

Civil Liberties and National Security

A conversation with Harold Koh, Norman Dorsen, and John Deutch
Moderated by Carl Kaysen

American Academy of Arts and Sciences, Cambridge Massachusetts
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On February 4, 2002, the American Academy hosted a panel to discuss civil liberties and national security in the aftermath of the events of September 2001. The speakers were introduced by the Academy's Executive Officer, Leslie Berlowitz. Carl Kaysen (MIT), who is co-chairman of the Academy's Committee on International Security Studies, moderated the discussion. The speakers first made an opening statement and then responded to one another's remarks. Following their presentations, the speakers answered questions from the audience.

On the panel was:

Harold Hongju Koh, Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School. He served as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998 to 2001. He is author of *The National Security Constitution: Sharing Power after the Iran-Contra Affair*, and editor of *Deliberative Democracy and Human Rights*.

Norman Dorsen, Frederick I. and Grace A. Stokes Professor of Law at New York University School of Law. He served as president of the American Civil Liberties Union from 1976 to 1991. He is president of the US Association of Constitutional Law and author or editor of 13 books, including *Political and Civil Rights in the U.S.* and *None of Your Business: Government Secrecy in America*.

John Deutch Institute Professor at the Massachusetts Institute of Technology. He served as Deputy Secretary of Defense from 1994 to 1995 and Director of Central Intelligence from 1995 to 1996. He has published work on physical chemistry, technology, energy, international security, and public policy issues. (Professor Deutch requested that his remarks not be posted online.)

OPENING REMARKS

Harold Hongju Koh

Thank you, Carl, for your kind introduction. It is a special honor to appear here with two scholars and public servants whom I have long admired: Norman Dorsen and John Deutch. I speak from my perspective as a professor of international law and former Assistant Secretary of State for Democracy, Human Rights and Labor (or as my children

liked to call the job, “Assistant Secretary for Truth, Justice, and the American Way”). On reflection, that is not a bad job description, because I saw my job as ensuring that U.S. foreign policy is conducted consistent not just with American interests, but with American and universal values: particularly, our founding values of democracy, human rights, and the rule of law.

My point tonight is that the longer this “war against terrorism” wears on—and we will soon enter its sixth month—the greater our temptation becomes to bend those values in the name of battling the forces of evil. Our leaders—and we, as concerned citizens and scholars advising them—need to resist those temptations, or we risk winning the battle and losing the war. Unless we are careful, we may end up prevailing over the Taliban, Al Qaeda, Saddam, or whoever, while condoning a society that is noticeably less democratic, less tolerant, less pluralistic, and less able to lead effectively in a world in which nations support us not because of our power, but because they share our announced principles.

Of course, we live in an age of globalization, but that age can now be divided into two discrete eras: the first, the age of *global optimism* that began, as my Yale colleague, John Lewis Gaddis has pointed out, in November 1989 with the collapse of the Berlin Wall and the second, the age of *global pessimism*, which began on September 11, 2001 with the collapse of the World Trade Center. The focus of the first eleven years—the age of global optimism—was primarily on what I would call the “positive face of the globalization”—the astonishing transformation of transport, commerce, communications, and finance so that we had started to take for granted the freedom to fly at a moment’s notice across national borders, to invest night or day in worldwide money markets, to communicate instantly with others around the world by cell phone, beeper, fax, or e-mail, all without fear or intimidation. Just one measure of the astonishing pace of this globalization was Bill Clinton’s recent recollection that “When [he] became president in January of 1993, there were fifty sites on the World Wide Web. When [he] left office, there were three hundred and fifty million,” a 70 million fold increase in just eight years.

When I was inducted into the Academy a few years ago, my remarks for my Class highlighted what I thought was the most overlooked aspect of this global optimism: the *globalization of human freedom*: the expansion of global democracies from some 22 democracies in the world half a century ago to about 120 democracies today, so that at the dawn of the new millennium an astonishing 63% of the people on the planet lived under some form of democratic rule.

But on September 11, that optimistic, positive face of globalization was suddenly threatened by globalization’s most destructive face: the globalization of terror. With a shock, we realized that the flip side of greater global freedom is greater national vulnerability. Terrorists can exploit the very forces that have made the world freer, more mobile, more interconnected to destroy the very symbols of our economic and military power. So the most striking feature of this new global age is a near universal availability of destructive power, matched by a limited availability of constructive power. As we’ve seen in recent months, 19 men with a few hundred thousand dollars can paralyze our

system of air transportation and cause billions of dollars of damage to the worldwide economy; a man lighting his sneakers can add hours to every plane flight; unseen individuals can shut down our mail system with a few envelopes of anthrax; and a single hacker can send one virus-ridden e-mail that cripples our system of internet communications. Many can now destroy; but only a few can build. And so September 11 posed to us in starkest terms the central challenge of the new age of terror: namely, how do we use the constructive face of globalization—particularly the new global freedom—to overcome its most destructive face?

