cost to democratic institutions and individual rights.

Independent Executive Law?

On December 17, 2005, after the New York Times published the story about the NSA eavesdropping program, President Bush in a radio address acknowledged that he had authorized the agency to conduct the surveillance, “consistent with U.S. law and the Constitution.” In subsequent statements, as President Bush continued to refer to “U.S. law” or “authority,” it appeared that he meant law created solely within the executive branch, even if contrary to a law passed by Congress. He underscored his independent Article II constitutional powers: “The authorization I gave the National Security Agency after Sept. 11 helped address that problem [of combating terrorism] in a way that is fully consistent with my constitutional responsibilities and authorities.” He said he had

“reauthorized this program more than 30 times since the Sept. 11 attacks.” Similarly, on December 19 Attorney General Alberto Gonzales stated that “the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity.”

Michael V. Hayden appeared before the Senate Intelligence Committee on May 18, 2006, to testify on his nomination to be CIA Director. Previously he had served as NSA Director at the time the TSP was initiated. At the hearing, he defended the legality of the program on constitutional, not statutory, grounds. In recalling his service at NSA after 9/11, he told the committee that when he talked to NSA lawyers “they were very comfortable with the Article II arguments and the president’s inherent authorities.” When they came to him and discussed the lawfulness of the program, “our discussion anchored itself on Article II.” The attorneys “came back with a real comfort level that this was within the president’s authority [under Article II].”

This legal advice was not put in writing and Hayden “did not ask for it.” Instead, “they talked to me about Article II.” What could the talk have been about? The President as Commander in Chief? What other words in Article II would have clarified the legal analysis and produced a comfort level? Apparently the NSA General Counsel was not asked to prepare a legal memo defending the TSP. No paper trail. No accountability. Just informal talks. We all know that halfway discussions about legal and constitutional issues are not likely to look as persuasive or as sound when put on paper and submitted to peers for their independent assessment.

During the hearing, Hayden repeatedly claimed that the NSA program was legal and that in taking charge of the CIA the agency “will obey the laws of the United States and will respond to our treaty obligations.” Given what he said throughout the hearing, what did he mean by “law”? A policy drawn solely from within the executive branch, depending on someone’s interpretation of Article II? That appears to be what he meant. After 9/11, while at NSA, he said he “had two lawful programs in front of me, one authorized by the president [the TSP], the other one would have been conducted under FISA as currently crafted and implemented.” In other words, he had two choices: one authorized by the President, the second authorized by Congress. He selected the former. He told one Senator: “I did not believe – still don’t believe – that I was acting unlawfully.

45 Id.
46 Id. at 69.
47 Id. at 74.
48 Id. at 30.
49 Id. at 74.
50 Id. at 88.
I was acting under a lawful authorization.”

Hearing him insist that he was acting legally in implementing the NSA program, a Senator said: “I assume that the basis for that was the Article II powers, the inherent powers of the president to protect the country in time of danger and war.” Hayden replied: “Yes, sir, commander in chief powers.” Hayden seemed to clearly imply that he was willing to overstep statutory law in order to carry out presidential law. After 9/11, CIA Director George Tenet asked whether NSA could “do more” to combat terrorism with surveillance. Hayden answered: “not within current law.” In short, it appears that the administration knowingly and consciously decided to act against statutory policy. It knew that the NSA eavesdropping program it decided to conduct was illegal under FISA but decided to go ahead, banking on Article II powers.

At one point in the hearings, Hayden referred to the legal and political embarrassments of NSA during the Nixon administration, when it conducted warrantless eavesdropping against domestic groups. In discussing what should be done after 9/11, he told one group: “Look, I’ve got a workforce out there that remembers the mid-1970s.” He asked the Senate committee to forgive him for using “a poor sports metaphor,” but he advised the group in this manner: “since about 1975, this agency’s had a permanent one-ball, two-strike count against it, and we don’t take many close pitches.” TSP was a close pitch. If Congress learns more about the program, we may learn if NSA hit or missed.

Continued Reliance on Article II

In January 2007, after several setbacks in the federal district courts on the TSP, the administration announced it would no longer skirt the FISA Court but would instead seek approval from it, as required by statute. Exactly what “orders” the FISA Court issued is unclear, because they have not yet been released to Congress. The announcement seemed to promise compliance with FISA, but there is insufficient information to know what the new policy is or how permanent it is.

Was the administration now relying solely on statutory authority or had it kept in reserve its Article II, inherent power arguments? Had the administration merely offered a temporary accommodation while keeping the door open to Article II claims? At oral argument on January 31, 2007 before the Sixth Circuit, regarding one of the TSP cases, one of the judges asked the government: “You could opt out at any time, couldn’t you?” The Deputy Solicitor General acknowledged the possibility.

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55 Id. at 138.
56 Id. at 144.
57 Id. at 68.
58 Id. at 61.
59 Id. at 61.
Biosketch

Louis Fisher is a specialist in constitutional law with the Law Library of the Library of Congress, after working for the Congressional Research Service from 1970 to March 6, 2006. During his service with CRS he was research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher received his doctorate in political science from the New School for Social Research and has taught at a number of universities and law schools.


Dr. Fisher has been invited to testify before Congress on such issues as war powers, CIA whistleblowing, covert spending, executive privilege, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the budget process, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential impoundment powers, and executive lobbying.

He has been active with CEELI (Central and East European Law Initiative) of the American Bar Association, the International Bar Association, and the Library of Congress in helping other countries draft new constitutions. He is the author of more than 350 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. Fisher filed four amicus briefs in military tribunal cases (Padilla and Hamdan) and an amicus brief in a case brought by the Center for Constitutional Rights regarding NSA eavesdropping. He has been invited to speak in Albania, Australia, Belgium, Bulgaria, Canada, China, the Czech Republic, England, France, Germany, Greece, Israel, Japan, Macedonia, Malaysia, Mexico, the Netherlands, Oman, the Philippines, Poland, Romania, Russia, Slovenia, South Korea, Taiwan, Ukraine, and the United Arab Emirates.
IS CONGRESS THE REAL “LAWBREAKER”?:

Reconciling FISA with the Constitution

Prepared Statement of

Prof. Robert F. Turner, SJD
Cofounder
CENTER FOR NATIONAL SECURITY LAW
University of Virginia School of Law

Before the
House Judiciary Committee
Hearing on
Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans’ Privacy Rights

Wednesday, September 5, 2007 • 10:15 A.M.

2141 Rayburn House Office Building

About the Witness

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for many years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.

His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President’s Intelligence Oversight Board at the White House, and acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left twenty years ago to return to the University of Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying the separation of national security powers under the Constitution. Senator John Tower wrote the foreword to his 1983 book The War Powers Resolution: Its Implementation in Theory and Practice; and former President Gerald Ford wrote the foreword to Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy (1991). Dr. Turner authored the separation-of-powers and war powers chapters of the 1400-page law school casebook, National Security Law, which he co-edits with Professor John Norton Moore. Turner’s most comprehensive examination of these issues, National Security and the Constitution, has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA National Security Law Report. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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GOOD MORNING, MR. CHAIRMAN. It is an honor to appear before this distinguished Committee to discuss issues of checks and balances and the FISA statute.

These are not new issues to me. I have focused much of my academic career on the separation of national security constitutional powers since first becoming interested in these issues more than four decades ago. I witnessed firsthand the tragic consequences of the breakdown of legislative-executive relations in Indochina, and as a Senate staff member I followed the Church Committee hearings on intelligence abuse. Three years later, in that same capacity, I followed the enactment of the Foreign Intelligence Surveillance Act (FISA); and three years after that I was hired to oversee executive branch compliance with FISA and other intelligence laws and executive orders as Counsel to the President’s Intelligence Oversight Board in the White House.

I was raised in a military family and taught to believe that when our nation goes to war we set aside our differences and unite against the common enemy. My father and his only brother served respectively in the Army Air Corps and Infantry in Europe during World War II, and my only brother and I each served twice in Vietnam—both as a Marine sergeant and later lieutenant, and I as an Army lieutenant and captain. Because I had written my undergraduate honors thesis on the conflict, I was detailed to work for the American Embassy. Ironically, a major part of my work involved investigating incidents of Viet Cong terrorism. Long before the attacks of September 11, 2001, I was warning that America was vulnerable to terrorist attacks and the only issue was when and whether we were going to be hit.

After 9/11, I was delighted to see America come together in a display of unity not seen since World War II. I think one of the reasons we have not been at home again may be the message that display of bipartisan unity sent to our enemies—they had united and awakened a sleeping giant. Watching the way partisan politics has torn this nation apart these past few years has therefore been a source of great sadness to me, as it has undone much of the good we accomplished and provided incentives for our enemies to strike us again.

And sadly, much of the discord appears to be a result of ignorance. I don’t question the sincerity of either side, but it would be difficult to overstate the harm that has resulted from the failure of our education system to train our public leaders about our constitutional system in the realm of national security and foreign affairs.

This morning, I would like to examine some important constitutional history that I hope may help both sides better understand this dispute. I will quote to you from the Federalist Papers and from the writings of George Washington, Thomas Jefferson, James Madison, Alexander Hamilton, John Jay, and John Marshall—letting their words explain their understanding of our Constitution in this specialized area. I will also quote to you from congressional documents and court opinions, and I will show that there was a broad consensus among all three branches of government about the control of foreign
intelligence activities under our Constitution prior to the Vietnam War. It is as if during the heated debates which characterized the latter years of that conflict we had a collective national hard-drive meltdown, and both sides forgot the original understanding. I think it is time that we pause for a few moments and revisit that history.

Introduction

Let me start by setting forth my perception of the two major competing views here today. On one side we have people focused heavily on the terrorist threat who believe we need to unite behind our elected president and give him the flexibility and discretion to collect the intelligence we need to identify and neutralize the al Qaeda threat. At least some of them also believe the Constitution gives the president the discretion to do that without being told how by Congress. On the other side we have people who agree it is important to collect foreign intelligence to protect America against terrorism, but who don’t want to sacrifice the Bill of Rights in the process. To them, claims of broad “executive power” over intelligence, war, and other issues ring of the regime of King George III rather than a constitutional president in a free and democratic republic. They want to protect our nation, but not at the expense of the Constitution and the rule of law. I respect that view, but I am now going to tell you why I believe they are mistaken.

I would like to begin by summarizing a few basic points:

• In our system of government we have a hierarchy of “laws,” with the Constitution being supreme and superior to a conflicting act by either the president or Congress. Article V provides several means for amendment, but they do not include merely passing an inconsistent legislative statute or an informal agreement that a particular president will comply with a statute that in reality seeks impermissibly to narrow the constitutional discretion of his office. Congress may not usurp the constitutional powers of the president by statute than it may usurp the rights guaranteed to the people by enacting legislation contrary to the First Amendment or dictate to the Supreme Court how to decide pending cases.

• Not all presidential decisions were intended by the Constitution to be “checked” by Congress or the courts. This is especially true with respect to the conduct of business with foreign states and protecting the security of the nation against foreign powers and their agents within this country. When the Founding Fathers gave the nation’s “executive” power to the president, they understood that this power included the general control of our nation’s relations with the external world. To be sure, both the Senate and Congress were given certain “negatives” in this area as well as several affirmative powers often viewed as part of “foreign affairs”; but, as “exceptions” in the eyes of the Framers of our Constitution to the general grant of executive power to the president, these powers were intended to be construed strictly.

