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If you will allow me to reminisce just a bit, in September of 2005, I was sitting in a window seat on a commercial flight from Madrid to Philadelphia. It was mid-afternoon on a Tuesday. The plane was high above the clouds in the sunshine, halfway across the Atlantic. I was returning from a long trip to Europe. It was typically frenetic: six countries in five days, visit after visit with politicians and businessmen, diplomats and soldiers. I was tired, but marveling at what a great job I had. It is like being chief legal officer of a medium-size country. Any conceivable legal issue conjured up by the Department's more than 10,000 military and civilian lawyers could end up in my lap.

I remember my head buzzing with those responsibilities as I began to doze, and then it hit me with a jolt: I knew this flight. It was the same flight that we had tracked four years earlier on September 11th, 2001, another Tuesday. You know the story: Nineteen hijackers on four planes murdered almost 3,000 innocent people in an atrocity unlike any in American history. What you may not remember as well is that on that day our department tracked two international flights, one over the Pacific and this one over the Atlantic, suspecting that they too were hijacked and heading toward an American skyline. And we steeled and readied ourselves to shoot them down.

All of us remember where we were on that day. I was in my office on the phone with my wife, telling her to turn on the TV, when I saw the second plane hit the second tower. I raced down to one of the Pentagon command centers with some others to help set up a crisis action cell. And as the American Airlines plane hit our building on the other side, I felt only a shudder pulse of the monstrous concrete building, and then it was like I was in a movie playing in fast-forward: smoke and confusion, multiple conversations between the President and the Secretary, sending my own deputy off with the Deputy Secretary of Defense to a survival site in the event that another plane came at our side of the building, hearing situation reports about dead and wounded in the Pentagon courtyard.

I spent nineteen hours in the Pentagon that day, mostly at the elbow of then Secretary of Defense Don Rumsfeld and then Joint Chief General Dick Myers. Most of the time I was in two of the Pentagon command centers, reacting and contemplating possibilities I had never expected to face. These scenarios had nothing to do with corporate transactions, environmental clean-ups, government contracts, class action litigation or any of the other issues that had been on my mind when I first took the job nearly four months earlier.

That day, we considered whether to shoot civilian airliners from the sky, and we wondered what would come next. Were there more terrorists on the ground in American cities? Did they have suitcases nukes? After New York and D.C., were Chicago, Atlanta or Los Angeles next? The legal questions were legion: What were the rules of engagement? How do the 4th and 5th Amendments apply to a decision to shoot down an American airliner en route to a U.S. city? Should any enemies that we might capture be treated as criminal suspects or enemy combatants?

Smoke lingered in the Pentagon for days. We could not totally extinguish the fires for a while, because the water itself threatened to shut down the electrical information systems of the building.

But as the smoke dissipated, some things soon became clearer. We were attacked by a non-state organization known as Al Qaeda, and the President decided that we would fight this enemy with all national power, including our armed forces. We were at war. At the time, this was widely accepted. In those weeks following 9/11, both the United Nations and NATO concluded that we had suffered an armed attack, thereby invoking the UN Charter and the NATO Charter provisions for collective military action.

The Congress on September 18th, 2001, passed a breathtakingly broad authorization for use of military force. The decision to go to war also followed recent precedent. President Clinton had ordered cruise missile strikes against Al Qaeda in response to the 1998 bombings of U.S. Embassies in Kenya and Tanzania, also by Al Qaeda. But going to war had many legal consequences. It meant we could attack Al Qaeda with deadly force. It meant we could detain captured fighters for the duration of hostilities. It meant we could ask questions without reading *Miranda* warnings. It meant we could seek to intercept their communications to learn their intentions and foil their future plots. It meant we could use military commissions to try them for war crimes.

I was invited and tempted to give a detailed defense of these matters here today. Bob Fiske told me this group has heard many speakers over the past years criticizing the government's legal practices and that you would give me a fair hearing in rebuttal. I'm confident that that's true. But there are so many questions and there are so many better expositions, that in the time we have, I don't think that was a good course to take.

On Monday, I am leaving my job after almost seven years, so rather than justify, or attempt to justify, the actions that we have come up with, I would like to invite you to look with me to the future, as this national and global dialogue continues.

As you all are incredibly important opinion leaders, and as our democracy considers these new legal policies, I ask you to consider three questions, important to all Americans, and maybe especially important to those of us in the legal profession. One: With the law as it is developing, can we fight and win wars? Number two: Can we preserve the systems that we hold most dear? And number three: When the next big attack comes, will we be able to live within the law in responding to it?

The first: How does the law affect how we fight and win wars? An obvious approach to this question is to think about the rules we place on government. In the aftermath of 9/11, we have seen reforms in this mode. We have removed the so-called wall between law enforcement and intelligence. We created a Department of Homeland Security. We created the office of the Director of National Intelligence. These legal reforms have been aimed at restructuring government to be more effective.

