A CASE FOR A NATIONAL SECURITY COURT

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Thank you, Judge. It is a pleasure to be back in Detroit in February. It has so far been delightful. The last time I was here somebody referred to me as "the American Taliban" and that hasn't happened today . . . but of course I haven't started talking yet.

I do want to make a pitch for a national security court. But before I do, what I would like to do is try to take up the question that Professor Lobell put towards the end of his remarks—and I think, in fairness to him, did not really have enough time to respond to adequately. That question is: "Why is this war unlike every other war in our history?" I think what he laid out was, as far as it went, correct: it is a different enemy and that's not just a legal fact, it is also a political fact of immense importance.

The difference between confronting this enemy, whether it is on the battlefield or meeting it in the stealth in which al Qaeda prefers to operate, is that the enemy does not present like a true traditional military enemy. Now if you thought about that in a logical way, that is a pretty good argument for according *less* in the way of rights and privileges, rather than more. In presenting itself as a non-traditional enemy, al Qaeda is subverting the laws and customs of war, which are designed to protect civilians. Instead, we are confronting an enemy that acts in stealth and specifically targets civilians for mass murder.

But logic is often overcome in a democratic society by politics and by who we are as a people. It speaks well of Americans that we are sufficiently uncomfortable about the possibility of detaining the wrong people and about the possibility of trial results that do not have integrity. We know that even if logic dictates doing things one way, we need to do it a different way in order to be what we want to be as a people. What we have been trying to do for the last ten years is arrive at a balance which allows us to uphold our legitimate concerns (for the most part, the protection of intelligence during war time) and, at the same time, accord

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enough rights that the proceedings we give to the enemy are not regarded as kangaroo courts—that is, that they have legitimacy.

It is also true that we have not come to grips with what it means to be at war. It is all well and good to say that you are "at war" rhetorically. A gentleman asked one of the earlier panels about whether this is really a war or not. I think it is often missed that we are actually involved in military hostilities as a result of an Authorization for the Use of Military Force (AUMF).[1] That is not a trivial or irrelevant fact. If we chose not to be at war any longer, it would be a simple matter to repeal the AUMF and end all this. The fact that this has not been done indicates that there is strong political support for treating this particular threat as, primarily, a military threat rather than a law enforcement threat.

But it is one thing to say that, and quite another thing to accept all of the fallout that is attendant to it. One aspect of this fallout is the unavoidable fact that the risk of error in wartime is not on the government, as is the case in the criminal justice system. When we are in a law enforcement paradigm, the risk of error is on the government, which thus bears the burden of proof at all times. That is how it ought to be in ordinary criminal cases, in peacetime. When we decide to go to war, however, we make a national decision that prevailing in the war is the most important national objective. One of the unfortunate consequences from that—and this is a fact of every war—is that a lot of injustice happens, and the risk of it is borne very often by innocent people.

Another thing is that when you are in a prevention paradigm (i.e., when you prioritize preventing terrorist attacks over prosecuting the terrorists), even criminal prosecutions are going to look much different from what they looked like prior to 9/11. It is a lot harder to be a prosecutor today and to be an investigator today than it was when I was doing terrorism cases because most of the prosecutions in the 1990s came after terrorist attacks. It is not difficult to have the support of the public and the media at your back—which is not an inconsiderable thing for the Justice Department—when you are prosecuting people after Americans and others have been killed. It is a very different thing, as a practical matter, to take the position that we now are going to prioritize the prevention of attacks. Because what that necessarily means is, you are going to prosecute under circumstances where your evidence is considerably more ambiguous. I often think, "What would the academy have said, what would the media have said, if we had tried to arrest, say, Mohamed Atta based only on what was known about him on September

1. *See* AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001).

10, 2001?" It probably would have been met with outrage. Yet, we have seen the fallout from that.

In the 1990s, prosecutors batted a thousand. In every single case that was brought, every defendant was convicted of at least something, and most defendants were convicted of everything that was charged. The problem is: We did not get very many defendants. The total between the 1993 World Trade Center bombing and 9/11 is less than three dozen – about 29 convicted terrorists.[2] And if you are going to talk about the efficacy of the justice system, Osama Bin Laden has been under indictment since June of 1998.[3] That is before a number of the terrorist attacks that followed – the embassy bombings, the *Cole* bombing, and 9/11. So it is just a fact that if you are going to have an exclusively law enforcement-oriented approach, as we had in the counterterrorism of the 1990's, you are not going to even be able to reach most of the people who are the cause of the challenge.