• At the core of exclusive presidential constitutional powers are the conduct of diplomacy, the collection of foreign intelligence, and the supreme command of military forces and conduct of military operations. Into these areas, Congress was not intended by the Founding Fathers to interfere. This was the consistent view of the Federalist Papers and the courts have repeatedly affirmed these principles.

• The distinction between domestic or internal affairs that affect the rights of individuals, on the one hand, and foreign or external affairs that affect the nation, on the other, is fundamental to understanding our constitutional separation of powers. That is the difference between the Steel-Seizure case (Youngstown) and Curtiss-Wright. And the failure of many scholars to see this distinction has led to a great deal of confusion and misunderstanding.

• Admittedly, not every decision can be neatly placed into a “domestic” or “foreign” box. Many decisions touch on both areas. And often in resolving them we must balance competing interests. But the distinction is nevertheless an important one.

The Constitution and Control Over
“The Business of Intelligence”

It is often noted that the Constitution does not even mention the words “national security” and “foreign affairs,” and from this many modern commentators conclude that this area is no different from domestic affairs – Congress has the power to set policy by law and the job of the Executive is to see that those laws and the policies they embody are “faithfully executed.” Some who are familiar with our history note that this was not in reality the paradigm that prevailed, and it is speculated that when the beloved President George Washington seized control in this area the other branches went along rather than risk offending this wonderful old man.

In reality, there was a broad consensus among all three branches that foreign affairs were different than domestic affairs, and the reason we don’t understand this today is because of changes in our language over the centuries. I remember once being confused when I read a letter from one of the great champions of our new Constitution around 1788 who described it to a friend as an “awful” document. It took some research into the etymology of “awful” to realize that in the eighteenth century the term described something that filled one with awe or was awe inspiring. And in a similar way, concepts like “executive power” and “declaration of war” had specific meanings when the Constitution was written that have largely been forgotten.

The Founding Fathers were remarkably well-read men, and they were familiar with John Locke’s Second Treatise on Civil Government, Montesquieu’s Spirit of the Laws, and Blackstone’s Commentaries on the Laws of England. Each of these distinguished theorists – and most of their contemporaries as well – viewed the control of foreign
affairs (what Locke described as control over "war, peace, leagues, and alliances") as part of the "executive" power.

We know that this was the shared understanding of the content of the grant in Article II, Section 1, of the Constitution of the nation's "executive Power" to the president, because it was widely discussed at the time. For example, in a June 1789 letter, Representative James Madison explained: "[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department. . . ."

Relying upon this same clause ten months later, Thomas Jefferson wrote in a memo to President Washington:

The Constitution . . . has declared that "the Executive power shall be vested in the President," submitting only special articles of it to a negative by the Senate . . . . The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly. 3

Three days later, Washington recorded in his diary that he had discussed Jefferson's memo with Representative Madison and Chief Justice John Jay — who was by far the nation's most experienced authority on foreign relations — and both shared Jefferson's view that the Senate had "no constitutional right to interfere" with the business of diplomacy save for its expressed constitutional negatives. As Washington explained, "all the rest being Executive and vested in the President by the Constitution." 4

Writing as Pacifists in 1793, the third author of the Federalist Papers (in addition to Madison and Jay), Alexander Hamilton, also pointed to the grant to the president in Article II, Section 1, of the Constitution of the nation's "executive" power in remarking:

[A]s the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution. 5

Another of Jefferson's political enemies to make this observation was the legendary John Marshall, who — as a Federalist member of the House of Representatives in 1800 — defended President Adams' decision to surrender an alleged British deserter pursuant to the extradition clause of the Jay Treaty without any involvement of the judiciary. He reasoning: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations . . . . He possesses the whole Executive power . . . . In this respect the President expresses constitutionally the will of the nation." 6

Arguably the finest book on this topic is the late Quincy Wright's 1922 classic, The Control of American Foreign Relations. As you may know, Professor Wright served as president of the American Political Science Association and was a leading constitutional scholar for most of the twentieth century. (My own interest in the field was sparked by a lecture I heard him give in 1966.) He wrote that "When the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto." 7

Many of you will remember the late Senator J. William Fulbright, who served as chairman of the Senate Foreign Relations Committee for fifteen years and was a leading critic of the Vietnam War. Speaking at Cornell Law School in 1959, Chairman Fulbright captured the conventional wisdom shared by all three branches until that time when, in arguing for even greater presidential power, he explained:

The pre-eminence responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear terms." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus.

I would emphasize the word "formulation" here. The president's authority was not merely to carry out policies established by Congress, as is the case domestically, but to make foreign policy as well. When those policies took the form of a solemn treaty, the Senate had a negative. But otherwise foreign policy was an executive function.

Does this mean that Congress and the Senate have no powers related to foreign affairs? Of course not. Congress has important powers, including control over foreign commerce,

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1 Madison to Edmund Pendleton, 21 June 1789, in 5 WRITINGS OF JAMES MADISON 405-06 n. (Gaillard Hunt, ed., 1904).
2 Jefferson's Opinion on the powers of the Senate Respecting Diplomatic Appointments, April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 14 (Mem. ed. 1903) (facsimile added).
3 4 DIARIES OF GEORGE WASHINGTON 122 (Regents' Ed. 1925).
5 10 ANNALS OF CONG. 613-15 (1800).
6 QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).
7 J. William Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, 47 COLUMBIA L. Q. 1, 3 (1961).
8 I realize that the Senate is a chamber of Congress, but (as will be explained momentarily) in this instance I am referring to executive powers expressly vested in the Senate by Article II of the Constitution — powers which the Senate exercises in "executive session" in addition to sharing the powers granted by Article I, Section 8, with the House of Representatives.
a negative over a decision to launch a major offensive war, control over appropriations, and many other powers enumerated in Article I, Section 8. But none of these give Congress a role in the conduct of war or diplomacy or the business of intelligence. The Senate has even more authority related to foreign affairs. It shares the powers of Congress with the House, and also is given several negatives — such as the right to block a completed treaty or a diplomatic nomination. But it is important to keep in mind that when the Senate considers treaties and nominations, it is acting not as a chamber of the legislature but rather in "executive session" considering business from the "executive calendar."

Congress and the Keeping of Secrets

A key consideration in the decision to deny Congress a role in diplomacy and the conduct of war (both of which involve the critically important function of gathering foreign intelligence and safeguarding secrets) is that Congress was not thought able to keep secrets. I testified at length on this issue in 1994 before the House Permanent Select Committee on Intelligence (HPSCI), so I will not spend a great deal of time on this issue this morning. But it is important to understand that this was not just a concern of the executive branch. Indeed, before there was an executive branch, under the Articles of Confederation in 1775, the Continental Congress understood that it was not competent for the business of diplomacy and its members could not be relied upon to keep secrets, so it established a "Committee of Secret Correspondence" to conduct diplomacy, run spies, and the like. And in setting up this committee, the Continental Congress expressly instructed it to delete the names of intelligence sources in any reports it made to Congress.

In reality, the Committee of Secret Correspondence found it necessary to conceal from Congress many secrets other than the names of spies and other intelligence sources. When France agreed to a major covert operation to provide support to the American Revolution, the committee members were delighted. But Benjamin Franklin and the other four members unanimously resolved that they could not share the information with others in Congress, explaining "We find by fatal experience that Congress consists of too many members to keep secrets."2

The Federalist Papers are replete with references to the need for secrecy, unity of design, and speed and dispatch in war and foreign affairs — and each of these was recognized as a strength of the executive branch. Since the official journal and Madison’s notes on the proceedings of the Federal Convention were not made public until decades after the

Constitution was ratified, these brilliant essays on the principles of our new government were the most important single source in explaining the Constitution to the people. And in Federalist No. 64, John Jay made it clear that neither the House nor the Senate were to have any role in "the business of intelligence." His essay is worth quoting at length:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.3

Sadly, my experience both in the legislative and executive branches and as a scholar have persuaded me that the Framers’s concern was justified. I’ve seen far too many harmful leaks from Capitol Hill. (To be sure, too many leaks also come from the executive department.)

Unchecked Presidential Discretion

It is popular today to teach that in our government, all presidential powers must be checked by Congress and/or the courts. But that is in fact neither an accurate statement nor the original understanding as explained by the Framers of our Constitution — especially with respect to the nation’s external relations. We have already seen that the "executive" power was only to be checked by the expressed "exceptions" clearly vested in Congress or the Senate and that these were to be construed strictly. Obviously, some powers not involving foreign affairs — such as the president’s pardon power — are also exclusive. But as the Supreme Court noted in the landmark 1936 Curtiss-Wright decision — which remains by far the most frequently cited Supreme Court case on foreign affairs — there was a marked difference between domestic and foreign affairs. The Court explained:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the

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1 Federalist No. 64 at 434-35 (Jacob E. Cooke, ed. 1961) (emphasis added).
Senate cannot intrude, and Congress itself is powerless to invade it.\textsuperscript{14} That this was consistent with the original understanding of the Constitution is apparent from perhaps the most famous Supreme Court case of all times, Chief Justice John Marshall’s landmark opinion in the 1803 case of\textit{Marbury v. Madison}:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . A judgement whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.\textsuperscript{15}

To illustrate this point, Chief Justice Marshall continued:

The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

So it is apparent that the idea of presidential supremacy in foreign affairs – subject to narrow but very important “negatives” or “checks” vested in Congress and the Senate – is not some grand scheme for seizing monarchical powers for another “King George” dreamed up by John Yoo or David Addington, but was in fact the original design of our Constitution.

Another key point from Chief Justice Marshall’s \textit{Marbury} opinion is equally important and addresses a situation in which Congress acts without constitutional authority or attempts to exercise powers vested by the people through the Constitution in another branch. Marshall declared, and again I quote: “an act of the legislature, repugnant to the constitution, is void.”

The Fourth Amendment

In \textit{Curtiss-Wright} and many other cases, the Supreme Court has noted that all constitutional powers “must be exercised in subordination to the applicable provisions of the Constitution.”\textsuperscript{17} This is critically important. And while Congress was not given constitutional authority to interfere in the business of intelligence, that does not mean there are no checks at all – particularly when a foreign affairs or intelligence issue also involves the constitutional rights of Americans.

The Bill of Rights – including the Fourth Amendment – is every bit as in effect in wartime as in peacetime. To be sure, the determination of what is a “reasonable” search may well shift when the government is seeking to prevent a WMD attack on the American mainland versus more traditional peacetime concerns like enforcing laws against white-collar criminals. But all exercises of presidential power must comply with relevant provisions of the Constitution.

One popular myth today is that the Fourth Amendment requires probable cause and a judicial warrant for any lawful search or seizure. When I entered this building a short time ago a government agent demanded to search my briefcase and made me pass through a metal detector. This was a “search” under the Fourth Amendment, and that government agent had neither probable cause to believe that I had done anything wrong nor a judicial warrant for the search. And since the First Amendment guarantees “the right of the people . . . to petition the Government,” such “searches” are arguably an impediment to the exercise of a constitutional right.

Yet few would argue that such searches are a bad idea, and perhaps fewer that they are unconstitutional. For the Constitution does not prohibit “searches and seizures” by government, but only those searches and seizures that are “unreasonable.” And as I will discuss, these public safety searches have long been upheld as reasonable by the courts without the slightest degree of individualized suspicion or probable cause and without a warrant. They are comparable to the searches we all endure before boarding a commercial airplane. In a similar way, monitoring the electronic communications of foreign nationals outside this country who are believed to be affiliated with terrorist groups – particularly during a period of congressionally-authorized war – is reasonable and thus not constrained by the Fourth Amendment. And monitoring the electronic communications of foreign terrorists is even more reasonable when they are communicating with people inside the United States, who might be plotting the next catastrophic terrorist attack.