My answer, and I believe President Bush's—judging from his speeches since September 11—is to build an enduring global coalition of principle based on shared values of democracy, human rights, and the rule of law. We need to rally the forces of global democracy to battle the forces of global terror. As the President put it in his State of the Union Address just last week: “America will lead by defending liberty and justice because they are right and true and unchanging for all people everywhere.” I could not agree more, but the question is: has our government thus far been true to the President's word?

Let me take three areas where I fear that it has not: first, the dragnet approach to law enforcement implicit in the web of laws and domestic counter-terrorist actions that have been implemented in the last five months, about which Norman will surely have more to say; second, the President's November 13, 2001 order calling for military tribunals, and third, the treatment of detainees on Guantanamo. Each of these actions, I would argue, undermines our long-term objective of sustaining a global coalition based on common respect for human rights and the rule of law.

First, the Attorney General's dragnet approach to domestic law enforcement. Taken individually, the various assaults on civil liberties that we have seen in response to September 11: the broadscale detentions, the USA PATRIOT Act, the Military tribunal order, the infringement of attorney client privilege, the interviews of some 5000 Middle Eastern men—each departs from past practice and has been done without a meaningful showing that the preexisting law or practice somehow contributed to the September 11 tragedy.

Taken together, these various legal initiatives reject three core principles that underlie the way that the United States has balanced national security and civil liberties since World War II. First, the idea that our government does not spy on us. We have struggled to keep domestic law enforcement and foreign intelligence separate, and do not substitute the latter for the former in order to guarantee the constitutional rights of the criminally accused. Second, the belief in equal justice for all, including aliens. Once admitted to our shores, lawfully admitted aliens enjoy roughly the same political and civil rights in the United States as citizens (except the right to vote), and foreign-born Americans have reasonably expected not to be stereotyped as a political underclass with second-class rights. Third, the idea that even in wartime, the constitutional principle of check and balances applies. While the executive branch must have the lead in the national security area, all executive action in the national security area should be subject to meaningful

legislative oversight and judicial review, on the theory that a constitutional system of checks and balances requires the President to make his case to—and persuade—elected legislators and judges who do not work for him.

These are not accidental features of the American legal landscape, but key elements of our claim to be the world's leading democracy. During my government service, I visited many countries, like Turkey and Algeria, which had shadowy Ministries of the Interior that spied on the people without legal constraint, an approach we have vigorously rejected. Almost alone among the world's countries, we have treated diversity as a national asset by inviting aliens and foreign-born Americans to participate in our national community without treating them like members of a political underclass. Third, unlike many countries, we have operationalized our commitment to the rule of law by recognizing that all governmental acts must be conducted openly, and subject to legal restraint.

The net effect of the various laws and orders passed since September 11 has been to stand all three of these propositions on their head. At a time when we should be reaffirming these principles and relying on time-tested institutions, our Attorney General is rejecting these ideas in the name of new, untested institutions. But we don't need to conduct dragnet detentions and withhold names of detainees at a time when the public unanimously supports aggressive law enforcement and judges and magistrates would enforce any reasonable warrant. At a time when our schoolchildren are pledging allegiance to liberty and justice for all, and we are looking for national unity and foreign support, we shouldn't be targeting the foreign-born for discriminatory investigations. And we shouldn't be trying suspects before untested military commissions that are unauthorized by Congress when our own existing federal courts have fairly and openly tried and convicted some 26 *jihads* supporters, including Al Qaida members, for attacks on the World Trade Center and our embassies in Kenya and Tanzania and have indicted bin Laden himself, without acquittals, compromise of classified information, or attacks on jurors or judges.

That brings me to the President's November 13 order on military commissions. I do not call them tribunals, because at this moment, we have no assurance that they will bear any resemblance to "courts" or "tribunals" in the ordinary sense of those words. A number of my fellow professors and I at Yale Law School recently wrote a letter to the Senate Judiciary Committee, which has now been signed by over 700 law professors nationwide, arguing that the order authorizing military commissions is legally deficient, unnecessary and unwise. It is legally deficient because it undermines separation of powers, constitutional and international principles of due process and our treaty obligations under international human rights treaties. It is unnecessary because it falsely presumes that our existing judicial institutions are incapable of dealing with the problem. When al Qaeda members are accused of killing American citizens and destroying American property on American soil, we should recall that our courts have tried pirates and terrorists charged with similar acts for more than two centuries. If only three or three hundred had died on September 11, no one would argue that they should be tried other than in a U.S. court. Despite the terrorist attacks, both the Presidency and Congress have continued to

function, yet the Order implicitly assumes that existing federal military or civilian courts are incapable of dealing with the very cases they dealt with just before the attacks occurred.

