

SPEECHES

UNSETTLED FOUNDATIONS: TEN YEARS AFTER 9/11, LEGAL QUESTIONS AND PRACTICAL CHALLENGES OF HOW TO BATTLE TERRORISM REMAIN

*The Honorable Thomas H. Kean**

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This Symposium takes place at a critical juncture in our nation's struggle against transnational terrorism. In the wake of the attacks on 9/11, the government has spent billions of dollars and taken hundreds of steps to assure the public's safety. Air travel security has been enhanced. Security at our ports and other transportation hubs has been improved. Our national security bureaucracy has been reorganized, with the creation of the Department of Homeland Security and the adoption—at least in part—of the 9/11 Commission's recommendation that a new director of national intelligence be created. We have fought and are fighting ground conflicts in Afghanistan and Iraq, and we have killed and interdicted suspected terrorists in other parts of the world. And through a combination of effective law enforcement and intelligence and sheer good fortune, we have avoided another attack on our homeland.

Almost uniquely in our history, however, these actions have been taken without settled legal guidance. As a non-lawyer, it is remarkable to me that this far into our struggle against transnational terrorism, we have yet to settle the fundamental legal foundations on which we are waging this fight. Ten years after 9/11, we continue to improvise the rules and to disagree about where to draw the legal line between liberty and security. Let me give you some examples.

I. Is plotting or following through on a terrorist attack a crime or an act of war?

During the 1990s, the terrorist attacks on the United States—the 1993 World Trade Center bombing; the 1996 Oklahoma City bombing; the embassy bombings in 1998 in Tanzania and Kenya; and

* Chairman, National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) (2002-2004); President, Drew University (1990-2005); Governor, State of New Jersey (1982-1990).

the bombing of the U.S.S. Cole—were considered federal crimes and were investigated and prosecuted successfully as such. But, as the *9/11 Commission Report* concluded, this reliance on law enforcement had unintended collateral consequences.

An unfortunate consequence of this superb investigative and prosecutorial effort was that it created an impression that the law enforcement system was well-equipped to cope with terrorism.

. . . [T]he successful use of the legal system . . . had the side effect of obscuring the need to examine the character and extent of the new threat facing the United States.

. . . .

. . . [S]uccessful prosecutions contributed to widespread underestimation of the threat.¹

In the wake of the 9/11 attacks, our nation underwent a sea change in attitude. Suddenly, we were a nation at war with a particularly insidious enemy that did not conform to the norms of international conflict. This reality led the Bush administration to take unprecedented, aggressive measures to preserve public safety. Although some people held as terrorists were prosecuted in the federal courts—notably John Walker Lindh and Richard Reid—it was clear that most people detained would be considered enemy combatants. According to early Bush administration legal opinions, this meant that they could be held indefinitely without charge or access to counsel, and that they could be interrogated in a manner that was not condoned by the Army Field Manual or Geneva Conventions.² Aggressive tactics such as waterboarding were approved by administration lawyers.³ A special prison was opened at Guantánamo Bay, Cuba, so that the administration could argue that the detainees were being held outside the jurisdiction of the federal courts.⁴ Other detainees were rendered to the custody of other foreign governments or held in secret CIA prisons, known as black sites.⁵

As time went on, however, public opposition to many of the Bush

1. 9/11 COMM'N REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 72-73 (2004).

2. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Dep't of Justice, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency (May 30, 2005).

3. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Dep't of Justice, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency (May 10, 2005).

4. See Steve Vogel, *Afghan Prisoners Going to Gray Area; Military Unsure What Follows Transfer to U.S. Base in Cuba*, WASH. POST, Jan. 9, 2002, at A01.

5. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A01.

administration's most aggressive policies grew. The Supreme Court, abandoning its customary hands-off approach to national security issues during a time of crisis, rejected the notion that by holding the detainees offshore at Guantánamo Bay the government placed them beyond the protections of habeas corpus.⁶ The administration reversed its own legal opinions regarding the aggressiveness of interrogation tactics, eventually forbidding waterboarding, among other tactics.⁷

By the time of the 2008 presidential campaign, both candidates were calling for the closure of the Guantánamo Bay detainee center, and future President Obama pledged to return to the use of the federal courts as the primary weapon against acts of domestic terrorism. Shortly after taking office, he signed executive orders prohibiting torture and limiting interrogation tactics to those authorized by the Army Field Manual.⁸ The orders shut down the CIA's overseas prisons and mandated the closure of Guantánamo Bay's detention center within one year.⁹ The administration announced, moreover, its intention to try Khalid Shaikh Muhammed, the alleged mastermind of 9/11, in federal court in Manhattan.¹⁰

These early intentions have not been fulfilled. Guantánamo Bay remains open. It is unclear where and under what rules the 9/11 conspirators will be tried. President Obama has announced, moreover, there are some forty-eight detainees considered too dangerous to release but there is insufficient evidence to try them. After all this time, it remains unclear what the rules are. Nor is this question of whether to treat terrorists as criminals or combatants the only unanswered question from the past decade. Other questions follow from it and remain unresolved.

II. *What precisely happened at the black sites and Guantánamo?*

The Obama administration has stated that it wants to move forward, not look back, and that it will not prosecute anyone involved

6. *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004) (holding that federal courts have jurisdiction to hear habeas corpus petitions from detainees held at Guantánamo), *superseded by statute*, Detainee Treatment Act of 2005, 28 U.S.C. § 2241 (2006) (removing jurisdiction from federal courts to hear habeas corpus petitions from detainees held at Guantánamo).

