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Keynote Address

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KEYNOTE ADDRESS

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This afternoon, I want to touch briefly on a number of issues rather than discuss one or two to death. I chose this approach because it seemed an appropriate way to open a conference. I also chose it because I hope I can convince you that intelligence and international law interact in a way that simultaneously strengthens the law and improves intelligence; that law matters, especially in time of war; and that both good intelligence and good law have one common core value: integrity. So that you will have a sense of the perspective that I bring to this, I should begin with a very brief history of how I got into the intelligence business.

As the Dean mentioned, I graduated from the law school in 1971. I was in the Army at the time, and I wound up, through good fortune, as the Pentagon's lawyer for the Panama Canal negotiations. So, literally, eighteen months after sitting in one of these seminar rooms with then-Professor Bill Bishop taking a seminar in international law, I was helping draft the Panama Canal Treaty. It was quite an experience. But I quickly learned then how valuable intelligence was to support U.S. foreign policy objectives.

In 1975 I resigned from the Army and joined the Legal Adviser's office at the Department of State as the Department's lawyer for the Congressional investigations of the American intelligence community that grew out of the Watergate scandal. You will recall that some of the Watergate burglars were former CIA officers, and that President Nixon sought to use the CIA and overstated assertions of national security to quash the investigations. Congress then investigated the CIA and the rest of the intelligence community. America did not like much of what it saw: assassination attempts, overseas coups, warrantless wiretaps, exploding cigars, and so on.

Those were exciting days for a young lawyer, but my colleagues and I at the Department of State thought that the focus on intelligence issues would only last for a year or so, because surely no lawyers would need to be worried about intelligence issues once the investigations were over. How wrong we were. Judge Baker knows that very well. These investigations led President Ford to sign the nation's first executive order setting forth the basic rules governing American intelligence activities in 1976.[1] Congress enacted a series of laws that govern the intelligence

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1. Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

community to this day. These include the Intelligence Oversight Act,[2] the Foreign Intelligence Surveillance Act, or FISA,[3] and a law requiring a written presidential finding that must be reported to Congress prior to the commencement of covert action.[4] The two congressional oversight committees were also established.

As intelligence work continued to grow, I wound up spending eight years at the State Department, including being the first assistant legal adviser for law enforcement and intelligence. As the Dean said, I then went to the Hill as General Counsel of the Senate Armed Services Committee under Sam Nunn, subsequently joined Arnold & Porter, later went to the CIA, and then back to Arnold & Porter.

And having been actively involved in issues of law and intelligence for some thirty-two years, what do I make of it all? As for international law, most lawyers would likely scoff at the notion that espionage activities are constrained in any meaningful way by international law. Indeed, most probably believe that international law's only influence on espionage is that in wartime, spies caught behind the lines out of uniform can be shot. Hardly a sophisticated or, to intelligence services, comforting notion.

But I believe there is a great deal of interaction between international law and intelligence activities. To begin, virtually every state has an intelligence service that seeks to collect information on potential adversaries. These collection activities frequently violate the municipal (or domestic) law of other states. However, because espionage is such a fixture in international affairs, it is fair to say that the practice of states recognizes espionage as a legitimate function of the state, and therefore it is legal as a matter of customary international law. Evidence of that is that when intelligence officers are accused of operating under diplomatic cover in an embassy, they are nearly always declared *personae non gratae* and sent home. In exercising the right to "PNG" a diplomat, the receiving state typically says their activities were inconsistent with diplomatic activities. I can recall no instance in which a receiving state has said that these activities violate international law.

That international law acknowledges the collection of intelligence by clandestine means, at least as viewed by the United States, can also be seen through Congress' reaction to the Supreme Court's decision in the 1972 *Keith* case, holding that warrantless electronic surveillance in the

2. Intelligence Oversight Act of 1980, Pub. L. No. 96-450, § 407, 94 Stat. 1975, 1981–82 (codified at 50 U.S.C. § 413 (2000)).

3. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified in scattered sections at 50 U.S.C. §§ 1801–1871 (2000)).

4. 50 U.S.C. § 413(b) (2000).

United States for domestic intelligence purposes was unconstitutional.[5] That case, by the way, originated when a person on campus named "Pun" Plamondon put a bomb outside the CIA office here in Ann Arbor. It turns out he was wiretapped without a warrant, which he challenged in court. Eventually the case went all the way to the Supreme Court, and they threw it out—another connection between intelligence and Ann Arbor. That case led Congress to enact the Foreign Intelligence Surveillance Act, which does require a warrant before the government may engage in electronic surveillance to collect foreign intelligence in the United States. Or at least we thought a warrant was required before learning about the President's "Terrorist Surveillance Program." We can talk about that later if you wish.

But in considering FISA in 1978, Congress was worried that directing electronic surveillance at foreign diplomatic establishments in the United States would violate the Vienna Convention on Diplomatic Relations and the inviolability of diplomatic missions. In response, the executive branch prepared a list of states that had targeted U.S. diplomatic installations overseas either with electronic surveillance or physical intrusion. As you might imagine that list was very long. But it satisfied Congress that this was such a widely accepted practice of states that, although not specifically authorized by the Vienna Convention, one could hardly argue violated the Convention, since everybody was doing it.

So, if espionage activities—that is to say the collection of intelligence—are consistent with, or at least tolerated by, international law, what activities are prohibited? The first that comes to mind is a covert action, which is a secret action by one state to influence the conduct of another state. One of the fundamental tenets of international law is, of course, that one state not intervene in the internal affairs of another state. It may be a fundamental principle, but it is also fairly tattered. States seek to influence each other daily. Sometimes this is done by economic sanctions, or by international political pressure. Most of that activity is clearly legal, although the state that is the target of the efforts almost always says that it is not.

But it is difficult to argue, absent some extraordinary circumstances, that a covert paramilitary effort to overthrow another government is consistent with international law. I should add at this point that the overwhelming number of covert actions carried out by the United States in the last few years, and indeed the last few decades, have not been designed to overthrow another state. Far more typically, they provide very

5. United States v. U.S. Dist. Court for the Eastern Dist. of Mich., S. Div., 407 U.S. 297 (1972).

necessary but secret support to an existing government by, for example, specialized training in counterterrorism or counternarcotics. However, this does not prevent many around the world from believing that the CIA has a hand in everything from mad cow disease to global warming. I can assure you that it has no role in either. I can also tell you that the CIA has cleared this entire Address. I was hoping they would take a lot more out and I could hold up a sheet with lots of redactions—but they let it go through.

As I mentioned, American law requires that before the president can engage in covert action, he must make a written "finding" that the activity is important to national security, and that finding must be reported in advance to the congressional oversight committees. Such a finding is required whether it is merely secret assistance to a friendly government by U.S. intelligence agencies or a full-scale effort to effect regime change, to use a term currently in vogue.

It is a curiosity of our legal history that findings and notice to Congress are required even in the most minor of covert actions, whereas no such requirement governs the use of our military forces. The War Powers Resolution of 1973,[6] which requires the president to notify Congress when he deploys forces and provides that they are to be withdrawn within sixty days unless Congress authorizes otherwise, has become toothless. Although Congress authorized the Gulf War in 1990 and the invasion of Iraq in 2003, no congressional authority or advance notice is necessary in order for the president to move military forces around the globe or to engage in very aggressive military activities. These activities, which can carry great risk of deeper U.S. involvement than covert actions, are often characterized as "preparation of the battlefield," because this activity requires—and think for a minute of the President's recent decision to deploy another carrier strike group in the Persian Gulf—no congressional notice. Nothing is required, and perhaps that is right, but contrast that to what is required every time the CIA wants to send an old copying machine somewhere overseas.