In assessing the Fourth Amendment, we need to remember that the Supreme Court has repeatedly observed that its language is not absolute. Thus, speaking for a unanimous Court in the so-called \textit{Keith} case (\textit{United States v. United States District Court}), which will be discussed in some detail in a few minutes, Justice Powell observed: “As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.”\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{14} \textit{United States v. Curtiss-Wright Export Corp.}, 299 U.S. 304, 319 (1936) (emphasis added).
\item \textsuperscript{15} \textit{Marbury v. Madison}, 5 U.S. [1 Cranch] 137, 165-66 (1803) (emphasis added).
\item \textsuperscript{16} Id. at 166.
\item \textsuperscript{17} \textit{United States v. Curtiss-Wright Export Corp.}, 299 U.S. 304, 320 (1936).
\item \textsuperscript{18} \textit{United States v. United States District Court}, 407 U.S. 297 at 314-15 (1972).
\end{itemize}
In making this balance, we should keep in mind that— even in peacetime—the Supreme Court has repeatedly recognized that "It is ordinary and unarguable" that no governmental interest is more compelling than the security of the Nation..." This is presumably all the more true in situations like the present, when the nation is involved in a war authorized by Congress. As the unanimous Supreme Court noted in the Keogh case, "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered."23

On the other side of the scale, the interception of electronic communications is not generally viewed as among the more egregious violations of individual privacy. Indeed, it was not until 1967 that the Supreme Court decided that wiretaps even involved a Fourth Amendment interest, and when they did the great defender of the Constitution, Justice Hugo Black, refused to accept it. Lower courts have also recognized that wiretaps are "a relatively nonintrusive search."24

In addition, the Fourth Amendment was designed primarily to guard against unreasonable searches and seizures in a criminal law context, and in other settings the Supreme Court has recognized a number of exceptions. As the Court explained in Von Raab in 1989:

While we have often emphasized, and reiterated today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, . . . our decision in Railway Labor Executives reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. . . . As we noted in Railway Labor Executives, our cases establish that where a Fourth Amendment intrusion serves special governmental needs beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.25

These "special needs" cases usually involve some aspect of public safety or security. The Court has permitted warrantless searches of individuals crossing into the United States from other countries or even within a certain distance of national borders,26 safety inspections of restaurants and certain types of factories, and even fairly intrusive mandatory drug testing of customs agents and even high school athletes.27

I suspect that each of you regularly encounters one classic example of these exceptions to the warrant requirement each time you enter a public airport and have to submit to a search of your person and baggage. These can be more than a little annoying and costs each of us many hours of time each year that we can never recover. Yet most of us recognize that being inconvenienced by our government to guard against or protect against hijacked or blown up is a good trade-off.

American courts have recognized that airport security screenings constitute a "search" under the Fourth Amendment, yet have consistently upheld their legality despite the absence of the slightest individualized suspicion, much less "probable cause" and a judicial warrant. As the legendary Second Circuit jurist Henry Friendly—rumored to have achieved the highest grade-point-average in the history of Harvard Law School—explained in the 1974 Edwards case:

The reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion. We need not labor the point with respect to need; the success of the FAA's anti-hijacking program should not obscure the enormous dangers to life and property from terrorists, ordinary criminals, or the demented. The search of carry-on baggage, applied to everyone, involves not the slightest stigma . . . . More than a million Americans subject themselves to it daily; all but a handful do this cheerfully, even eagerly, knowing it is essential for their protection. To brand such a search as unreasonable would go beyond any fair interpretation of the Fourth Amendment.28

Given the risks inherent in modern terrorist attacks, one might think that the same logic that leads courts to conclude that conducting mandatory drug tests for student athletes and rather intrusive personal searches of any American who wishes to travel by airplane would, a fortiori, apply to electronic searches designed to obtain foreign intelligence information to prevent such attacks; and in reality, every federal court of appeals to have decided the issue has held that the president has independent constitutional authority to approve foreign intelligence national security wiretaps without a warrant. But let me save that discussion for later.

I shall not take your time to document the long history of both affirmative assertions of constitutional power for presidents to authorize the collection of foreign intelligence information and the actual exercise of that power, for I suspect that point is not in controversy. Even before we had a Constitution, General George Washington authorized the opening of mail coming from Great Britain— instructing that it be carefully resealed

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28 See, e.g., Von Raab, supra at 656; Board of Education v. Earls, 536 US 822 (2002).
before delivery so as not to disclose it had been read and risk losing a valuable source of future intelligence.

Thomas Jefferson and his Secretary of State James Madison conducted a number of foreign intelligence activities and even paramilitary operations without informing or seeking authorization from Congress, including sending two-thirds of the new American navy half-way around the known world with instructions to sink and burn ships and raising a small army of Greek and Arab mercenaries to send across a vast North African desert to attack a foreign governmement.26

In an 1804 letter to Treasury secretary Albert Gallatin, President Jefferson explained:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations . . . The Executive being thus charged with the foreign intercourse, no law has undertaken to prescribe its specific duties . . . From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.27

This was in fact a longstanding practice. Save for the Senate’s legitimate authority to reject or consent to the ratification of treaties, it was not until my lifetime that Congress made serious efforts to seize control of presidential powers in this area. Most of those came in the wake of the Vietnam War.

Discussing Jefferson’s behavior in 1996, Dr. Stephen F. Knott – a leading authority on the history of covert operations in this country – observed: “Jefferson’s employment of covert operations was not an example of an extraterritorial abuse of power but a simple exercise of the president’s prerequisite to implement foreign policy.”28

In the twentieth century, both Woodrow Wilson and Franklin D. Roosevelt acted unilaterally to authorize wartime interception of international cable traffic. Every American president from Roosevelt to Carter authorized the warrantless collection of foreign intelligence information without judicial or legislative sanction.29

Congressional Recognition of Executive Control Over Foreign Intelligence Activities

In his first State of the Union Address on Jan 8, 1790, President Washington asked for “a competent fund designated for defraying the expenses incident to the conduct of foreign affairs.”20 The statute that resulted reflected the broad recognition in Congress that foreign affairs was the president’s business. Despite the requirement in Article I, Section 9, of the Constitution that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time,” the statute permitted the president at his discretion to conceal how he had spent the money:

[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually . . . 21

This deferential language was incorporated in similar bills for many years.

Similarly, although Article II, Section 2, of the Constitution gave the Senate a negative over many presidential appointments, Congress recognized that the president needed no legislative sanction to hire spies.22 Indeed, in 1818, when a debate occurred in the House chamber about reports of a diplomatic mission to a South American country, the legendary Henry Clay declared that expenditures from the president’s just referenced “secret service fund” were not “a proper subject for inquiry” by Congress, and others quickly echoed this view.23

The congressional view of presidential authority over the collection of foreign intelligence could hardly have been more clearly expressed than it was in the Omnibus Crime Control and Safe Streets Act of 1968, when Congress enacted Title III establishing legal rules for wiretaps for the first time in our history. (This followed the Supreme Court’s decision of the previous year declaring that wiretaps constituted a “seizure” under the Fourth Amendment.) But in so doing, Congress emphasized that it was not attempting to interfere with the constitutional powers of the president over foreign intelligence:

Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential

21 11 WRITINGS OF THOMAS JEFFERSON 5, 9, 10 (Mem. ed. 1903).
23 1 HOUSE REP’T 95–1268 at 13–17. For information on the use of a warrantless national security wiretap by the Carter administration for more than 250 days without judicial or legislative involvement, see UNITED STATES v. TRUONG, 629 F.2d 908, 912 (1980).
24 Available online at:
25 1 STAT. 129 (1790) (emphasis added).
26 HENRY MERRITT WRIGHT, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 224–39 (1929).
27 32 ANNALS OF CONG. 1466 (1818).
to the security of the United States, or to protect national security information against foreign intelligence activities.\textsuperscript{34}

Some have attempted to play down the significance of this language, correctly observing that it did not constitute a grant of any power to the president. It did, however, constitute a clear recognition by Congress that the president has independent constitutional authority to collect foreign intelligence. Others have dismissed it on the grounds that, in enacting FISA a decade later, Congress repealed this language. However, that does not change the fact that in 1968 Congress itself, as a matter of law, recognized the independent constitutional power of the president to authorize warrantless foreign intelligence wiretaps.

**Judicial Recognition of Executive Control Over Foreign Intelligence Activities**

Not only did both political branches from the earliest days of our nation recognize exclusive presidential control over the business of intelligence, but the courts, too, have been consistent in recognizing that authority. To be sure, there are no cases directly addressing a legislative challenge to presidential authority in large part because until relatively recently no such challenges existed. But there have been several criminal cases in which defendants challenged the president's authority to authorize warrantless surveillance, and a brief review of some of those is instructive. But first we should briefly deal with Katz.

*Katz v. United States (1967)*

In 1967, for the first time the Supreme Court held that wiretaps "conducted without prior approval by a judge or magistrate are per se unreasonable, under the Fourth Amendment."\textsuperscript{35} However, in footnote 23 the Court specifically distinguished its holding from a case involving national security wiretaps, writing: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."\textsuperscript{36} While this footnote clearly left the issue of the constitutionality of presidentially-authorized national security wiretaps unresolved, the fact that the Court included it strongly suggested that at least some of the justices believed such activities were lawful.

*The Keith Case (1972)*

The issue of warrantless national security wiretaps came before the Court five years after Katz, when a member of the White Panther Party (an ally of the better-known Black Panthers) named "Pun" Flamondon, who had been on the FBI's Most Wanted list for bombing a CIA office in Ann Arbor, Michigan, in 1968, was arrested with sixty-five pounds of dynamite in his possession along with maps showing military installations in the area.\textsuperscript{37} This was one of the first opinions written by Justice Lewis Powell, and to fully understand it some background on Justice Powell may be useful.

As an OSS officer during World War II, Powell had worked on the ULTRA Project with British Intelligence breaking German codes. He thus brought to the bench a rare personal expertise in the business of intelligence. He had also served as president of the American Bar Association, and in that capacity had been involved in creating and serving on an ABA blue-ribbon committee to establish standards for electronic surveillance. Completed in 1971, the ABA committee report endorsed the use of warrantless electronic surveillance in cases involving threats from a "foreign power" or "to protect military or other national security information against foreign intelligence activities"; and recommended as well that evidence obtained through such activities be admissible in criminal court when the search was found to be "reasonable."\textsuperscript{38}

However, in the commentary to the ABA report, the committee explained that the foundation for this recommendation was "the relation between this country and foreign nations," adding: "The Committee considered and rejected language which would have recognized a comparable residual power in the President not subject to prior judicial review to deal with purely domestic subversive groups."\textsuperscript{39}

Noting that the Supreme Court had carved out a number of special needs exceptions to the Fourth Amendment's warrant requirement, the ABA Committee observed:

> Indeed, if the interest of 'national self protection' warrants the present far-reaching practice in border searches, the interest of protecting the national security from foreign powers would seem to do no less. ... The standard, therefore, recognizes that the techniques must be, ought to be, and will be employed in the national security area.\textsuperscript{40}

Justice Powell's biographer and former law clerk, University of Virginia Law School Dean John Jeffries, writes that a year later in a Richmond newspaper article, Powell expressed serious doubts about the decision to exclude domestic national security wiretaps from the proposed exception to the Fourth Amendment's warrant requirement. Three months later, Powell found himself facing confirmation hearings in the Senate to become a member of the Supreme Court. During this process, Senator Birch Bayh and others grilled him repeatedly about the propriety of "warrantless surveillance in domestic security cases."\textsuperscript{41} Powell sought to dodge some of the more detailed questions, but in the end promised to "consider the entire case in light of the Bill of Rights and the restrictions

\textsuperscript{34} 18 USC § 2511(3) (1970) (emphasis added).
\textsuperscript{36} id at 358 n. 23.
\textsuperscript{37} JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 375 (1994).
\textsuperscript{38} AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ELECTRONIC SURVEILLANCE 120 (Approved Draft 1971 and Feb. 1971 Supp. 11). This study was foreshadowed by Justice Powell the following year in Keith at 322 n.20.
\textsuperscript{39} AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ELECTRONIC SURVEILLANCE 121 (emphasis added).
\textsuperscript{40} Id. at 123.
\textsuperscript{41} JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 377.
in the Constitution of the United States for the benefit of the people of our country." Within a year, Powell was called upon to write what turned out to be the unanimous Supreme Court opinion in the Keith case.