I encourage you, however, to consider the law's impact on national security from other perspectives beyond just the rules that we place on government. Think about how the law sets incentives and disincentives for others besides the government. What incentives does the law set for our enemies? In a way, the threat that Al Qaeda poses makes the application of the Law

of War to this conflict unprecedented. On the other hand, the bedrock documents underlying the Law of War, the Geneva Conventions, had this kind of conflict squarely in mind in some sense. They were consciously written with the purpose encouraging combatants to follow certain basic rules, to place bounds on inherently violent and barbaric conduct, war.

The heart of this effort is to separate fighters from civilians. If the two are separated, civilian populations will be spared killing and destruction. So the Law of War requires combatants to distinguish themselves from civilians and distinguish those whom they target, usually by wearing a uniform and carrying their arms openly. So the Law of War attempts to encourage everyone to follow these rules through incentives. People who follow the rules receive a privileged status. Lawful fighters get combatant immunity. Although they may kill and be killed on the battlefield, once removed from the fight, they may not be prosecuted for lawfully fighting.

Lawful fighters if captured also get a special status called "prisoner of war." This status comes with many privileges: access to athletic uniforms, musical instruments, access to a canteen where one can purchase tobacco and sundries, the right to whatever justice system the enemy uses to try its own troops. Now, Al Qaeda's reason for being, its method of operation, strikes at the core of the Law of War. Al Qaeda does not want to be distinguished from civilians that surround them. The September 11th hijackers did not wear uniforms or carry their arms openly. They posed as businessmen and students. They did not distinguish their victims. They attacked civilian aircraft and used those aircraft to attack civilian targets.

Should we afford prisoner of war status to Al Qaeda fighters, notwithstanding their conduct? Amplifying that, should they get more procedural rights than even prisoners of war? Here I invite you to think about the incentives going forward. If one gives more protections and privileges to these unlawful combatants, then we may be stripping away any legal incentives for people to fight according to the rules. Countries and groups will have strategic incentives to enjoy the benefits of clandestine warfare without bearing any of the consequences for doing so. We encourage countries and groups to develop whole corps of unlawful fighters and ultimately perhaps increase the savagery of future conflicts.

Now, this new series of rights affects the incentives of those on the front line, combating terrorist organizations too. In fighting, our military personnel may be buying a long series of civilian judicial proceedings, trials and accusations, and the prospect that our opponents will be released before the end of the war. These were never prospects that military personnel faced in prior conflicts. One must ask what will the effect of this new web of legal requirements have on battlefield decision-making in the future?

And consider this, we have hundreds of *habeas corpus* cases for persons the United States holds at Guantanamo Bay, Cuba, and I'm concerned about the impact these cases might have on the incentives provided by the Law of War. During World War II, the United States detained more than 400,000 German and Italian prisoners of war in camps sprinkled around the United States. Many of them were American citizens. Zero had successful *habeas corpus* prosecutions. There are literally less than a handful of reported decisions. Now, today, we have

fewer than 300 people that we consider to be unlawful enemy combatants outside the United States in Cuba, two hundred forty six *habeas corpus* cases go with them. These cases are in addition to the administrative processes that the Executive Branch has developed on its own to review the detention of them, and those administrative processes have been endorsed by the Congress.

The legal process afforded to these detainees far exceeds anything that German or Italian soldiers enjoyed at any time in their captivity within our borders, and more than any prisoner of war is entitled to in a conventional war.

But consider the state beyond Cuba. Coalition forces hold tens of thousands of detainees in Iraq and over a thousand in Afghanistan. If the detainees in Cuba receive these rights, should those detainees in Iraq and Afghanistan also receive them? Instead of hundreds, why not tens of thousands of cases in our courts about those detained in combat with the United States?

I would say that this is an incentive to violate the Law of War. As some have said, what's in it for any foe of the United States to abide by those rules if one gets better treatment upon capture by violating them?

We go to another example where it's important to consider the incentives that the law creates for national security, and that's FISA, the Foreign Surveillance Intelligence Act. The statute, as you all know, was written in 1978, and it has got to be updated to accommodate the remarkable advances of communication technology since then. That is one challenge before the Congress now.

But another issue of FISA reform is whether private companies can be sued for cooperating with government request for information on suspected Al Qaeda operatives. When it comes to private corporations, even the prospect of liability, the very existence of litigation, may be enough to cause them to turn the government down. Allowing private lawsuits to go forward is a consequence of the political branches' not making tough policy decisions. They deprive our political process of a real chance to consider what surveillance of enemies should be permitted and what should be the balance with the liberties that we all treasure so highly.