Because this activity—the "preparation of the battlefield" by the military—is typically carried out in close collaboration with the U.S. intelligence community, executive branch lawyers and members of Congress often develop headaches trying to decide whether a particular activity falls under Title 10 of the United States Code, which is the part of the code governing military activities,[7] and hence requires no presidential finding and no notice to Congress, or whether it is carried out

6. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 542, 93d Cong. (1973).

7. 10 U.S.C. §§ 101–1805 (2000).

under Title 50, which governs the intelligence community and does require a presidential finding and notice to Congress.[8] You can imagine that the inclination of the executive branch is always to conclude that a proposed action is a military action that requires no finding and no notice to Congress. Surely no rational government would organize itself that way, but here we are.

This dichotomy between Title 10 and Title 50 presents even more difficult problems when it comes to activities in the cyberworld and in space, which are increasingly vital to the conduct of military, intelligence, and diplomatic activities. As you know, international law is not very well-developed with respect to activities in space or the cyberworld. A host of questions are presented, including what law governs outer space and cyberspace, who has jurisdiction, which U.S. agencies are authorized to do what. A recent Chinese demonstration of their ability to use a ground-based system to destroy a low-earth-orbit satellite raises a number of very difficult legal, political, technical, and strategic issues. Do traditional international legal principles apply to activities in the cyberworld and in space? These are not easy questions to answer, and they become even more difficult when one factors in intelligence activities. Are existing laws adequate, or are new laws needed that are based on old principles?

The relationship between intelligence and international law is also raised by President Bush's new strategy, commonly known as the Preemption Doctrine. That doctrine holds, as I am sure you know, that the United States may engage in unilateral military activity against another state or political group, without waiting to respond to an armed attack—for example, to prevent a state from acquiring nuclear weapons. The doctrine, in my view, raises very serious questions under international law. To be sure, there is a right of self-defense and the United States has long argued, very quietly, that it may be necessary in some rare circumstances to shoot first. For example, we have never renounced the first use of nuclear weapons. However, the President's doctrine goes much further than previous U.S. positions on self-defense, and is premised on the idea that in the wake of 9/11 there is a new world requiring new rules. I am not so sure about that. But I am certain that any preemptive action would be valid only to the extent that the intelligence information justifying the strike was overwhelming and indisputable. Such certainty in intelligence is very rare, as we have tragically seen in the case of Iraq.

Issues similar to those raised by intelligence activities in space and the cyberworld, namely whether existing laws are adequate, are raised by the attacks of 9/11. The President was correct, in my view, to regard

8. *See* 50 U.S.C. § 413(b).

many existing laws, both domestic and international, as outdated when it came to responding to terrorist attacks. The President was wrong, however, to conclude therefore that he could act on his own, without asking Congress to amend the law, or in the case of international law, without consulting our allies and seeking to develop consensus on modernizing the laws of war.

For example, then-White House Counsel Alberto Gonzales famously characterized the Geneva Conventions as "quaint,"[9] and advised that we were therefore free to ignore them. Would it not have been much better to begin immediate discussions with our allies about how the Conventions should be updated? That would not in my view have prevented the United States from seizing Taliban and al Qaeda fighters in Afghanistan and either imprisoning them while awaiting trial or, if they had committed no criminal acts, from detaining them as prisoners of war. We should also have sought to amend the statute of the Court in The Hague,[10] so that those who violated international law by attacking us could be brought to justice, as we did in the case of the Balkans and Rwanda. How much better would it be if the detainees in Guantánamo were held under some sort of international agreement of the coalition partners, rather than unilaterally by the United States?