The strongest argument against military commission is not legal, but political. Military commissions create the impression of kangaroo courts, not legitimate accountability mechanisms. Rather than openly announcing the truth, commissions tend to hide the very facts and principles the United States now seeks to announce to the world. Because military tribunals in Burma, Colombia, Egypt, Peru, Turkey and elsewhere are perceived as granting judgments based on politics, not legal norms, the United States State Department has regularly pressed to have cases involving its own citizens heard in civilian courts in those countries. Most troubling, the use of military commissions undermines the United States' moral leadership abroad just when we need that leadership the most. The United States regularly takes other countries to task for military proceedings that violate basic civil rights. But how can the United States be surprised when its European allies refuse to extradite captured terrorist suspects to U.S. military justice? The use of military commissions potentially endangers Americans overseas by undermining the U.S. government's ability to protest effectively when other countries use such tribunals.

To truly win a global war against terrorism, the U.S. must not only apply, but also be universally seen to be applying, *credible justice*. Credible justice for international crimes demands tribunals that are fair and impartial *both in fact and in appearance*. By their very nature, military tribunals fail this test. Even if, through tinkering, the Defense Department regulations could ensure that military commissions operate more fairly in fact, they will never be perceived as fair by those skeptical of their political purpose, particularly, the very Muslim nations whose continuing support the United States needs to maintain its durable coalition against terrorism. Ironically, the more the Defense Department tries to address the perceived unfairness of military tribunals by making them more "court-like"—more transparent, with more procedural protections, more independent decision-makers, and more input into their design by the legislative branch—the more these modifications will eliminate the supposed "practical" advantages of having military tribunals in the first place, yet without dispelling the fatal global perception of unfairness.

To ensure that the international community perceives those convicted for the September 11 attacks as having received fair and impartial justice, the United States should send suspects to standing tribunals that have demonstrated their capacity to dispense such justice in the past. While I do not oppose new *ad hoc* international tribunals, I am skeptical that the international community can overcome existing political obstacles to create such tribunals quickly and with genuine capacity to dispense fair and impartial justice. Absent such functioning international tribunals, the most credible justice will be delivered by time-tested U.S. judicial institutions.

That brings me finally to the situation on Guantanamo. I should mention that in 1992-4 I represented thousands of Haitian and Cuban boat people held on GTMO and so have

visited there perhaps as much as any American lawyer. As you have heard in the media, there is a huge debate raging within the administration as to whether or not detainees on GTMO should be treated as persons having rights under international law, entitled to a determination by an impartial tribunal or a POWs under the Third Geneva Convention.

To my mind, the press has missed the major issue here. I do not think we are in real danger that the detainees will be tortured, or otherwise be treated inhumanely. The United States has no interest in providing inhumane treatment, and if it did, the international criticism in recent weeks has certainly disabused them of that interest.

Nor is the issue interrogating them—it is true that if they were POWs they need only give name, rank and serial number, but we are entitled to ask them anything, and our constitutional rules already prevent our officials from subjecting them to torture or other kinds of cruel and unusual pressure.

So why are detainees really being brought to Guantanamo, and why does the United States refuse to recognize them as prisoners of war entitled to rights under the Geneva Conventions? The short answer is that to do so would limit the United States' ability to try these detainees before military commissions whose decisions are not subject to review in civilian courts. Secretary Rumsfeld's dilemma is that if Al Qaeda detainees are common criminals, they should be tried in American civilian courts; but if they are prisoners of war, they should be tried in courts-martial. Either way, they have full procedural rights, and access to appeal in civilian courts. If they are sent to foreign courts or international tribunals, they could not be held indefinitely, and they might not be subject to the death penalty.

To prevent that from happening the Defense Department has tried to create a new, third legal category: unlawful combatants being held offshore in American naval facilities on Guantanamo, who the Government suggests may be held indefinitely, without procedural rights under either human rights or humanitarian law, and who may be tried on little evidence before military commissions whose rules have not yet been announced.

And why Guantanamo? Because under existing U.S. law, some U.S. courts have ruled in highly controversial precedents that the United States Naval Base at Guantanamo Bay, Cuba, where many of the detainees are being transferred, amounts virtually to a rights-free zone. In 1994, when large numbers of Cuban boat people were held on Guantanamo, the Eleventh Circuit rendered the extraordinarily broad ruling that "these [alien detainees on Guantanamo] are without legal rights that are cognizable in the courts of the United States. . . ." In short, they are human beings without human rights. Read literally, the panel's holding would permit American officials deliberately to starve alien detainees, to subject them to forced abortions and sterilizations, or to discriminate against them based on the color of their skin. Moreover, as aliens held in detention outside the United States, it is not clear under existing precedents what legal right they might have to seek a writ of habeas corpus, although some lawyers in California have begun habeas proceedings in the last few days.