Let me suggest that there is one big difference between this war and other wars that I do not think Professor Lobell touched on, but that is extraordinarily important. There has been a significant change in the legal culture and in the national culture in terms of our understanding about the role of the judiciary, and the legal system at large, in national security matters. In 1948, the Supreme Court had an intelligence collection case called *Chicago & Southern Airlines v. Waterman*.[4] In that decision, Justice Jackson, writing for the court, explained why he thought judges had no business in the national security business particularly when it came to the gathering of intelligence.[5] One part of it was institutional competence.[6] There is nothing about being a lawyer or a judge that makes one particularly able in such national security matters as securing classified information and gathering intelligence. There was some discussion about the *Keith* case[7] earlier. I think the Carter Administration was supportive of the Foreign Intelligence Surveillance

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2. Andrew C. McCarthy, WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD 20 & n.3 (2008); Adam Liptak and Leslie Eaton, *Mistrial Is Latest Terror Prosecution Misstep for U.S.*, N.Y. TIMES, Oct. 24, 2007, http://www.nytimes.com/2007/10/24/washington/24justice.html.

3. Benjamin Weiser, *Prosecutors Are Expected to Seek Dismissal of Charges Against Bin Laden*, N.Y. TIMES, May 3, 2011, http://www.nytimes.com/2011/05/04/nyregion/with-bin-ladens-death-seeking-the-dismissal-of-all-charges.html.

4. 333 U.S. 103 (1948).

5. *Id.* at 112.

6. *Id.* at 111.

7. United States v. U.S. Dist. Court for E. Dist. of Mich. (*Keith*), 407 U.S. 297 (1972).

Act (FISA) because of the *Keith* case, in part. But I am not sure it was quite in the way that the panelist suggested. What the Carter Administration liked about the *Keith* case was the suggestion that judges could become competent in national security matters by husbanding in one court all of these different surveillance questions. You would have a specialized court that would repeatedly deal with national security issues, particularly in the context of intelligence gathering, and it would become competent—the judges would gain an institutional competence that they did not have at that time.[8]

The *Keith* case actually was a case of *domestic* terrorism not international or foreign terrorism.[9] And the court was quite clear in that case that there was a big difference between the two.[10] That is why, for example, then-Attorney General Griffin Bell testified on behalf of the Carter Administration in favor of FISA.[11] He maintained that the executive branch continued to have Article II constitutional authority to collect foreign intelligence whether a court signed off on it or not.[12] That's the same position the Clinton Administration took when FISA was modified in 1994.[13] And it's also the same position taken by the highest specialized intelligence court Congress has created, the Foreign Intelligence Court of Review, when that court reviewed this question and several others in 2002.[14]

But putting institutional competence to the side, Justice Jackson's *Chicago & Southern* opinion pointed out something else that I do not think can be answered by creating a specialized court and making that court competent in national security matters. That is, the framework of our constitutional system. The framers wanted the most important political questions that a society faces—questions about its security—decided by political actors, meaning elected officials who are responsible and accountable to the people whose lives are at stake. The problem with shifting these questions to a court is that judges are the *unaccountable* actors in government; we intentionally make them unaccountable precisely because we do not want political pressures on their decision-making. By contrast, national security decisions do not involve the kinds of issues that were meant to go to courts.

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8. *Id.* at 305-06.
9. *Id.* at 297.
10. *Id.* at 303.
11. Andrew C. McCarthy, *The Case for Telecom Immunity*, NAT'L REV. ONLINE, Mar. 4, 2008, http://www.nationalreview.com/articles/223831/case-telecom-immunity/andrew-c-mccarthy.
12. *Id.*
13. *Id.*
14. *Id.*

Let me make my brief pitch for national security courts in the few minutes I have left. We have had a pretty robust debate—in some ways going back prior to 9/11, but certainly since 9/11—about whether we ought to be attacking the challenge of international terrorism with Article III courts or military commissions. Both systems have commendable elements. It is a fact that it is easier to protect national security information and to place evidence in front of a tribunal in the military context. The military commission rules are written in a way that makes those very legitimate government interests easier to vindicate in war time. On the other hand, people like me, who have said for a number of years that we ought to let the military commissions work and see how they do, have to admit that—although we are dealing with a very small data set at this point, to be sure—their performance has been very spotty. We have had one military judge, I think in the first commission case, instruct the jury incorrectly on what a war crime is.[15] Since you can only have military commissions when there are war crimes, that is a pretty bad error to make.