In creating a new and previously unknown category of "unlawful enemy combatants," the President acted outside the scope of international law, and caused enormous harm to the United States. As has been widely reported, he ignored the advice of military officers, JAG officers, and career lawyers at the Department of State who had been guardians of the United States' leadership at the Geneva Conventions since World War II. William Taft IV, the Legal Adviser to the Department of State under Secretary Colin Powell, speaking last spring at the Yale Law School, described how ideologically driven lawyers had hijacked the process. He said, and this is a long quote so bear with me:

> Bearing an abstract hostility to international law, developed in the sheltered environment of academic journals, and equally unfamiliar and unconcerned with our broader policy interests in promoting respect for the rule of law, among states as well as within them, these lawyers proposed to create a regime in which detainees were deprived of all legal rights, and the conditions of their treatment were a matter of unreviewable executive discretion. Why lawyers, of all people, should want to establish the

9. Internal memorandum from Alberto R. Gonzales, White House Counsel, to George W. Bush, President of the United States (Jan. 25, 2002), *available at* http://www.msnbc.msn.com/id/4999148/site/newsweek/.

10. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

> point that such a lawless regime could legally exist, even as a theoretical matter, much less recommend that one actually be created, is, I confess, beyond me, and in itself is a sad commentary on the extent to which sophistry has penetrated what used to be widely regarded as an honorable and learned profession.[11]

Tough stuff from the great-grandson of the only man to serve as both President and as Chief Justice of the United States.

The President also acted in violation of U.S. law as far as the Supreme Court is concerned. Indeed, the courts and Congress are beginning to roll back some of the President's asserted authority. For example, last October Congress passed the Detainee Treatment Act,[12] which sets up procedures to try some of the detainees in Guantánamo, affords very limited rights for other detainees to challenge their detention and, under intense pressure from the White House, creates two standards for the treatment of detainees. The first standard is for the military, which will be governed by the Army Field Manual—long the official U.S. interpretation of the Geneva Conventions. The second is a set of standards to be drafted by the President in an executive order that has not yet been issued and that would apply to the CIA. I am deeply troubled by that.

I do not believe that there should be two standards for the U.S. treatment of detainees. Two standards create confusion in the field, and confusion was clearly a major contributing factor to the abuses of Abu Ghraib. Moreover, if the President truly believes the CIA needs to be more aggressive in order to elicit vital information for our national security, shouldn't the military also be able to use those same techniques? Does the President believe that the military is entitled to worse information than the CIA? Why should the CIA be asked to undertake risky behavior without knowing whether, when the political winds shift in Washington, they will once again be left out on a limb?

Congress should revisit this, hold hearings on what are effective interrogation techniques, and consider enacting them into law. I should say, by the way, that a distinguished scientific advisory body to the American intelligence community just issued a report saying that there is no valid scientific support for the notion that aggressive interrogation

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11. William H. Taft IV, Keynote Address at the Yale Journal of International Law Young Scholars Conference, View from the Top: American Perspectives on International Law After the Cold War (Mar. 4, 2006), *reprinted in* 31 YALE J. INT'L L. 503 (2006).

12. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified at 10 U.S.C. § 801, 42 U.S.C. §§ 2000dd–2000dd-1 (2006)).

techniques produce anything useful.[13] Congress should take that report into its consideration.

I also believe that Congress should examine the matter of renditions, that is, the practice of moving individuals from one state to another to stand trial or be interrogated or imprisoned without going through the formal extradition process. In my opinion, renditions can be valuable tools for law enforcement and intelligence. The United States has done many over the years, before 9/11, and it worked very well, including getting the terrorist Carlos out of Sudan and back to Paris where he stood trial. In my opinion, they can be very valuable, but they should be used only in very rare circumstances and when certain criteria have been met. Surely no state should ever send a individuals to another state knowing that they will be tortured, or without adequate assurances that basic human rights and due process will be respected, a commitment by the way we have already undertaken by becoming a party to the Convention Against Torture.[14] Recent investigations by Germany and Italy of renditions carried out by individuals alleged to be CIA officers point out the critical need to agree upon appropriate legal bases for renditions.