In my view, it was a huge error for the United States government to start bringing detainees to Guantanamo, without adequate facilities, plans for lawful tribunals, or any indication of how many the United States intends to hold for how long. In surveying our justice options, the United States should have more carefully distinguished between its most pressing concern—how to redress and prevent the murder of Americans on American soil—and much broader efforts to support the creation of an enduring post-Taliban system of justice in Afghanistan. The United States should have adopted a simple, clear division of labor: American prosecutors and judges should try crimes committed against Americans on American soil in American courts, while experienced foreign and U.N. lawyers should address crimes committed against Afghans on Afghan soil. The U.S. should have brought near our shores only proven Al Qaeda suspects who could be tried in U.S. courts by seasoned federal prosecutors using legislatively mandated procedures to handle classified information. Everyone else should have been tried where arrested.

By making Guantanamo a new offshore detention facility for terrorists, we encourage the Russians and Chinese to try their Chechen and Uighur terrorists on their offshore islands. How can we object to Castro granting his detainees no rights in the Communist part of Cuba when we claim our detainees have no rights on the American zone in Cuba? When the Chinese or Russians try Uighur or Chechen Muslims as terrorists in military courts, our diplomats protest vigorously and the world condemns those tribunals as anti-Muslim. So how can we object when other countries choose to treat U.S. military commissions the same way?

My point is simple: as this war on terror wears on, a transcendent issue in the debate over U.S. foreign policy will be what kind of new world order is emerging, and what is America's role in it? America's choice is not isolationism versus internationalism, but what version of internationalism will we pursue: a power-based internationalism, in which we get our way because of our willingness to exercise our power whatever the rules, or a values-based internationalism, in which our power derives from our fidelity to the values of democracy, human rights, and the rule of law? As Americans, we need to extend to the international institutions the very values and institutions that we treasure so much at home. As the President said last week: "America will always stand for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property, free speech, equal justice; and religious tolerance." What that means is that we have to respect human rights, even the human rights of terrorist killers; that we need to speak out forthrightly against human rights violations, whether they're committed by terrorists, or allies or our own government and we have to reaffirm loudly that it's never unpatriotic to question what our government does in our name, particularly in time of war. If the globalization of freedom is going to triumph over the globalization of terror, in the long run, we—as a nation conceived in liberty and dedicated to certain inalienable rights, including liberty and justice for all—must respond not just with power alone, but with power coupled with principle.

Norman Dorsen

There is now a cottage industry on the topic of this panel, but I do not find it an easy subject to address beyond rhetoric and the taking of predictable positions.

What is plain is that the preservation of national security and the protection of civil liberties are both values of a high order. Kofi Annan, secretary general of the UN, recently said, "We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights." In my view, this is only partly true. It is possible to accommodate the values to some extent, but in other respects there is a trade-off between national security and civil liberties. Before addressing this point I have some preliminary observations.

Initially, it is important to recognize that the two competing values are neither absolute nor measurable. It is very difficult to estimate either the exact security benefit that will be achieved from a particular governmental initiative or its precise cost to civil liberty. Among other things, people put different values on particular liberties -- free expression, personal autonomy, privacy and freedom from arbitrary constraint -- and government actions can have unintended consequences for both security and liberty.

Secondly, while most of us assume there is significant value in civil liberties, the American people have frequently been willing to compromise them in the face of real or imagined threats to security, including World War I censorship, the post-World War I Palmer Raids, the Japanese relocations during World War II, and the many violations during the McCarthy era and the Viet Nam War. The public almost surely has the same mindset today. Perhaps the best indicator is congressional passage of the Patriot Act in October by overwhelming majorities without anything close to an ample opportunity to debate or even examine its many problematic provisions. In December, the publisher of the Sacramento Bee was hounded off a platform at a California state university when she suggested that concern for constitutional rights should temper the most extreme reactions to terrorism. In particular, she was loudly booed for urging that we "safeguard rights to free speech, against unlawful detainment and for a fair trial," and the audience cheered when "she wondered what would happen if racial profiling became routine." At about the same time, a survey taken by the American Jewish Committee showed that a majority of Jews, traditionally one of the most reliably liberal segments of the American community, are content to see constitutional principles abridged in order to increase the investigative powers of law enforcement agencies. These events bring to mind a longstanding maxim of the American Civil Liberties Union, often repeated half-jokingly, that if the Bill of Rights were put before the American people in a referendum, it would not pass. I doubt if my friends at the ACLU are joking about this now.

The public's attitude can largely be explained by fear, fear for the country in the abstract and also a more focused fear for their families, friends and themselves. A second explanation derives from the public's awareness of the awful responsibility that officials bear for the nation's safety. While I shall suggest shortly that the Administration has failed to accord civil liberties adequate respect since September 11, I do not minimize the pressure on it to do everything feasible to protect the country and to avoid the inevitable

political retribution that would follow a terrorist action costing American lives that the public believed was preventable by law enforcement measures.