More importantly, say what you will about the downsides of Article III courts, the fact is that when terrorists have been convicted in those civilian trials, they have been severely sentenced by Article III judges. I had one defendant in the Blind Sheikh case against whom we basically had proof only for the last forty minutes or so of the conspiracy.[16] He showed up at the very end, agreed to participate, and was in the safe house mixing explosives when the FBI kicked the door down and arrested everyone. Judge Michael Mukasey, later Attorney General Michael Mukasey, sentenced him to twenty-five years in prison. He may have sentenced him to more if we had statutes available to us in 1993 akin to the laws available to prosecutors after the 1996 overhaul of counterterrorism law. But the point is, even the most minimal actors in the criminal justice system have gotten appropriate sentences in terrorism cases—meaning very severe sentences have been imposed.

Contrast that with, for example, the first of the military commission trials, in which you had somebody who was a confidante and bodyguard of Osama bin Laden himself—an al Qaeda operative named Hamdan, who, at the time of his capture, was in possession of missiles intended for use against American soldiers.[17] He was captured, convicted at a military

15. *See* Kyundra Rofunda, *Gitmo, Russia, and China: Fair Trial*, N.Y. SUN, Aug. 15, 2008, http://www.nysun.com/opinion/gitmo-russia-and-china-fair-trial/..

16. U.S. v. Rahman, 189 F.3d 88 (2nd Cir. 1999).

17. William Glaberson, *Bin Laden's Former Driver is Convicted in Split Verdict*, N.Y. TIMES, Aug. 6, 2008,

commission, and essentially given a sentence of time-served—that is, he got a sentence of another six months or so beyond the few years he had already spent in custody and was repatriated.[18] That is appalling. In the criminal justice system he would have been slammed. He would have never seen the light of day again.

So, even allowing that they have not had that many opportunities to preside over cases, it would be foolish to argue that the military judges have performed as well as the civilian judges have. My suggestion is that we take the best of both worlds.[19] The military system enables us to protect intelligence information better than the civilian system does. What it lacks, however, is an independent judicial check on the executive branch. This is the big point of contention for our allies who complain that, in our military commissions, the executive branch is basically the judge, jury, prosecutor, and executioner. If you use Article III judges, which gives you an independent judicial check, and you allow them to try the cases under what would essentially be otherwise the military rules, you would bring the efficiencies of both systems to bear.

More importantly, regardless of whether you think military commissions are acceptable or not, or whether you think they are constitutionally valid, as I do, the fact is: most of the terror threat against us comes from outside the United States, at least at the moment. Whether we like it or not, we need to have the cooperation of other countries in order to fight this threat effectively. If we do not design a system that they will cooperate with, what you are essentially doing is outsourcing your national security to countries that have a lot less interest in it then you do. I believe our allies would be more apt to cooperate with a system that had an independent judicial check on it at the trial phase, and had safeguards for protecting not only our own intelligence information but the intelligence information that they give us—and on which we rely to protect Americans.

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http://www.nytimes.com/2008/08/06/washington/07gitmo.html?adxnnl=1&partner=rssnyt&emc=rss&adxnnlx=1311625037-goW1u1oC7LqIkAH8cuhpjg.

18. Andrew C. McCarthy, *Disgraceful Hamdan Sentence Calls Military Commissions into Question*, NAT'L REV. ONLINE, Aug. 8, 2008, http://www.nationalreview.com/articles/225256/disgraceful-hamdan-sentence-calls-military-commissions-question/andrew-c-mccarthy?page=1; *Hamdan Gets 5 ½ Years on Terror Charge*, MSNBC.COM (Aug. 7, 2008), http://www.msnbc.msn.com/id/26055301/ns/world_news-terrorism/t/hamdan-gets-years-terror-charge/.

19. Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court*, AM. ENTER. INST. & FOUND. FOR DEF. OF DEMOCRACIES (Oct. 1, 2006), *available at* http://www.defenddemocracy.org/publications/we-need-a-national-security-court/.