To the surprise of many, Powell declared that the warrant requirement would apply to national security investigations involving purely domestic targets with no suspected ties to a foreign power. But he carefully distinguished this from a foreign intelligence case, writing: "Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." Powell found the distinction important enough to reemphasize it near the end of the opinion:

We emphasize, before concluding this opinion, the scope of our decision.
As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.44

From the opinion alone, it is difficult to divine the views of the justices on the issue before us, the constitutional power of the president to authorize warrantless foreign intelligence surveillance. Fortunately, Powell's able biographer fills in some of the blanks for us, writing that only Powell, Douglas, Brennan, Stewart, and Marshall were prepared to "say once and for all that warrantless wiretaps in domestic security cases were flatly unconstitutional." Justice Rehnquist did not participate, presumably because he had been involved in the matter while a senior Justice Department official. The other three justices were willing to join the opinion on non-constitutional grounds.

We of course cannot be certain, but on the basis of Justice Powell's well-established belief that warrantless wiretaps were constitutional in the foreign intelligence area, and the fact that only four other justices were prepared to strike down such wiretaps even in a case involving a purely domestic target, there is little reason to believe that had this case involved an agent of a foreign power the surveillance would have been declared unconstitutional. One might add to this equation the strongly pro-national security views of Justice Rehnquist had he been in a position to vote on a case.

Before leaving the Keith case, one more observation is in order. It has often been alleged that FISA was enacted at the urging of the Supreme Court in Keith. That is simply not true, and this is absolutely clear from the language of the opinion:

Given those potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary depending on the governmental interest to be enforced and the nature of citizen rights deserving protection.

Thus, the Court was inviting Congress to legislate standards for "domestic security" surveillance, not to enact a foreign intelligence surveillance act. But few people actually read Supreme Court decisions, and by 1978 Congress was on a roll in grabbing control over national security powers that had for nearly two centuries been recognized by all three branches as the province of the executive.

Other Pre-FISA Cases

Since the Keith case, every U.S. Court of Appeals to decide the issue has ruled in favor of an independent presidential constitutional power to collect foreign intelligence information without a warrant. A useful summary is provided in the June 8, 1978, report of the House Permanent Select Committee on Intelligence on the FISA bill:

Since the Keith case, four circuit courts of appeals have addressed the question the Supreme Court reserved. The fifth circuit in United States v. Brown . . . upheld the legality of a surveillance in which the defendant, an American citizen, was incidentally overheard as a result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. The court found that on the basis of

the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign intelligence.

In United States v. Butenko, . . . the third circuit similarly held that electronic surveillance conducted without a warrant would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court found that such surveillance would be reasonable under the fourth amendment without a warrant even though it might involve the overhearing of conversations.47

The HPSCI report then mentioned a warrantless wiretap case involving a purely domestic target and noted that, in dicta, a plurality of judges, applying Keith, had "questioned

45 Id. at 321-22 (emphasis added).
46 Id. at 379.
47 47 U.S.C. at 323 (emphasis added).
48 1 H. Rep. 95-1283 at 19-20.
whether any national security exception to the warrant requirement would be constitutionally permissible. The HPSCI report then continued:

Finally, in United States v. Buck, ... the ninth circuit following Brown and Butenko, referred to warrantless surveillance of foreign powers and agents of foreign powers as a "recognized exception to the general warrant requirement." On the basis of the three circuit court decisions upholding the power of the President in certain circumstances to authorize electronic surveillance without a warrant, and in the absence of any court holding to the contrary, the [Carter] Justice Department firmly maintains that in the absence of legislation, such warrantless surveillances are constitutional. Thus, after almost 50 years of case law dealing with the subject of warrantless electronic surveillance, and despite the practice of warrantless foreign intelligence surveillance sanctioned and engaged in by nine administrations, constitutional limits on the President’s powers to order such surveillances remains an open question.99

Right! Every president has done it and every appeals court to decide the issue has upheld the power of the president — Congress itself has recognized the president’s constitutional power as a matter of law, and the Supreme Court has repeatedly taken pains not to limit the president in this area — so Congress concludes the issue is a toss-up.

Consider also the sleight-of-hand used by HPSCI to explain away the admitted fact that every president had engaged in warrantless foreign intelligence surveillance and every court to address the issue had upheld such a power. "Under H. R. 7308, as amended, the authority of the President to engage in surveillance in certain cases without a warrant will derive from statute, not the Constitution ..." This certainly seems to be asserting that statutes trump the Constitution — once Congress passes FISA, any independent constitutional power of the president will somehow cease to exist — which suggests that someone didn’t pay enough attention to Marbury v. Madison in law school. Imagine the consequences if this theory were applied to the First Amendment or judicial review.

United States v. Truong (1980)

Before FISA was enacted, the Carter Administration engaged in extensive warrantless wiretapping and “bugging” with hidden microphones and video cameras to track the espionage activities of a Vietnamese national who had resided in the United States for more than a decade and was a vocal critic of American involvement in the Vietnam War. Some of the surveillance equipment had been in operation for nearly a year, running continuously and recording virtually every call. The effort paid off with evidence that Truong Dinh Hung was obtaining classified documents from a government employee and delivering them to another Vietnamese (who happened to be a CIA and FBI informant) for delivery to representatives of the Socialist Republic of Vietnam in Paris. The surveillance operation was personally approved by Attorney General Griffin Bell, without any effort to obtain judicial sanction or any notification of Congress.

At the district court level, the judge admitted into evidence the recordings that had been made prior to July 20, 1977, on the theory that their purpose was to gather foreign intelligence information. Recordings made after that date were excluded on the theory that the investigation had shifted from foreign intelligence gathering to law enforcement.

The Fourth Circuit Court of Appeals noted that the Carter administration had "relied upon a "foreign intelligence" exception to the Fourth Amendment’s warrant requirement," contending that no warrant was necessary because of the president’s "constitutional prerogatives in the area of foreign affairs."101

Relying upon Keith and applying a balancing test, the court of appeals provided a lengthy analysis of why the executive branch was better suited to decide these issues than federal judges and relied on Curtiss-Wright for the proposition that "separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and consensually for foreign intelligence surveillance." It emphasized that this "foreign intelligence exception to the warrant requirement" was only applicable to cases involving "a foreign power, its agent or collaborators."102

So both before and after FISA, federal appeals courts have remained unanimous in recognizing presidential power to authorize warrantless foreign intelligence surveillance. Indeed, as the next case will demonstrate, things got even worse for Congress after FISA was enacted.

In re Sealed Case (2002)

In addition to establishing the FISA Court to consider applications and grant or refuse14 warrants, Congress established a FISA Court of Review consisting of U.S. Court of Appeals judges appointed by the Chief Justice to decide appeals from the FISA Court. That special appeals chamber has only issued one opinion to date, in 2002. And in that opinion the Court of Review unanimously declared:

[References and footnotes]

100 Id. at 914.
101 Id. at 912, 915.
102 There is a common misperception that the FISA Court is but a "rubber stamp" because it has approved the overwhelming majority of the applications submitted. Having been involved in this process in the early days, I can explain that the reason the court did not need to reject applications was because a truly remarkable woman named Mary C. Lawton, who was the Justice Department’s Office of Intelligence Policy and Review for nearly a dozen years prior to her untimely death in 1993, made certain that no application went forward to the court that was not totally in order and consistent with the statute.
The Truong court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.55

Congress appears to have largely ignored this judicial declaration that it has broken the law by usurping an exclusive presidential power. But perhaps that is not surprising, given the other areas where Congress has decided to flagrantly thumb its nose at the Supreme Court and the Constitution. For example, since the Supreme Court nearly twenty-five years ago declared that "legislative vetoes" were unconstitutional on several grounds,56 Congress had made no effort to repeal them but instead has enacted more than five hundred new ones.57

What About Youngstown?

I will be shocked if at least one of the other witnesses at this morning's hearing does not rely heavily on Justice Robert Jackson's concurring opinion in the 1932 "Steel-Seizure" case of Youngstown Sheet and Tube Co. v. Sawyer.58 Even if they don't, it was relied upon by HPSCI in its 1978 FISA report,59 so it deserves some discussion.

My old friend Professor Harold Koh, now Dean of Yale Law School, probably deserves a large part of the credit for the theory that Jackson's Youngstown concurrence somehow has replaced Curtiss-Wright as the appropriate paradigm for foreign affairs cases. This was a central thesis in his prize-winning 1990 volume The National Security Constitution.

Like Los Fisher and many others, Professor Koh favors the "shared powers" concept of foreign affairs. I'm not fond of the term, not because I don't agree that many decisions in foreign affairs ultimately require the participation of more than one branch, but because the specific role of each branch tends to be different. The President "nominates" and "appoints," while the Senate may either consent to or veto the person nominated. The President has the exclusive power to speak to foreign governments on behalf of the nation, but before a treaty he has negotiated may bind the United States as conventional international law it must be approved by two-thirds of those Senators present and voting. I think it best not to merge these distinct roles with language that might suggest that the actual functions of each branch are interchangeable or "shared" in some way. It is not that Harold and Loui are necessarily wrong in this explanation, but rather that I fear the use of the term "shared powers" may promote sloppy thinking by readers less knowledgeable about the actual workings of government.