In this light, it is not surprising that the Bush administration has taken aggressive steps to further the nation's security and protect itself politically. Unfortunately, in doing so it has simultaneously compromised civil liberties. There are at least four sets of problems, two or possibly three of which could be solved pretty easily if the will were present. To this extent Mr. Annan seems correct: in these matters there would be no or little cost to security if civil liberty were granted greater protection. The fourth area is more complicated. It would require a congressional remedy, and a trade-off between security and liberty is inevitable.

The first issue concerns free expression. Dean Kathleen Sullivan of Stanford Law School said in November that the government's action to stop dissent or questioning of national policy has been "notably restrained" compared to the Civil War and the World Wars. Perhaps, but there nevertheless have been conspicuous attempts to impede open and full discussion. On September 11 itself, the news media that criticized the president for not immediately returning to Washington following the terrorist attacks received warning telephone calls from government officials. Those who criticized the telephone calls were then publicly rebuked. Soon thereafter, the National Security Advisor called the networks and print media, urging them not to run Osama bin Laden's taped statements. The asserted justification was to thwart bin Laden's possible coded messages, but it seems clear that the Administration simply did not want the American people to hear his message directly. A little later, Attorney General Ashcroft, during the pendency of the Patriot Act in Congress, said that critics of the bill were giving comfort to the country's opponents and that every day of delay in passage made terrorism more likely. Such statements are not exactly designed to further the deliberative process. Whether or not these incidents amount to an improvement over prior government interferences with free speech during hostilities, they are wrong, and there is a simple remedy for the Administration to take that would not impair national security: Stop!

A second area of concern is the military tribunals that President Bush authorized by executive order, that is, without congressional approval. This territory has been heavily plowed by commentators, and there are many potential civil liberties problems: no juries, majority verdicts, military judges in the chain of command rather than civilian judges, diluted rules of evidence, and the possibility of double jeopardy. Beyond these issues, there is an overarching question of who will or might be tried by these tribunals. If they include aliens who are lawful permanent residents of the U.S., this would contradict the established principle that such persons are entitled to the protection of the Constitution. If it is prosecution of the Taliban and al Qaeda captives, whether or not they are denominated "unlawful combatants," there are complicated questions under international law that, even at this preliminary stage, are causing embarrassment to the U.S. among our European allies. It is unlikely that the president will revoke his order establishing the tribunals, but there is hope that some of the problems may be cured by regulations that are being prepared and that the tribunals will be used sparingly. If these hopes eventuate,

the trade-off between national security and civil liberties will be kept to modest proportions or even eliminated altogether.

A third area of concern represents the most grievous violation of civil liberties since the terrorist attacks: the secret detention of more than 1100 aliens, all or almost all from the Middle East. The government has refused to release their names or to charge them with any crime or, until very recently, permitted lawyers to advise them. And the Department of Justice has announced that it will electronically eavesdrop on conversations between the lawyers and their clients, in plain violation of the venerable lawyer-client privilege. It is a core element of a free society that the people have a right to know who is arrested and for what reason, and for a judge or magistrate to decide openly if the detention is justified. The only comparable invasion of individual liberties in recent decades is the forced removal of Japanese-Americans from the West Coast in 1942. The present detentions, like the earlier ones, have met with surprisingly little public criticism. Perhaps this is the quintessential illustration of the public's privileging of national security over civil liberties even when the violation of civil liberties is stark and the benefits to national security unknown. The government would no doubt claim that these detentions serve a national security end, and perhaps there are good reasons to hold at least some of the aliens in custody. But this proposition should be tested under the rule of law.

The fourth and final example is the Patriot Act itself. As I have suggested, the process that led to its passage was not a model. As far as is known, the administration did not carefully analyze what went wrong before September 11 and identify what emergency powers it would need to prevent additional attacks or even whether existing powers are inadequate. It refused to limit the new powers to the current threat or to meet with independent experts to discuss how to draft provisions that would safeguard civil liberties. And, I am advised, the final bill was drafted in secret meetings; there certainly are no conference or committee reports to explain the Act's provisions.

Beyond process, it would be possible, although not in the time available, to detail the many provisions that could abridge free expression and privacy, not merely of aliens but of American citizens. Instead of doing that, I shall take a different tack, one that acknowledges the unique current threat to the United States and its people from an organized, determined and violent enemy -- international terrorists. It is natural and appropriate for the government to combat this danger aggressively. But, equally, the government's response to safeguard national security should be no broader than the threat requires. In that way, the trade-off between civil liberties and national security could be relatively confined. This result would be achieved only if the Patriot Act were limited to the essence of the terrorist threat and not applied to other crimes.*

*I am indebted for this suggestion to Morton Halperin, former Acting Director of Policy Planning in the State Department and former Director of the Washington office of the ACLU.