The prospect of litigation against individuals, our troops and government officials, also affects the decisions that we make. When it comes to foreign lawsuits, the prospect of an adverse reaction, not by our executive branch, by our Congress or by our courts, but by a foreign tribunal, is affecting the decisions of military personnel and civilian leaders. For example, in April of 2003 in Baghdad, a U.S. tank under enemy fire, in active combat, returned fire and killed a Spanish cameraman covering the event. More than four years later and thousands of miles away, a Spanish judge indicted three U.S. soldiers for violating a Spanish law.

Another case, March 2005: soldiers at a U.S. checkpoint in Iraq killed an Italian intelligence agent after his speeding vehicle ignored multiple warnings and tried to run the checkpoint. Almost two years later, an Italian judge indicted a U.S. soldier on homicide charges. In Great Britain, U.S. Air Force pilots involved in tragic friendly fire incidents, and by that I

mean accidental deaths of Allied soldiers in combat, are the subject of multiple county coroner inquests that have accused our pilots of negligent homicide.

In each one of these cases, each one of them, the criminal investigative elements of the Defense Department, and in some cases, the British Defense Establishment investigated the events and concluded that no administrative or judicial action was warranted. So litigation and changing laws are dramatically affecting the conduct of warfare.

I express no value judgment about that at this point. I'm leaving this job. But it is something I invite you all as opinion leaders and as leaders of the legal profession to consider as the country wrestles with these difficult questions going forward.

Now, the second question I posed is: Can we preserve the American legal system? We have a remarkable criminal justice system. It's adversarial. It seeks to restrain government power and to preserve space for individual freedoms, and it's the most solicitous of individual rights of any in the world. Our criminal law system is remarkable in many ways, but one of them is because of how much it is not focused on putting criminals behind bars. It is a system where it's more important that innocents be found innocent, than that the guilty be punished. Therefore, the standard of proof is very high: beyond a reasonable doubt.

As Blackstone formulated, "Better that ten guilty persons escape than that one innocent suffer." It is a system where it is more important to keep the government playing by the rules than to punish the guilty. We have the exclusionary rule where, as Judge Cardozo put it, "the criminal is to go free because the constable has blundered."

Now, how would we adapt this gold standard of criminal law to deal with Al Qaeda and its likes? Is it better that ten Al Qaeda operatives escape than that one be wrongly detained? Should Al Qaeda members go free if the government blunders? And even if the government doesn't blunder, if the elements of proof are different in a combat situation, should that result in freedom for the Al Qaeda? Many might answer "yes." And there are good reasons to do so. Frankly, I think that any criminal process has got to have that set of procedural protections, because that's what we Americans prize most.

But I invite you to remember what only nineteen people were able to do nearly seven years ago. Some believe that doctrinaire logic of this type, applied without reflection, may be unwise in the future. It could, as Justice Robert Jackson once warned, convert the constitutional Bill of Rights into a suicide pact. Indeed, nearly all who have seriously considered the question view prosecution in the U.S. federal courts under rules currently in place as a viable option for only a handful of the Al Qaeda members that we have detained.

Now, adapting our criminal justice system to a 9/11-type terrorist threat could entail a compromise between our long tradition of individual rights and the new public need for thwarting mass murder and destruction. Academics and pundits have proposed such compromises. Special terrorism courts, for example, might detain individuals for long periods of time in spite of reasonable doubts. They might overlook blunders by constables, if those

blunders found credible evidence. And they might consider secret evidence. But I ask, do we want to introduce those qualifications into our gold standard criminal justice system?

Consider Justice Jackson's dissent in the World War II case of *Korematsu v. United States*. There he argued that the Court should abstain from judging the military's claim that it was necessary to exclude Korematsu from the West Coast on the basis of his race. Justice Jackson thought that judges should not review claims of military necessity because doing so would import unwarranted doctrines into our jurisprudence. Once a practice of racial discrimination is imported and validated by a judge, then it, as Justice Jackson said, "[L]ies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes." Justice Jackson went on to contrast the ephemeral nature of military orders with the enduring works of the court. He said, "A military commander may overstep bounds of constitutionality and it is an incident, but if we review and approve, that passing incident becomes a doctrine of the Constitution. There, it has generative power of its own, and all that it creates will be in its own image."

Now, I mention these things not to justify either *Korematsu* or any adverse modification of our criminal justice system. I pose the question merely: Should we be so fast to merge the two systems, the Law of War and the criminal justice system of the United States? If we choose to do that, we must take care that we do not endanger our long-held principles and values. Once we add special relaxed procedures in the criminal justice system, can we keep those procedures confined to the hardest cases? How will we prevent those who follow from using those as convenient ways to bypass the rigors of the system at large?