My real quarrel with Professor Koh's scholarship involves his suggestion that there is some struggle going on between the Supreme Court's landmark 1936 Curtiss-Wright opinion and the concurring opinion of Justice Jackson in Youngstown. Candidly, I think this argument is silly. When properly understood, the two opinions are not at all in conflict. But before turning to that, let me put the issue in context by quoting from Professor Koh's highly-acclaimed volume:

At the Republic's birth, the Framers deliberately drafted a Constitution of shared powers and balanced institutional participation, fully aware of the risks that arrangement posed to the nation's international well-being. By mandating that separated institutions share powers in foreign as well as domestic affairs, the Framers determined that we must sacrifice some short-term gains for speed, secrecy, and efficiency in favor of the longer-term consensus that derives from reasoned interbranch consultation and participatory decision making. Although in the early years of the Republic, all three branches condoned a de facto transformation of the original National Security Constitution from a scheme of congressional primacy to one of executive primacy, they never rejected the concept of power sharing and institutional participation. . . .60

He then goes on the explain how Curtiss-Wright radically changed the historic paradigm:

In 1936, Curtiss-Wright's dicta boldly asserted the alternative vision of unfettered presidential management. But even as the Cold War raged, the 1947 National Security Act, Youngstown, and finally the post-Vietnam-era framework statutes (e.g., war powers Resolution) definitively rejected that vision as America's constitutional model for dealing with the outside world. Vietnam (and Watergate, as well, to the extent that it arose from Vietnam) then taught that even in a nuclear age, America would not conduct globalization at the price of constitutionalism. It is therefore ironic that the Curtiss-Wright model should now resurface . . . .61

In reality, throughout the Cold War the Supreme Court routinely relied upon Curtiss-Wright as the established foreign affairs paradigm, as it does today. If its status was weakened in any way by Youngstown, someone clearly forgot to tell the Court, which continues to cite Curtiss-Wright more than any other case dealing with foreign affairs more than half-a-century later.62

57 LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 152 (5th ed. 2007). ("From the day that Chadha was issued on June 23, 1983, to the end of 2006, more than 500 new legislative measures had been enacted into law.").
58 343 U.S. 579.
59 1 H. REP'T 95-1283 at 24.
61 Id. at 211-12.
62 A Westlaw search reveals that Curtiss-Wright has been relied upon in Supreme Court cases in five of the last seven years. See, e.g., Panamanian v. United States, 544 U.S. 349, 360 (2005) ("In our system of government, the Executive is "the sole organ of the federal government in the field of international relations," United States v. Curtiss-Wright . . . .")
I was particularly amused by this passage of the Koh book: Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the Youngstown vision in favor of Curtiss-Wright. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.63

I think what I enjoyed the most was that of the ten or so "critics on the right" he footnotes to this passage, he listed me first -- well ahead of such distinguished scholars as former Yale Law School Dean Eugene Rostow and my University of Virginia colleague and mentor John Norton Moore. But, flattery aside, I've never been able to get Professor Koh to come up with statements from men like Washington, Jefferson, Hamilton, Marshall, or Jay supporting his theory that foreign and domestic affairs involved the same basic "sharing of powers" or that Congress was intended to be the senior partner in foreign affairs.64 Perhaps other witnesses here this morning can do so.

I hope I've demonstrated the broad consensus among these key Founders that Congress and the Senate were to be excluded from many decisions in the foreign affairs realm, and the powers they were given in this area were viewed as exceptions to the broad grant of "executive Power" to the president and were thus intended to be construed strictly. In contrast, without any effort to document his assertion, Professor Koh simply tells his reader "the first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role."65 And sadly, in the post-Vietnam era, this is the prevailing paradigm being taught in our universities and law schools.

Elsewhere in the volume, Professor Koh writes:

This structural vision of a foreign affairs power shared through balanced institutional participation has inspired the National Security Constitution since the beginning of the Republic, receiving its most cogent expression in Justice Robert Jackson's famous 1952 concurring opinion in Youngstown. Yet throughout our constitutional history, what I call the Youngstown vision has done battle with a radically different constitutional paradigm. This counter image of unchecked executive discretion has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in United States v. Curtiss-Wright Export Corp. As construed by proponents of executive power, the Curtiss-Wright vision rejects two of Youngstown's central tenets, that the National Security Constitution requires congressional concurrence in most decisions on foreign affairs and that the courts must play an important role in examining and constraining executive branch judgments in foreign affairs.66

One wonders if Dean Koh has carefully read Justice Jackson's Youngstown concurrence, or the majority opinion in the case written by Justice Black. For both went to considerable lengths to emphasize that they were not endeavoring to constrain the powers of the president in dealing with the external world. At issue in that case was whether the president's "war powers" (in a conflict Jackson noted had not been approved by Congress)67 authorized him to order the Secretary of the Interior to seize domestic steel mills -- the private property of American citizens -- in order to prevent a labor strike that might affect the availability of steel for the Korean War. (And keep in mind that the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . .")

There is no reason to believe that Justice Jackson was in any way hostile to Curtiss-Wright as the appropriate foreign policy paradigm. On the contrary, just two years before Youngstown, he wrote for the majority in Johnson v. Eisentrager:

Certainly it is not the function of the Judiciary to entertain private litigation - even by a citizen - which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region . . . . The issue . . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. United States v. Curtiss-Wright Corp . . . .

And consider this excerpt from Justice Black's majority opinion in Youngstown:

The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding

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63 KOH, THE NATIONAL SECURITY CONSTITUTION 225.
64 The two obvious exceptions involve a few statements made very early in the Federal Convention and James Madison's essays as Helvidius, which were clearly contrary to positions he took both before and after that debate with Hamilton and which are easily attributable to the reality that Jefferson and Madison were essentially "forum shopping" - hoping to remove the issue of U.S. diplomatic conduct towards France from the executive (where Washington was clearly going to follow Hamilton's advice) to the legislative branch (where the Republicans had a better chance of prevailing).
65 Id. at 73.
66 Id. at 72.
67 In fairness, despite subsequent attacks from Republicans, Truman played the Korean conflict by the book. He repeatedly asked to address a joint session of Congress and had Secretary of State Acheson draft an authorization for the use of military force. But he decided not to push the idea when in consultation with congressional leaders he was repeatedly told to stay away from Congress and assured he had the power to send troops into hostilities pursuant to the Constitution and the UN Charter. See Robert F. Turner, Truman, Korea, and the Constitution: Debunking the "Imperial Presidents" Myth, 19 HARV. J. L. & PUB. POL. 553 (1996).
broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces had the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.68

Similarly, Justice Jackson in Youngstown was very deferential to presidential power with respect to the external world:

[N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often is even unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign adventure. ... That military powers of the Commander in Chief were not to superease representative government of internal affairs seems obvious from the Constitution and from elementary American history. ... Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war powers as an instrument of domestic policy ... .

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. ... What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize person or property because they are important or even essential for the military or naval establishment.69

Even more fundamentally, in Youngstown Justice Jackson actually cited Curtis-Wright as authority, but then explained: "That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories. ..." And as both Justice Black and Jackson repeatedly emphasized, Youngstown was an "internal affairs" case.

That is also the consensus of scholars like Professor Louis Henkin, who in Foreign Affairs and the Constitution noted:

Youngstown has not been considered a "foreign affairs case." The President claimed to be acting within "the aggregate of his constitutional powers," but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.70

Consider also the reaction of Justice Rehnquist, joined by Chief Justice Burger and two other members of the Court, in the 1979 dispute over President Carter's constitutional power to terminate the mutual security treaty between the United States and Taiwan. Senator Goldwater had urged the Court to decide the case on Youngstown, but Rehnquist wrote:

The present case differs in several important respects from Youngstown ... cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In Youngstown, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. ... Moreover, as in Curtis-Wright, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs."71

Others may disagree, but my own sense is that The National Security Constitution is not a particularly useful contribution to the literature in this highly-specialized field. Indeed, my strong suspicion is that when the book was written Professor Koh was unaware of many of the materials I have mentioned earlier from Washington, Jefferson, and all three authors of the Federalist Papers.72

Post-Vietnam Congressional Usurpation of Presidential Power and Its Consequences

Mr. Chairman, the FISA statute needs to be understood in the context of a period of congressional assault on the constitutional power of the executive that developed during the heat of the Vietnam War debates. We can quarrel about how many legislators believed they were defending the Constitution from another "imperial president" and how much reality they were acting to some degree that the executive branch lacked the power to carry out its duties. But even then, the reality is that Congress took advantage of the flow of public opinion as the Vietnam War became unpopular, the weakness of Richard Nixon following Watergate,

68 343 U.S. 579, 587 (1952) (emphasis added).
69 Id. at 642, 644, 645 (emphasis added).
70 Id. at 637 n.3.
71 Id. at 638 n.11.
72 HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 341 n.11.
74 For example, he at least implies that the first assertion that the grant of executive power to the president carried with it the general control of foreign relations came in Hamilton's 1793 Pacificus essays. KOH, THE NATIONAL SECURITY CONSTITUTION 79-80.
and the reality that Gerald Ford had not even been elected to the position of Vice
President and had no clear public constituency. A very nice but largely (in this field)
clueless Jimmy Carter then came to Washington, anxious to work with Congress to bring
an end to intelligence abuse and restore power where he probably honestly assumed it
belonged.

The earliest reference I have found proposing that Congress challenge presidential
authority over foreign intelligence was in a 1969 book by radical activist Richard Barnet,
a founder of the Institute for Policy Studies, who wrote:

Congressmen should demand far greater access to information than they
now have, and should regard it as their responsibility to pass information
on to their constituents. Secrecy should be constantly challenged in
Congress, for it is used more often to protect reputations than vital
interests. There should be a standing congressional committee to review the
classification system and to monitor secret activities of the government
such as the CIA.13

Revelations a few years later of abuses in the intelligence area set the stage for that to
become a reality.

Were there in fact "abuses" in the Intelligence Community? Anyone who followed the
Church and Pike Committee hearings knows there were. But even Frank Church
ultimately admitted that the CIA had not been a "rogue elephant" (as he had initially
charged), and that virtually every activity of which he disapproved had been ordered by a
president or senior policy official.

President Franklin D. Roosevelt had bypassed his attorney general in 1936 and directly
ordered J. Edgar Hoover to start "spying" on Americans thought possibly to be connected
with communism or fascism, and Hoover had on his own initiative banned FBI "black
bag" jobs nearly a decade before the Church Committee hearings took place.14 Most of
the abuses had already been investigated and made public by the attorney general before
the hearings even began. And some of the sensationalized charges in the end turned out
to be largely unfounded.

For example, most people who followed the hearings in the press came away with the
idea that the CIA routinely went around "assassinating" foreign leaders who would not do
what America demanded. In fact, when the Church Committee published its massive
volume on the subject,15 it admitted it had not found a single case in which the CIA had
ever assassinated anyone. And Directors of Central Intelligence Richard Helms and

William Colby had each issued orders that no one connected with the CIA would have
anything to do with assassination long before the hearings began.16

What about Fidel Castro? Yes, at the instructions of Presidents Eisenhower and Kennedy
the CIA did make several plots to dispatch the Cuban dictator with extreme prejudice.
But given Castro’s unlawful intervention in several Latin American countries, one might
make a plausible case that a use of lethal force was permissible as an act of collective
self-defense under Article 51 of the UN Charter. There was also a decision made to kill
the Congo’s Patrice Lumumba, but before any action was taken he was arrested by his
own government and killed soon thereafter by rival leftist guerrillas.17 In all of the other
cases investigated by the Committee, the CIA was cleared of wrongdoing.

What about allegations of "spying" on Dr. Martin Luther King and anti-war leaders? The
charges appear to have been true. But as the 1978 HPSRC report on FISA observed, most
of the truly objectionable disclosures involved "domestic" targets.18 The Supreme Court
has since declared that warrantless wiretaps of purely domestic targets are
unconstitutional, and the Bush administration has agreed to obtain warrants from the
FISA Court any time U.S. persons in this country are targeted for surveillance, so that
sort of abuse should not again be a problem.

In reality, with the extensive oversight mechanisms already in place within the executive
branch, it is highly unlikely that any politician would even consider repeating those errors
of the past. NSA alone is reported to have a staff of 100 people in its Office of Inspector
General. Particularly in wartime, the president has – and he must have – a great deal of
largely unchecked power that could conceivably be abused. A truly rogue president
might theoretically order the Air Force to shoot down a plane that was actually carrying
the congressional Democratic leadership on a junket to Paris by claiming it had been
hijacked by bin Laden himself and was about to be flown into the Pentagon. The truth
would soon become public, and few sane people would argue that Congress should by
statute usurp the Commander-in-Chief power on the grounds that it might conceivably be
abused at some point in the future.