Let me briefly offer three examples. The Act provides for the sharing of traditionally confidential grand jury testimony with government officials and law enforcement officers in ways that previously were unlawful. Such material is unfiltered, often unreliable and acquired from witnesses who testify without counsel. If there are credible factual affidavits that a case involves international terrorism directed at the U.S. and its people, it might be appropriate to share grand jury testimony, but not otherwise. Similarly, the broad invasions of privacy authorized by the Act, through wiretapping, electronic eavesdropping and the like, without traditional showings of probable cause of a crime, might be appropriate if there are persuasive affidavits of international terrorism, but not in other criminal cases. A final example involves alleged clandestine intelligence activity by an individual on behalf of a foreign power. Unless the matter meets the standard of aiding and abetting international terrorism, the normal criminal rules should apply. These rules have long served the country well, have led to the successful prosecution of wrongdoers in numerous cases, including the 1993 World Trade Center bombings, and were not serious candidates for congressional revision before September 11. For my approach to succeed, there would of course have to be a careful definition of “international terrorism directed against the U.S. and its citizens.”

Ideally, in times like these Congress and the courts could be counted on to reverse or invalidate unlawful actions of the Executive Branch. But history has abundantly shown that during war or other hostilities there is little stomach to block presidential initiatives, even if later, in calmer times, Congress or the courts may choose to rectify wrongs or compensate those who were injured. On the other hand, it is good news that neither President Bush nor Attorney General Ashcroft has asserted, as President Nixon once did, that only the president can fix the line between constitutional and unconstitutional conduct when national security is at issue. Nor have they said, as Nixon did, that “when the President does it, that means that it is not illegal.

In sum, I think the country and its responsible officials should have the necessary tools to fight international terrorism directed against our country. At the same time, I deplore the potential erosion of longstanding constitutional safeguards when there is no solid basis for broad new powers. Of course, if evidence emerges that they are needed, in one respect or another, that new situation should be evaluated carefully. Until then, we should follow a venerated axiom of Chief Justice John Marshall -- that government should exercise the least amount of power necessary to achieve its desired end. In that way we will protect the nation’s security without undermining the Constitution.

RESPONSES

Koh: I think we all agree that we are in a situation of changed circumstances, but at the same time, we don’t want to exceed good judgment. So the question is how do we operationalize the new reality?

Let me just mention four points prompted by my colleagues' remarks. The first is the shocking difference between the domestic and international perception of what we are doing. If you're in the United States, everything we are doing seems alright. A kind of patriotic correctness has settled in, which means that our papers and media are reporting quite little about protests that are going on abroad. When I went to Canada last week, I was stunned by what was being published. The papers were full of criticisms of our activities on Guantanamo. During that period, I flew back to Boston and none of this furor was even reported. So, there's a sense in which our own media is screening us from external criticism, and creating an orthodoxy of "appropriate patriotism," which we need to consider and to challenge.

The second point goes to the role of force. Here, my own rule of thumb has been that the more massive, the more indiscriminate, the more unilateral, the more prolonged our use of force, the more likely it is that it will kill innocent civilians and jeopardize our cause. Our defense department has made admirable efforts, with certain unfortunate lapses, to obey these rules. Here I would distinguish between international norms and international institutions. I believe that our use of force in this circumstance is lawful, and that to the extent to which we are going beyond self-defense—to other kinds of forms of humanitarian protection to prevent our civilians from being attacked—that could be justified in terms of international law. It does not necessarily mean operating exclusively within the UN or chapter 7 framework. So, I think that we have to obey International norms, but whether that always means operating within international institutions may be another story.

With regard to the role of justice, the third point, there are three aspects. First, profiling. We need not adopt indiscriminate racial profiling. I think that we *can* do behavioral profiling effectively. If you cross in England or in Canada, they ask you, "Why are you traveling today? Does your story hold together?" They ask you to produce documents that show that you are who you say you are, and that what you are doing makes sense given your own stated objectives. They don't take every fourth person out of line, and make them take off their shoes, even if one of them is a little old lady from Pasadena. What we have adopted instead is a kind of overbroad, dragnet approach that causes inconvenience, while reaping little in terms of improved security.

Second, on the detentions on Guantanamo, I agree that when we bring people to Guantanamo they become our responsibility, and if they are our responsibility, we have to treat them according to our system of laws and rights. The notion that our government officials can treat them with untrammelled discretion, with no entitlement on their part approximating rights, is a fundamentally anti-American concept.