The third question I pose is: Can we preserve our adherence to the Rule of Law? Today the threat of terrorism seems distant to many Americans. Polls show that people are more concerned with the economy and health care than with terrorism. And for many of the military and civilian personnel in government, this is our proudest achievement. By preventing attacks, the government has returned to the people a sense of safety. But as we continue to refine the laws, we should not just assume today's sense of security and safety. We should also ask ourselves how people will think, feel and act when the next attack comes. And it will come. We can be sure that when the next attack comes, the American people will rally to the government and demand that it take action to protect the nation.

Now, writing the laws today, how do we write them so that the government has enough flexibility to deal with tomorrow's crises? And what if we err? What if a future government is put in the position where he or she must choose between following the law and doing what he or she believes is necessary to protect the nation? This is an awful choice. The Founding Fathers recognized this when drafting the Constitution. I quote from Madison in *Federalist* 41, "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 unnecessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." We must be careful that the country can act lawfully in self-defense.

Now, in closing, I've shared with you some of my perspectives on law and national security. In a word, my perspective is conservative. I mean that literally. There's so much in our country worth preserving, worth conserving, worth protecting: the lives of our citizens, the liberties we enjoy, our legal traditions, our belief in government under law. As enemies threaten us, as the world changes, how do we best preserve all of that?

My first job out of law school was as a law clerk to Judge James B. McMillan in the Western District of North Carolina. I learned a lot from Judge McMillan, including some favorite phrases: "Never attribute to malice that which can be attributed to stupidity," being one. Another, "Your job as my law clerk is to keep me from making unintended error." But important for this talk today, he said," Government has no rights, only responsibilities." And I have always carried this lesson with me whenever I have been in government. The awesome powers of the government exist only to fulfill its responsibilities to the people. Throughout my time as General Counsel to the Department, I have viewed the actions, not so much as exercises of lawful executive power or governmental rights, but as an appropriate discharge of the difficult executive responsibility.

The Constitution confers upon the President the ultimate responsibility of ensuring that the American people are safe and secure, especially in wartime, and the Constitution gives the President the power to fulfill that responsibility. Exercising this responsibility is discharging the most basic of all presidential duties.

Now, of course, other branches have constitutional duties as well, and we have seen the dialogue between the Congress and the courts and the President on these national security issues. This dialogue is how our Constitution is supposed to work.

Without presuming to speak for anyone other than myself, let me speculate a bit in closing. I think and hope that history will be kinder to the decisions this administration has made than many current accounts might indicate. This country has not, and I knock on wood as I say this, suffered another devastating domestic attack from Al Qaeda since 9/11. And most of the stories told thus far have been by outside critics, people who do not know the whole story. I am reminded of the late 1940s and early '50s. It took all of those years transitioning from World War II to a steady state, including a change in presidencies and parties, before the country as a whole adopted the containment strategy that ultimately forty years later toppled the Soviet Union.

Quite consciously, the Administration, I can say in particular [Secretary of Defense] Bob Gates, has been working in a similar vein over the last year and in this year to work to bridge the gap between the executive and the legislature, between the parties, to suck some of the poison out of the discussions, to establish common approaches to a threat that is a long-term threat. And I hope we have seen some of the fruits of that labor in recent times and hopefully over the next few years. I believe our challenge as citizens now is to find ways to deal with this deadly and likely enduring threat, that we can agree to sustain, over time and across party lines, ways that protect the ability of our country to win wars, to protect our systems and to abide by the law.

How we manage to live in a long period under threat, even when we are fighting people somewhere between criminals and combatants, when we are in a state somewhere between war and peace, what will be the balance between security and liberty? Again, Justice Jackson, speaking in 1951 at the beginning of the Cold War, offered his thoughts on wartime security and liberty under law. After discussing our constitutional history, including arguments between President Lincoln and Chief Justice Taney, Justice Jackson concluded with the following, "The problem of liberty and authority ahead are slight in comparison with those of the 1770s and 1860s. We shall blunder and dispute and decide and overrule decisions, and the common sense of the American people will preserve us from all extremes which would destroy our heritage."

At first, this seems almost cliché. Common sense? Surely the great expositor of the *Steel Seizure* case had something more satisfying to say. But I think what Justice Jackson meant was this: The logic of liberty and the logic of security, if blindly followed without the other, each leads to the impracticable regimes. Carried to its extreme, the logic of liberty is a suicide pact. Carried to the other extreme, the logic of security is a government which can bend every law with a claim of urgent necessity, a government by fiat, not by law. Between those two extremes, we must chart a middle course, since ideology and dogmatic logic lead us to crash at either end, and I suppose we must rely on common sense to point the way.

As I leave government, as you all take up these challenges, may it guide you as well.

Thanks very much.