7. See Memorandum from the Office of the Sec'y of Def. Concerning the Application of Common Article Three of the Geneva Conventions to the Treatment of Detainees in the Dep't of Def. (July 6, 2006) (explaining Article Three of Geneva Conventions, which forbids the humiliation and degradation of non-combatants, applies to those detained because of alleged al-Qaeda activities).

8. See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

9. See *id.*; Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

10. Charlie Savage, *In Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

either in the alleged abusive detentions or in destroying the taped records of the interrogations. The administration has also opposed on national security and state-secrets grounds any effort to learn about what happened through the legal system. Can we in fact move forward without some accounting for what occurred?

III. Can suspected terrorists be held indefinitely without charges or a trial consistent with our Constitution?

That is the plan with respect to the forty-eight extremely dangerous detainees. The administration has adopted standards to govern this preventive detention, but are those standards sufficient?

IV. Are federal courts the appropriate forum to hear terrorism cases?

The Obama administration seemed committed to a return to the federal courts but has retreated from its announcement regarding Khalid Shaikh Muhammed.¹¹ Furthermore, the acquittal of Ghailani on all but one count of the more than 280-count indictment has renewed the legal debate over whether the federal forum was appropriate.¹²

V. What role should the courts and Congress play in defining the rules of this struggle?

VI Finally, and most fundamentally, what are the constitutional sources of presidential power to act in response to a threat like transnational terrorism?

George Bush and Barack Obama come at this problem from very different constitutional philosophies. President Bush believed, and he had legal opinions to support him, that the President's power to act is inherent in the Constitution's grant to him of the executive power and its designation of him as the commander-in-chief. Thus, President Bush felt free to authorize warrantless domestic wiretapping without relying on, and perhaps violating, congressional enactments such as the Foreign Intelligence Surveillance Act ("FISA").¹³ President Obama rejects the breadth of President Bush's formulation and points to the Authorization for the Use of Military Force passed by Congress shortly after 9/11 as the source of his authority.¹⁴ According to published reports, some even within the

11. *Id.*

12. Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1.

13. *E.g.*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1863 (2006)).

14. See Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President "to use all necessary and appropriate force . . . to prevent future acts of international terrorism against the United States").

administration question whether that authorization is broad enough to cover some of the tactics adopted by the Obama administration, which are in some ways more aggressive than those of his predecessor. As Yale Law Professor Stephen Carter puts it in his new book, *The Violence of Peace*, “President Bush . . . never claimed the power to target American citizens for assassination. President Obama has. He has also expanded the battlefield, both geographically and technologically, and is prosecuting America’s wars with a stunning ferocity.”¹⁵ Thus, even the question of the sources of presidential power remains unresolved.

We will hear variants of all of these unanswered questions discussed at this Symposium. Today’s focus will be on unsettled foundations. This morning, we will hear from experts on the sources of executive power and their interplay with the Fourth Amendment and from a panel with firsthand experience in dealing with the detainee situation at Guantánamo. At lunch, we will hear from retired Third Circuit Chief Judge John Gibbons, who argued the habeas issue successfully before the U.S. Supreme Court. This afternoon, we will explore the dimensions of the preventive detention and adequacy of the courts questions, with panels consisting of leading academics and practitioners. We will hear from former federal prosecutor, federal appeals court judge, and Secretary of Homeland Security Michael Chertoff on the uses of executive power and from a panel on the proper role of congressional oversight.

Although this is an academic Symposium, it is important to point out that these legal debates are no academic exercise; they are taking place in real time, in the context of constantly evolving threats to our safety and security. Our focus tomorrow will shift to uncertain outcomes. We will hear in detail about emerging threats and potential responses. I will moderate a panel of experts from government and the private sector, and we will hear from the General Counsel of the Department of Homeland Security. We will also hear about challenges facing the media in covering national security issues, implications of our policies for the law of war and the debate over one of the signature measures designed to meet the emerging domestic threat, Suspicious Activity Reporting.¹⁶

I do not expect that we will resolve the many unresolved legal issues here, but I know that they will never be resolved without civil dialogue.

15. STEPHEN CARTER, *THE VIOLENCE OF PEACE: AMERICA’S WARS IN THE AGE OF OBAMA*, at x (2011).

16. See generally BUREAU OF JUSTICE ASSISTANCE, DEP’T OF JUSTICE, NATIONWIDE SUSPICIOUS ACTIVITY REPORTING (SAR) INITIATIVE (NSI): NIEM STANDARDS IN ACTION, available at <http://www.askniem.org/request/SARInitiativeNSI.pdf>.

That is why conferences like this are important. The legal debate may not be an academic exercise, but it is appropriate nonetheless that it be carried on in an academic setting like Rutgers School of Law–Newark. We live in a time of extremely divided public discourse, in which legitimate differences of opinion too often devolve into exchanges of epithets. Our nation needs to rediscover civility, to conduct serious discussions in non-threatening settings, and to appreciate that opinions are so divided because the underlying questions are so hard. As a former university president, I view the academy as a potential refuge from the daily rough-and-tumble of partisan political debate, a place where difficult issues can be debated with openness, candor, and respect for differing views.

My faith as an American is that, with reasoned and civil discussions of difficult and complicated issues, we will succeed in defining the rules of this conflict in a manner that is consistent with our constitutional values and that honors the commitment to the rule of law that is the foundation of our civilization.