On adjudication, I really do think American courts should deal with those cases which involve attacks on American soil, American property, and American citizens. Those are cases that have traditionally been heard in US courts for the last 200 years. Pirates, terrorists, and others have all been tried in our courts. Those people who are being held in Afghanistan and are being charged with crimes in Afghanistan can stay there until a justice system is created there, just as is being done in Sierra Leone. It is only those

people with whom we can establish credible connections to acts on or against our citizens or our soil who should be brought here and should be tried in our courts. Bin Laden has been indicted in our courts already, and I have no problem with trying him here. The three people who have been charged so far, Zacharias Moussawi in Virginia, Richard Reid and John Walker Lindh, have all been indicted in U.S. courts, which to my mind sets the bar extremely high. If those people are going to be charged in American courts, what do you need military tribunals for? I think the prospect of setting up tribunals and potentially even punishment and execution facilities on Guantanamo is something none of us want to seriously contemplate. The point is credible justice. What is important is that we not simply punish, but that we punish in a manner that makes it clear that we are administering credible justice. Military tribunals simply cannot deliver that, no matter what efforts we make to tinker with them and make them look better to the world.

The fourth and final issue is legal process, which is one that Norman has already highlighted. The Patriot Act should really be called the “Round-up-the-Usual-Suspects” act. It was something that was created with hardly any deliberation or genuine legislative process. Most of the members of congress demonstrably did not read, it as they were out of their chambers and offices for anthrax fumigation while it was being done. Nobody dissented except Senator Russ Feingold. The mood was: “Run it up the flagpole and see how many people salute.” And we were shocked at how many people did. The same applies to the military tribunal order—drafted in haste, remarkably overbroad. Issue it, and then wait to see who protests. It turns out in fact that a lot of people do protest and that, indeed, the Justice Department’s own career criminal prosecutors object because they believe that they can fairly try these cases. The great danger here is, as Norman said, that the Supreme Court is unlikely to be a meaningful check in this circumstance. Not only are they a more conservative court than the one in the Japanese internment cases, but they have been forced to move out of their own chambers because of anthrax. I don’t think that they are going to be a meaningful check in these circumstances. The legislative branch has now proved that it is not much of a check. So that leaves it really to the media, to our allies and to citizens like us. And if the media does not convey these objections, that creates a veil of orthodoxy which is very hard to break through. That makes it all the more important that engaged citizen forums like this one, particularly involving academics with expertise in the subject, speak out and make it clear that patriotism means saying what the rule of law and our democratic values require.

Dorsen: Thank you. I’ll follow Harold and make four points also, two of which are basically in agreement with comments made so far.

The first one is very general. It was stressed several times that these are very complicated and new circumstances. That is a comment that often is made, but in this case I think it is extremely important to recognize. Nobody is going to come up with exactly the right answer too quickly. And a lot of these things are going to need sustained study and thought and advice – a point that I’ll get to in my fourth comment.

The second area where I agree with previous statements is on the more substantive level. It was mentioned that three dichotomies no longer pertain. There are the divide between

foreign issues and domestic issues, between war and peace, and between security and other law enforcement situations. Well, it is those very aspects that prompted me to come up with something a little original, namely to use some aggressive new law enforcement techniques, but only if they are limited to the current threat, to the new international terrorism that is worldwide, pervasive, dangerous, and special. The current people in the justice department would find my suggestion shocking because it would limit the Patriot Act. But I suspect that some of my former colleagues at the ACLU also would find it shocking because I would be giving away more than they would want to give away on that issue. But I take seriously the point that this is not just business as usual and that we cannot be wedded too tightly to earlier positions without some flexibility.

The third point is that I have seen no serious study – maybe this study is in process – of what went wrong on September 11th, how was it that the terrorists were able to do what they did. There are indications here and there that somebody heard that this fellow bought a one way ticket, another fellow was taking airplane lessons, but he did not want to learn how to land the plane, a third that somebody got a call about somebody that was very unusual and should have been checked out but was not, etc. These are all anecdotal leads. I am conscious of the fact that people are human, that everyone makes mistakes, that law enforcement officials are not immune to that. But nevertheless, the fact of the matter is that before we know exactly why this was allowed to happen in such a horrifying way, we cannot really tell whether new techniques which would involve a compromise of civil liberties are necessary. In other words, if there are failures in the system that can be corrected without imposing a new system of law that would invade people's privacy and free speech, they should be tried. But I've not seen enough evidence. Maybe it is too early, but I hear the usual signs: we don't want to have finger pointing; we don't want to put blame. Unfortunately, in this world, sometimes you have to point the finger; you have to assess blame, and give credit where credit is due. Maybe as I say it is too early; maybe it is the kind of thing that will be done a few months down the road.