MISLEADING AND SENSATIONALIST PRESS COVERAGE OF THE CHURCH COMMITTEE HEARINGS IN 1975-76
HAD CONSEQUENCES. IN RESPONSE TO PUBLIC PERCEPTIONS OF CIA ASSASSINS RUNNING LOOSE
AND WITH WEAKENED PRESIDENTS IN THE WHITE HOUSE, CONGRESS PASSED A SERIES OF NEW LAWS
CLAIMING POWERS ALL THREE BRANCHES HAD HISTORICALLY RECOGNIZED AS BELONGING EXCLUSIVELY TO
THE EXECUTIVE.

EVEN BEFORE THIS, CONGRESS HAD OVERRIDDEN PRESIDENT NIXON’S VETO TO ENACT THE 1973 WAR
POWERS RESOLUTION. THE CONSTITUTIONAL SHORTCOMINGS OF THAT STATUTE WERE EXPRESSED

17 2, REP. NO. 94-465 at 256.
18 1 H. REP’T No. 85-1283 at 21.
eloquently by former Senate Majority Leader George Mitchell, who on May 19, 1988, declared on the Senate floor:

Although portrayed as an effort "to fulfill"—not to alter, amend or adjust—"the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war . . . .

By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief . . . . [The War powers resolution does not work, because it oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests. The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security.]

Senator Mitchell might have added that the highly partisan September 1983 congressional debates over extending the U.S. peacekeeping force in Beirut, Lebanon—a deployment that did not even arguably infringe upon the power of Congress to "declare war"—sent a signal to Islamic terrorists that America was "short of breath" and would abandon its commitments if more casualties were experienced. Indeed, shortly after the congressional debate, our Intelligence Community intercepted a message between two radical militia groups saying that if they killed 15 Marines, the rest would go home. Presumably, the fact that congressional leaders had announced they would reconsider the vote by which the mission had been extended for 18 months if there were any further casualties might have been a factor in that analysis. In any event, a few days later, on October 23, 1983, 241 sleeping Marines were killed by a terrorist truck bomb. As predicted, we did bring the rest home. And Osama bin Laden later said that our quick withdrawal after the attack had persuaded him that Americans were unwilling to accept casualties—which in turn just might have been a factor in his decision to attack the World Trade Center and other American targets on September 11, 2001.82

It seems very clear as well that FISA itself was a contributing factor to the success of the 9/11 attacks. I'm sure everyone here recalls the compelling congressional testimony of FBI lawyer Colleen Rowley, who was named one of Time magazine's "Persons of the Year" in 2002 because of her scathing memo to FBI-Director Bob Mueller denouncing the incompetent bureaucrats in the FBI's Office of General Counsel who had repeatedly refused to even process her requests for a FISA warrant so field agents could examine the laptop computer of Zacharias Moussaoui. Most Americans never did learn the reason Rowley's requests had been denied. There was simply no evidence that Moussaoui was an officer, employee, member, or agent of al Qaeda or any other foreign terrorist organization. He was what we call a "lone wolf," a "sympathizer" or perhaps a "fellow-traveler." But in its wisdom, Congress made it a felony for anyone in the Intelligence Community to engage in electronic surveillance of Moussaoui without a FISA warrant—and it also made it illegal for the FISA Court to issue such a warrant in Moussaoui's case. All those contemptible FBI lawyers had done was to obey the law passed by Congress. True, this may well have contributed to the success of the 9/11 attacks. But that's hardly attributable to the FBI.

If anyone doubts that FISA was intended to make such surveillances unlawful, I would urge you to read the 1978 HPSCI report of FISA. On page 34 it emphasizes that the term "agent of a foreign power" intentionally excluded "mere sympathizers, fellow-travelers, or persons who may have merely attended meetings of the group . . . ."

I honestly don't know if FBI surveillance of Moussaoui prior to September 11, 2001, would have led to clues that might have prevented the attacks and saved 3000 lives. I do know that General Michael Hayden, who served as Director if the National Security Agency for more than six years starting in 1999 and has a reputation for the highest integrity, has publicly stated with respect to the Terrorist Surveillance Program so many legislators struggled so hard to destroy: "Had this program been in effect prior to 9/11, it is my professional judgment that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such."84 He did not connect the dots and suggest that, once having identified al Qaeda terrorists in our midst we might have monitored their activities and even prevented the attacks, but that's not an unreasonable conclusion.

In 2004, Congress quietly amended FISA to address the "lone wolf" problem. Some might view that as a bit late—3000 lives too late. In fairness, of course, no one in Congress expected that FISA would make it easier for foreign terrorist to slaughter thousands of innocent people in this country, and certainly no one in Congress wished for such a result. But one of the reasons John Locke explained that foreign affairs needed to be entrusted to the executive was because it was not possible to anticipate by "antecedent, standing, positive laws" all of the changed circumstances that might occur during negotiations, war, or other events—and thus this business of necessity had to be entrusted to the executive "to be managed for the public [sic] good."86

81 CONGRESSIONAL RECORD, May 19, 1988, quoted in ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 162-63.
82 For a discussion of congressional responsibility for this tragedy, see P.X. KELLEY & ROBERT F. TURNER, Out of Haven's Way: From Beirut to Haiti, Congress Protests Itself Instead of Our Troops, WASH. POST, Oct. 23, 1994 at C2; and TURNER, REPEALING THE WAR POWERS RESOLUTION 141-42.
84 I H. REP'Y No. 95-1283 at 34.
85 A copy of General Hayden's January 23, 2006, address to the National Press Club can be found online at: http://www.fas.org/irp/terror/2006/01/hayden012306.html.
86 JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 147 (1689).
Indeed, the congressional assault on presidential powers has given us textbook examples of this principle at work. In May 1973, Congress snatched defeat from the jaws of victory in Indochina (in the process consigning millions of human beings we had repeatedly pledged to assist by treaty and statute to death and tens of millions of others to a communist tyranny that decades later still ranked among the “worst of the worst” human rights violators in the world) by cutting off all funds for combat operations “in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.”

Two years later to the month, Cambodian forces seized the American merchant ship S.S. Mayaguez and took 42 crewmembers to an island. When Senator Frank Church was later asked whether he was upset that President Ford had repeatedly violated the amendment he had sponsored by using force in the air, on the ground, and off the shores of Cambodia to rescue those Americans, he explained that Congress had “not intended to prevent something like that.”

Then there was the statute that authorized the elder President Bush to use force in Operation Desert Storm in 1991. Congress carefully drafted the statute to prevent the president from using force for any objective beyond ejecting Iraqi forces from the territory of Kuwait. No one anticipated that General Norman Schwarzkopf would pull off a brilliant “left hook” that would leave Saddam’s Revolutionary Guard fleeing across the desert with only minimal American casualties, and not a few congressional Democrats who had voted to deny Bush any authority to enforce the UN Security Council decision quickly denounced the president as a wimp for failing to go all the way to Baghdad to exploit the great victory and bring an end to Saddam’s rule.

We don’t have to go back years to find examples of serious harm being done to our national security by a Congress that usurped presidential power and then attempted to anticipate the consequences of its actions. Time and again, the 1998 HPSCI report of FISA acknowledged that the new statute would only regulate “electronic surveillance conducted within the United States for foreign intelligence purposes.” The report explained: “The committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillance.”

And yet, if leaks in the newspapers are to be believed—and some have been specifically attributed to congressional sources—changes in technology have led the FISA Court to declare that communications between bin Laden in Pakistan and his top lieutenants in Afghanistan cannot longer be intercepted without a FISA warrant if they happen to pass through an Internet switch in northern Virginia, Silicone Valley, or any other part of the United States. Because of this, we are reportedly getting twenty-five percent less intelligence this year than we got last year. Congress has not only usurped the constitutional powers of the president, but in the process it has given a special gift to al Qaeda by immunizing communications that clearly were not intended to be affected by FISA. And yet I am told that last month more than four out of five House Democrats voted to prevent this situation from being corrected.

If you want to find other horror stories about how Congress through FISA is undermining America’s ability to protect the lives of our people, read the testimony and statements of Director of National Intelligence McConnell and other senior officials. Responding to a question from Senator Bond during his May 1 appearance before the Senate Select Committee on Intelligence, DNI McConnell declared that, “under the construct today, the way the definitions have played out and applied because technology changes, we’re actually missing a significant portion of what we should be gathering.”

Kenneth Wainstein, the Assistant Attorney General for National Security, noted during that same hearing that the current interpretation of FISA prevents the government from collecting intelligence with non-U.S. persons who are temporarily visiting the United States and who we know have important foreign intelligence information that might well help us prevent terrorist attacks. But because we can’t clearly connect that person—who might be a “tourist” from Pakistan or Iran—as an “agent” of a “foreign power,” we are helpless. Does Congress really place greater value on the privacy interests of foreign visitors than it does on the lives of American citizens?

In his August 6 letter to Senators Reed and McConnell, the DNI noted that because of FISA the Intelligence Community was “diverting scarce counterterrorism analysts who speak the languages and understand the cultures of adversaries to compiling lengthy court submissions to support probable cause findings on an individualized basis by the FISA Court in order to gather foreign intelligence from foreign terrorists located overseas.” He added: “This is an unacceptable and irresponsible use of Intelligence Community resources.” We have a horrible shortage of skilled linguists, and rather than allow the DNI to prioritize their assignments Congress is taking them away from the task of trying to find bin Laden and prevent attacks on America so they can prepare paperwork to persuade the FISA Court that perhaps we ought to be keeping an eye on our enemies during a war that Congress has authorized. If this has been the way our government did business during World War II, we might all be speaking German or Japanese today.

89 H. Rep’r No. 95-1283 at 24. See also, id. at 26, 36, and other references.
90 Id. at 27.
Conclusions

Mr. Chairman, I have gone on far too long. I would not have done so were the stakes involved not so serious, and were not my frustration over the ignorance and misinformation that has clouded this debate so great. Let me try to make a few final observations and bring things to a close.

FISA Was Essentially a Gentleman’s Agreement
Between Congress and President Carter

When Congress enacted FISA in the face of unanimous views to the contrary by those who had expressed an opinion in the other two branches of our government, I'm sure most members believed their decision was “law” and would bind future presidents. But a careful reading of the hearing record suggests that that was not the view of the Carter Administration (which, as discussed, had taken the position that there was a foreign intelligence exception to the warrant requirements of the Fourth Amendment). Consider this excerpt from the HPSCI testimony of Attorney General Griffin Bell:

[C]landestine intelligence activities, by their very nature, must be conducted by the executive branch with the degree of secrecy that insulates them from the full scope of these review mechanisms. Such secrecy in intelligence operations is essential if we are to preserve our society, with all its freedoms, from foreign enemies. . . .

[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interject here to say that this does not take away the power of the President under the Constitution. It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. The President, by offering this legislation, is agreeing to follow the statutory procedure.91

Now this statement may be subject to more than one interpretation, but it sounds to me like the Attorney General was asserting that the president had independent constitutional power to conduct foreign intelligence, and affirmed the truism that a mere legislative statute cannot take away a constitutional power – precisely the unanimous conclusion of the FISA Court of Review nearly a quarter-century later. And then he goes on to say that the statute will nevertheless be followed because the president – despite his independent constitutional power to act outside of FISA – was “agreeing to follow the statutory procedure.” There may be other interpretations, but that to me is the most reasonable one.