Why does all this matter? As lawyers, we instinctively say because it's the law. But one cannot merely say to cabinet officers or to the president, "you cannot do that because it will violate international law," and expect them to immediately scuttle some wild misadventure they were considering. The challenge is to persuade political leaders that not only will a proposed action violate international law, but also that if we do it the consequences will ultimately make us weaker, not stronger—that the short-term gain will be outweighed by the long-term harm.

Why? Because the United States cannot act alone. We need help to solve virtually every international legal problem we face. Other governments and their people care about international law. They care about maintaining the United Nations. They care about the Geneva Conventions. They care about playing by the rules. They understand that these rules, developed over many years, protect us all. And when the United States flouts these rules, as many nations believe we have, it makes it far more difficult for them to cooperate with us on other challenges we face. Also, there will come a time when the United States seeks to invoke international law. And we cannot flout it on Monday and invoke it on Tuesday.

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13. INTELLIGENCE SCI. BD., EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART—FOUNDATIONS FOR THE FUTURE (2006), *available at* http://www.fas.org/irp/dni/educing.pdf.

14. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

As I said at the outset of my remarks, there is one issue that runs consistently through all of these issues, and that is integrity. It may seem odd to say that integrity is as essential to the intelligence process as it is to the legal process, but I believe it to be true. The fundamental role of intelligence in the formulation and execution of policy is to establish ground truth, and to speak truth to power. Said another way, it is to maintain the integrity of the process. And by that I mean the job of intelligence officers is to provide the facts to the policymakers, so that they understand the consequences of different courses of action. Intelligence officers, who live in a world of deception and denial and secrecy, must be scrupulous in reporting the facts as they understand them to the policymakers. The Director of National Intelligence must have the courage to say, "Mr. (or perhaps Madame) President, your policy has failed."

As you know, under our system there is supposed to be a bright line between those who provide intelligence and those who make policy, rather like separation of church and state. Unfortunately, that separation has not always been sufficiently maintained, and every time it has been breached, we have paid a heavy price. The most recent example is the failure with respect to weapons of mass destruction prior to the invasion of Iraq. Whether that was a result of poor tradecraft on the part of the analysts or political pressure from the White House is debatable. My own view is that it is some of each, but at its base it is a failure of integrity.

In the intelligence business, secrecy is critical. We use deception to protect our most vital secrets, and we employ deception to acquire or, as George Tenet was fond of saying, "steal" the vital secrets of others. But intelligence officers live in a world of secrecy, and it is often as the novelists say, a world of mirrors where the truth is hard to find. Secrecy is seductive, and can be corrosive. It tempts those who operate in the secret world to cover up wrongdoing or to believe that things done in secret are more important than things done in the open. The current film *The Good Shepherd* deals as well with the corrosive effect of long-term secrecy as well as anything I have seen. The challenge is to use deception and secrecy, but assure that the end result is honest, that is, that the integrity of the process is maintained. I know of no other profession that uses dishonest behavior to achieve honest results. And that puts a special burden on the integrity and quality of people in the intelligence community, including their lawyers, to ensure that the game stays honest.

If one sets aside the secrecy, deception and false beards, lawyers have much the same responsibility in our broader society. We have an obligation as officers of the court to ensure that the law is enforced—that the system works. We often have to tell our clients things they do not

want to hear, to speak truth to power. And getting the headstrong CEO of a company not to do something that may be illegal can sometimes be just as challenging as getting a cabinet officer not to violate international law. Trust me on that one. In a democracy, it is the law that ensures the playing field is level, the rights of minorities are protected, and that elections are fair. In other words, the law ensures the integrity of the process. Lawyers and judges have a special responsibility to make the system work. If our integrity fails, the system fails. If the system fails, our country fails.

If I have learned one thing in all of these years, it is that the single most important thing that anybody in the intelligence business or in the law can do, is work as hard as we can every day to ensure the integrity of the process. I learned that here in this great law school. My only hope, and I do not think I understood it until I had to struggle with these issues, is that I have lived up to the ideals and standards that I learned here. Thank you very much.