And if that interpretation is correct, then the foundation of FISA from the start was not a lawful and binding Act of Congress at all, but rather a usurpation of presidential constitutional power that as a matter of U.S. constitutional law was void, but which the sitting president had nevertheless agreed as a matter of policy to observe. If that is true, then if Congress insists on trying to control this area it must come up with language that the current president will also be willing to accept. For it is axiomatic that neither Congress by itself nor Congress in cooperation with a sitting president can amend the Constitution so as to deny future presidents the full use of their independent constitutional powers.

Why Presidents Like FISA

I've been out of the intelligence business for nearly twenty-four years, and while I have many friends still working in the Intelligence Community I don't pretend to speak for them. But my own sense is that most administrations basically like FISA. Certainly many prosecutors and law enforcement officials do, because if surveillance is carried out pursuant to a FISA judicial warrant and authorizing statute they don't have to worry as much about whether evidence acquired in the process will be found admissible in a criminal trial. And in a setting where speed and dispatch are not essential, it also adds another layer of review to ensure that the right thing is being done.

So even though I do not believe that Congress has the constitutional power to demand classified foreign policy or intelligence information from the president92 or to compel him to conduct foreign intelligence operations as directed by statute, with appropriate revisions I can see FISA being accepted and observed on the basis of an understanding that it is mutually convenient to do so. Such an arrangement could not bind current or future presidents from acting outside FISA if their judgment led them to conclude that were necessary, but such an accommodation might well work.

But if Congress continues to stonewall, and refused even to correct the obvious technical problems that are preventing NSA from monitoring communications between foreign terrorists outside of this country – communications FISA was clearly not intended to govern – in my view the president would be derelict in his duty if he did not authorize a more robust program of foreign intelligence collection outside of FISA. And if America gets hit again by a major terrorist attack before the next election, were I a legislator who had voted to undermine efforts by our Intelligence Community to gather intelligence on al Qaeda and its affiliates, I think I might want to get my resume in order.


92 Fifty years ago, the great Princeton scholar Edward S. Corwin wrote: “So far as practice and weight of opinion can settle the meaning of the Constitution, it is today established that the president alone . . . is final judge of what information he shall entrust to the Senate as to our relations with other governments.” EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 211-12 (4th rev. ed., 1957).
Confusing Law Enforcement Search Warrants and the Business of Foreign Intelligence Collection

With the caveat again that I have been out of the intelligence business for nearly twenty-five years, I must nevertheless say that I don’t understand this insistence on imposing a warrant requirement, complete with “probable cause,” on the collection of foreign intelligence information. In law enforcement, you have evidence that a crime has been committed or is about to be committed and you search for evidence to identify wrongdoers and bring them to justice. In that process, the Fourth Amendment quite properly limits the extent to which police or other government authorities may infringe upon the reasonable expectations of privacy of citizens and others in the community. Certain activities are prohibited in the absence of probable cause that an individual has committed or intends to commit a criminal act.

There are occasions in the intelligence business where a similar situation occurs and law enforcement personnel are brought in to try to collect the necessary evidence to win a conviction. But much of the time, the task of the Intelligence Community is to look around and try to identify individuals who may be foreign spies or agents. Historically, much of that difficult and often thankless task has involved trying to make associations — who spends a lot of time with a known spy or terrorist, who calls his telephone, who socializes with him and again. No one is punished for telephoning a foreign agent or terrorist. Spies and terrorists do things other than steal secrets and blow up buildings, and there is not the slightest thing wrong with innocently but repeatedly communicating with an enemy spy you have no idea is a spy. Perhaps an e-bay transaction will lead to a series of e-mails, or the illness of a mutual friend will prompt repeated phone calls. Our intelligence officers patiently look for and check out lead after lead, and sometimes they get lucky and identify another spy or terrorist.

Technology can greatly assist in this business. If NSA can get access to telephone records of millions and millions of customers, sophisticated programs can search and find which numbers are time and again connecting with numbers known or suspected to be used regularly by terrorists. Again, no one is sent to jail for talking on the telephone with a covert enemy agent. Perhaps the calls are between teenagers in both houses who have fallen in love and are totally oblivious to the reality that one of their parents is a terrorist. Such searches often lead to dead ends, but such leads are worth checking.

Professor Philip Bobbitt, a distinguished constitutional scholar and Director of the Columbus University Center for National Security, recently published an outstanding op-ed in the New York Times that is worth quoting. He explained:

It made sense to require that the person whose communications were intercepted be a spy when the whole point of the interception was to gather evidence to prosecute espionage. This makes much less sense when the purpose of the interception is to determine whether the person is in fact an agent at all. This sort of communications intercept tries to build from a known element in a terror network — a person, a telephone number, a photograph, a safe house, an electronic dead-drop — to some picture of the network itself. By crosshatching vast amounts of information, based on relatively few confirmed elements, it is possible to detect patterns that can expose the network through its benign operations and then focus on its more malignant schemes.

For this purpose, warrants are utterly beside the point.93

Philosophers sometimes ask if a tree falls in a forest and no one is around to hear it, does it make a sound?94 In a similar vein, one might ask whether a computer that in a nanosecond scans my anonymous telephone records to see if I have been communicating with known terrorists and then moves on to examine other numbers has violated my legitimate privacy rights? In more than 99.999 percent of the searches, no relationship will be found and no human being will be told anything about me. When in May of last year USA Today reported that some telephone companies had provided telephone records to the NSA — without providing any names, addresses, or content information about the calls — some civil libertarians went ballistic. Senator Patrick Leahy asked: “Are you telling me tens of millions of Americans are involved with al-Qaeda?”95

Obviously, Senator Leahy knows that no one is suggesting that every record searched belongs to a suspected Qaeda operative, any more than every airline passenger searched is believed to be concealing a handgan. (The Supreme Court tells us that during the first fifteen years of airport passenger searches, firearms were found in about 0.0004% of searches.96 Senate Leahy is either being silly about a very serious matter or he is playing partisan politics by trying to confuse the public. We search millions of records to try to identify a small number that show a pattern of communicating with known or suspected terrorists in order to identify possible leads that may result in preventing the next major terrorist attack.

As I see it, this is no more a violation of my “privacy rights” than is the common practice of having government computers scan a digital record of my fingerprints — and they presumably have lots of them, starting with the ones I submitted while earning my Boy Scout fingerprinting merit badge half-a-century ago, and including those from my Army records and the various times I have been fingerprinted in connection with government jobs and security clearances — along with those of millions of other Americans whose prints are on file. Am I really “injured” when a government computer scans my prints in trying to find a match to the unknown print found on a murder weapon? Unless

94 The answer, it has always seemed to me, depends upon whether one defines “sound” as a series of vibrations created by the falling tree, or the impulse transmitted to the human brain when the ear receives those vibrations. But that’s not my point in making this comparison this morning.
96 Von Raab, 489 U.S. at 675-76.
there is at least a partial match, no human being will ever see my name as a result of such a search. I honestly don’t see the problem here.

I stand in line patiently at airports each year for hours and hours waiting to be searched. I want my government to make it difficult for terrorists to hijack my plane or blow it up. I am glad the FBI is scanning vast digital databases that include my fingerprints when it searches for criminals, because I know searching more records should increase the chance of finding a match and I want to get violent criminals off the street. And I would be very glad to learn that the government is having a computer examine my phone and e-mail connection records if there is even a slight chance that the process will expose a real terrorist and prevent him from killing me, my family, or other innocent human beings.

Unless one is actually involved in criminal activity or terrorism, to say the privacy intrusion associated with these “searches” is de minimis is a gross understatement. The Supreme Court held years ago in *Smith v. Maryland* that there is no reasonable expectation of privacy concerning such telephone records, but even were there a recognized privacy interest it would obviously pale beside the government’s interest in preventing terrorist attacks. Anyone who doubts that has forgotten the events of September 11, 2001. And when Members of Congress — or witnesses at congressional hearings, for that matter — make alarmist pronouncements calculated to upset the public they serve neither themselves nor their constituents. We have to make enough really difficult calls in trying to reach the right balance between privacy and safety without being led astray by unwarranted hysteria.

**Revising FISA**

I was absolutely shocked to read in Newsweek that 82 percent of House Democrats had voted against the “Protect America Act” prior to going on recess. As I read the statute, it was an emergency six-month fix to permit our Intelligence Community to resume intercepting electronic communications between foreign terrorists outside this country until Congress could return from a month-long recess and enact a more permanent fix. It may not have been perfect, but Congress was unwilling to stay in town long enough to try to make it perfect.

I am not aware of any knowledgeable person who believes FISA was intended to block surveillance of such electronic communications, or of anyone not tied to al Qaeda who does not agree we ought to be listening. Yet, the explanation given in the media for voting against correcting this very serious technological problem was a concern about offending the party’s “liberal base.”

I am not here as an expert on the details of proposed revisions to FISA. I’m sure you have had, or will soon have, an opportunity to discuss the details with people involved in the drafting who can give you much more authoritative answers than I could.

I have of course read the testimony of the DNI and Mr. Wainstein of the Justice Department, and I find both entirely compelling. Making FISA technology neutral and focusing our limited resources on protecting the civil liberties of U.S. persons in this country makes tremendous sense to me. The key issue ought to be who is being targeted, and the fact that bin Laden places a telephone call to “Joe Sixpack” in Peoria (about whom the government may know nothing and thus won’t be able to get a FISA warrant) ought not require NSA monitors to unplug their headphones.

Consider the case of a known drug dealer in this country. The government gets a warrant to wiretap his phone, and if I then telephone him and offer to sell him drugs the government can introduce every word I say into court against me without ever getting permission from a judge to record my statements. The same would be true if the warrant were issued in a case involving suspected securities fraud. In such cases, my privacy rights are essentially “collateral damage” in the reasonable effort to get information on the target of the surveillance. Why on earth should we apply a more difficult standard to intercepting communications of foreign enemies who wish to murder large numbers of Americans than we do to white-collar criminals in this country?

It seems to me that Congress ultimately has two choices. You can work with the president to try to find a mutually agreeable solution — one that will give him the benefit of knowing that foreign intelligence information will likely be admissible in a court of law, without in the process preventing him from taking the necessary measures to collect the intelligence needed to prevent the next catastrophic terrorist attack — or you can play hardball, intentionally preventing our Intelligence Community from collecting essential foreign intelligence information, until either we are attacked again and your constituents vote you out of office or the president simply decides to ignore FISA.

In *Federalist* No. 41, James Madison cautioned:

> The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose Constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.

In this instance, a decision by the president to ignore FISA would not involve a usurpation of power. For as I have demonstrated, he would merely be reclaiming authority that the Founding Fathers expressly said he had, that other presidents have
exercised since the earliest days of our country, that Congress itself has recognized by statute to exist, and that every court to decide the issue -- including a unanimous opinion by the appellate court Congress created to oversee FISA decisions -- has affirmed. When the facts get out, this is not a fight that Congress is likely to win in the struggle for public opinion.

As a political matter, it is very much in your interest to fix permanently the inadvertent consequences of technological changes and outdated statutory language that prevents our Intelligence Community from listening to every word we can intercept from Osama bin Laden and his associates in other countries. If the American people learn what you have done, the approval rating of Congress -- which the August 13-16 Gallup Poll reports has now dropped to 18 percent (a 38 percent drop since May), with a 76 percent disapproval rate -- may fall still further before next year's elections.

Mr. Chairman, lest there be any misunderstanding, I have the highest respect for this institution and its members. I worked as a staff member in the legislative branch for five years, and as a student of the Constitution I understand the critically important role assigned to Congress in maintaining our freedoms. If my testimony this morning seems critical of Congress, that is intentional. For the reasons I have tried to carefully explain, I believe Congress is violating the Constitution and endangering the safety of the American people. I come from the University of Virginia, whose founder, Thomas Jefferson, wrote in his Summary View of the Rights of British America: "Let those flatter who fear; it is not an American art." America is at war, and the stakes in this debate are far too serious for anything short of honest and full candor.

Focus on Minimization Issues

I would leave you with but one final thought. As you seek to find a workable solution to this very difficult problem, consider the oath you took upon assuming the important position of trust and honor that has been bestowed upon you by your constituents -- a solemn oath to support our Constitution. It is our supreme law. And in this instance, it is absolutely clear that Congress has grossly usurped presidential power. In so doing, it has contributed to the success of one major terrorist attack and may soon bear responsibility for others if no quick solution is found.

My own recommendation is that you focus on the later stages of the intelligence process. At least with respect to activities outside this country, trying to ascertain the intentions and capabilities of our enemies in a war you have authorized, don't focus on how the president decides to collect intelligence. Just as in war there is inevitable "collateral damage" and lives are lost because of faulty intelligence or imperfect execution, accept the fact that to do its job effectively and protect our nation from catastrophic terrorist attacks some private information about innocent Americans will inevitably be swept up. That's not ideal, but it is okay -- and it is far better that the alternative of allowing our enemies to kill thousands of our fellow citizens so that no U.S. person's privacy will be disturbed.

I would urge you instead to work with the DNI and others who understand these issues and focus on the retention and dissemination phases of the process. I don't have access to the latest minimization rules because they are presumably still at least in part classified. But having worked with those drawn up by Attorney General Levy when I served in the White House in the early 1980s, I can tell you that they work. And rather than compromise a vigorous collection effort, let's concentrate on making as certain as reasonably possible -- consistent with operational success -- that when information about specific U.S. persons that does not constitute legitimate foreign intelligence information is intercepted, it is identified, isolated, and ultimately destroyed.

Such measures may impose some costs on the Intelligence Community, as they will involve a certain number of man-hours over a continuing period of time. But my strong sense from reading the testimony of senior executive branch officials is that they favor these procedures, and they, too, are committed to trying to protect the civil liberties of U.S. persons.

The Stakes Are High for Congress Too

Admittedly, to date the president's critics have scored some major points by accusing him of being insensitive to civil liberties and charging him with breaking the law. Indeed, the administration has done a truly atrocious job of explaining its position in this struggle to the American people. But their case is a strong one -- supported by revered names like Washington, Jefferson, Hamilton, Madison, Jay, and Chief Justice John Marshall himself -- as well as by past legislative statutes and every court to decide the issue, including the unanimous appellate court established by FISA itself.

If you refuse to seek a reasonable and workable compromise and the American people eventually learn the truth, you will lose. I think you will lose big. The American people may sometimes be uninformed and even misinformed, but they are not stupid. And they will not likely forgive you if they learn that Congress has been playing politics with the lives and safety of their families and friends. If before this issue is resolved, America is hit by another catastrophic terrorist attack, maintaining your 18 percent public approval rating may prove to be but a pipe dream. The clock is running, our Intelligence Community is anxious to get back to business, and the ball is in your court.

Thank you, Mr. Chairman. That concludes my prepared statement.

\[160\] A series of recent job rating polls on Congress may be found online at: http://www.pollingreport.com/CongJob.htm.

\[161\] Available online at: http://www.yale.edu/lawweb/avalon/jefferson.htm.
FISA vs. the Constitution

Congress can't usurp the president's power to spy on America's enemies.

BY ROBERT F. TURNER
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In the continuing saga of the surveillance "scandal," with some congressional Democrats denouncing President Bush as a lawbreaker and even suggesting that impeachment hearings may be in order, it is important to step back and put things in historical context. First of all, the Founding Fathers knew from experience that Congress could not keep secrets. In 1776, Benjamin Franklin and his four colleagues on the Committee of Secret Correspondence unanimously concluded that they could not tell the Continental Congress about covert assistance being provided by France to the American Revolution, because "we find by fatal experience that Congress consists of too many members to keep secrets."

When the Constitution was being ratified, John Jay—America's most experienced diplomat and George Washington's first choice to be secretary of state—wrote in Federalist No. 64 that there would be cases in which "the most useful intelligence" may be obtained if foreign sources could be "relieved from apprehensions of discovery," and noted there were many "who would rely on the secrecy of the president, but who would not confide in that of the Senate." He then praised the new Constitution for so distributing foreign-affairs powers that the president would be able "to manage the business of intelligence in such manner as prudence may suggest."

In 1790, when the first session of the First Congress appropriated money for foreign intercourse, the statute expressly required that the president "account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify." They made no demand that President Washington share intelligence secrets with them. And in 1818, when a dispute arose over a reported diplomatic mission to South America, the legendary Henry Clay told his House colleagues that if the mission had been provided for from the president's contingent fund, it would not be "a proper subject for inquiry" by Congress.

For nearly 200 years it was understood by all three branches that intelligence collection—especially in wartime—was an exclusive presidential prerogative vested in the president by Article II, Section 1 of the Constitution. Washington, Madison, Jefferson, Hamilton, John Marshall and many others recognized that the grant of "executive power" to the president included control over intelligence gathering. It was not by chance that there was no provision for congressional oversight of intelligence matters in the National Security Act of 1947.

Space does not permit a discussion here of the congressional lawbreaking that took place in the wake of the Vietnam War. It is enough to observe that the Constitution is the highest law of the land, and when Congress attempts to usurp powers granted to the president, its members betray their oath of office. In certain cases, such as the War Powers Resolution and the Foreign Intelligence Surveillance Act, it might well have crossed that line.

Keep in mind that while the Carter administration asked Congress to enact the FISA statute in 1978, Attorney General Griffin Bell emphasized that the law "does not take away the power of the president under the Constitution." And in 1994, when the Clinton administration invited Congress to expand FISA to cover physical as well as electronic searches, the associate attorney general testified: "Our seeking legislation in no way should suggest that we do not believe we have inherent authority under the Constitution. "We do," she concluded.
For constitutional purposes, the joint resolution passed with but a single dissenting vote by Congress on Sept. 14, 2001, was the equivalent of a formal declaration of war. The Supreme Court held in 1800 (Bas v. Tingy), and again in 1801 (Talbot v. Seamen), that Congress could formally authorize war by joint resolution without passing a formal declaration of war; and in the post-U.N. Charter era no state has issued a formal declaration of war. Such declarations, in fact, have become as much an anachronism as the power of Congress to issue letters of marque and reprisal (outlawed by treaty in 1856). Formal declarations were historically only required when a state was initiating an aggressive war, which today is unlawful.

Section 1811 of the FISA statute recognizes that during a period of authorized war the president must have some authority to engage in electronic surveillance "without a court order." The question is whether Congress had the power to limit such authorizations to a 15-day period, which I think highly doubtful. It would be akin to Congress telling the president during wartime that he could attack a particular enemy stronghold for a maximum of 15 days.

America is at war with a dangerous enemy. Since 9/11, the president, our intelligence services and our military forces have done a truly extraordinary job--taking the war to our enemies and keeping them from conducting a single attack within this country (so far). But we are still very much at risk, and those who seek partisan political advantage by portraying efforts to monitor communications between suspected foreign terrorists and (often unknown) Americans as being akin to Nixon's "enemies lists" are serving neither their party nor their country. The leakers of this sensitive national security activity and their Capitol Hill supporters seem determined to guarantee al Qaeda a secure communications channel into this country so long as they remember to include one sympathetic permanent resident alien not previously identified by NSA or the FBI as a foreign agent on their distribution list.

Ultimately, as the courts have noted, the test is whether the legitimate government interest involved--in this instance, discovering and preventing new terrorist attacks that may endanger tens of thousands of American lives--outweighs the privacy interests of individuals who are communicating with al Qaeda terrorists. And just as those of us who fly on airplanes have accepted intrusive government searches of our luggage and person without the slightest showing of probable cause, those of us who communicate (knowingly or otherwise) with foreign terrorists will have to accept the fact that Uncle Sam may be listening.

Our Constitution is the supreme law, and it cannot be amended by a simple statute like the FISA law. Every modern president and every court of appeals that has considered this issue has upheld the independent power of the president to collect foreign intelligence without a warrant. The Supreme Court may ultimately clarify the competing claims; but until then, the president is right to continue monitoring the communications of our nation's declared enemies, even when they elect to communicate with people within our country.

Mr. Turner, co-founder of the Center for National Security Law at the University of Virginia School of Law, served as counsel to the President's Intelligence Oversight Board, 1982-84.
intelligence information. Every administration from FDR to (and including) Jimmy Carter engaged in warrantless foreign-intelligence wiretapping in the belief that this was one of the "exceptions" to the Fourth Amendment's warrant requirement. Others include border searches and searches of commercial airline passengers and their luggage (not to mention the requirement, imposed by Congress, that citizens entering a congressional office building to exercise their constitutional right to petition their government for redress of grievances must submit to a warrantless search absent the slightest probable cause).

In 1978, Carter administration Attorney General Griffin Bell told the Senate that FISA "does not take away the power of the President under the Constitution"; but he explained that the statute could nevertheless work because President Carter was "agreeing to follow the statutory procedure." That was Mr. Carter's prerogative as it is President Bush's--but neither they nor Congress may take away the constitutional power of future presidents.

The Foreign Intelligence Surveillance Court of Review (composed of federal appeals court judges) noted, in a unanimous 2002 opinion, that every federal court to decide the issue held the president has constitutional power to authorize warrantless foreign-intelligence electronic surveillance. The opinion added: "FISA could not encroach on the President's constitutional power."

The Supreme Court has had at least six opportunities to limit presidential power in this area. In the 1967 Katz case that first required a warrant for wiretaps, the Court expressly exempted "national security" wiretaps from its holding. When it required a warrant for national security wiretaps of purely domestic targets in 1972, it exempted electronic surveillance of the "activities of foreign powers and their agents" in this country. On four other occasions it declined to hear cases on appeal where it had the opportunity to impose a warrant requirement on foreign-intelligence electronic surveillance.

Much contemporary debate over presidential claims of power to ignore "laws" fails to appreciate the modern congressional practice of enforcing flagrantly unconstitutional statutes. This helps explain the increased use of presidential "signing statements" in recent decades. On June 11, 1976, Sen. Robert P. Griffin (R., Mich.) inserted a lengthy statement I'd drafted into the Congressional Record explaining why "legislative vetoes" of executive agency actions were unconstitutional. Seven years later, the Supreme Court echoed those arguments in reaching the same conclusion in the Chadha case. The congressional response? It has since enacted more than 500 new unconstitutional legislative vetoes.

Mr. Mukasey rightly promised to resign rather than violate his oath of office if the "president proposed to undertake a course of conduct that was in violation of the Constitution" and could not be dissuaded. For precisely the same reason, he was also right to refuse to be bound by unconstitutional acts of Congress like FISA that usur...
presidential power. Any senator who elects to vote against him because of this issue has a duty to explain to the American people by what theory an unconstitutional statute has suddenly taken on a superior position to the Constitution itself.

Mr. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where he cofounded the Center for National Security Law in 1981. He is a former three-term chairman of the American Bar Association's Standing Committee on Law and National Security.
Also see:

Dr. Louis Fisher’s testimony to the Senate Select Committee on Intelligence regarding Disclosure of Classified Information to Congress.

http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.183&filename=51671.pdf&directory=/data/wais/data/105_senate_hearings