My final point could be taken to be a political point. Maybe it is, or maybe I should not try to characterize it. On these tradeoffs or non-tradeoffs between civil liberties and national security, I would feel a lot more comfortable if I felt that the people making the decision in the Department of Justice and the White House, were sensitive to civil liberties issues. This does not mean that they have to agree with everything that I say or that Harold says, but that they are aware of the importance of the civil liberties tradition to the country and the future of, if I may not be too bold, Western enlightenment values. I don't see evidence of that. I see a hard edged, Agnew-like, approach to these issues that does not make sense to me. Incidentally, since I mentioned the word political, this is not republican or democrat. It has nothing to do with that, although in part it is being played out that way. The greatest civil libertarians during my period as the president of the ACLU – the people we relied on most in the senate – were people like Mathias, Case, people like Javits, and many others who were republicans. So this is not a question of party label. But what has happened is that an unfortunate attitude exists in large parts of the administration. Even though they are totally honest and are obviously trying to do the

best thing for the country, they are not aware of the implications, I think, of some of the decisions they are making, and what the long term consequences are.

QUESTIONS & ANSWERS

Kaysen: Well, ladies and gentlemen, the floor is open.

Question: I have one question. The panel has been very convincing in saying that the FBI or the Department of Justice are not exactly equipped to deal with countries which are “far away and about which we know nothing,” as Chamberlain said of Czechoslovakia. But that leaves me with a question: Who should do it? Do you really believe that the record of the CIA is so good that one could unleash it on countries like Yemen and Afghanistan and all the others you mentioned, with better results than the other agencies that you have dismissed? It is a very serious issue. Ok, let’s assume that the domestic law enforcement agencies are insufficient and incompetent. But then what?

Koh: Let me respond to the question. What do you do with these bad people when you pick them up? Suppose it were September 10th. What did we do in those circumstances? In the State Department, I worked on Sierra Leone, East Timor, Cambodia, Bosnia, Kosovo. What we did in those circumstances is this: those people who were war criminals, who had committed crimes on foreign soil against foreign citizens, we held them. And then we created some sort of system of justice to deal with them. In the case of Bosnia, Kosovo, Rwanda, it was an international tribunal; in the case of Cambodia and Sierra Leone, it was a mixed domestic-international tribunal. But if their fundamental crimes were foreign crimes on foreign soil, we tried them on that soil, and made sure that the international crimes were not amnestied, as we have tried to do with Foday Sankoh in Sierra Leone.

So what is different about September 11th? It is that this Al Qaida network, working with Taliban and others, attacked American citizens and American property on American soil. My conclusion is this: those people for whom you can establish that case ought to be brought to US courts and tried as terrorists (which is what we have done in the past, by the way). As I mentioned, some 26 *jihad* supporters, including members of Al Qaida, have been convicted with no acquittals for precisely such attacks – such as the attacks on the World Trade Center in ’93 and in Tanzania and Kenya in ’98. Those people who are picked up as part of the Al Qaeda network in another country, like Germany, can be tried there, so long as their trials meet international due process standards. If we seek extradition, they can be extradited here. That leaves no room for military tribunals. To get them here in a military tribunal, you have to call them something new to justify not trying them either where they are or in a US court. The term that has now been appropriated is “unlawful combatants.” But an unlawful combatant as traditionally understood is someone behind enemy lines who is not wearing their uniform. The only two captives who meet that description are Reid, who is being tried in a US court, and Moussaoui, who is being tried in a US court. What the Defense Department probably did is simply

separate everybody who was an Afghan and left them in Kandahar, and brought everybody who was non-Afghan to Guantanamo –except for John Walker, who is an American, so they chose to try him in a US court. But suddenly, all of these people are our responsibility and we are trying to figure out what to do with them, while trying to justify not granting them legal rights. I think that was a huge mistake.

The point Norman made is a very important one: nobody denies the threat. The question is: has the response been tailored to the threat, and to human rights concerns? The dragnet approach is both overbroad and has reaped little in terms of improved security. For all of the thousands of people who have been detained, the only people who have been charged are either people like Moussaoui, who was held before September 11th, or people who have been apprehended since, like Reid or Walker. The other thousand people, it is not clear what has been gotten from holding them other than violating their civil liberties.

Question: It seems to me that the key problem that is forced upon us by this new era is uncertainty with respect to identifying the enemy. And as long as that is uncertain, all that follows in our procedures is apt to be uncertain. Let me be as concrete as possible and remove some of that uncertainty in an academic fashion. Among the thousand detainees, let us take as an example that about 100 of them are members of sleeper groups dedicated to carrying out acts upon order of the magnitude of the tower destruction. There are two extreme possibilities. One is that we can hold all of the thousand people in detention and avoid what might happen. At the other extreme, there may be no sleeper groups present, and therefore holding the thousand people detained would be a major violation of human rights. So, how can one proceed in the interim between these two extremes? If there are sleeper groups there, the only way that we can for certain prevent their acting is to maintain detention of a number of innocent people. So, it is this kind of uncertainty that we have to grapple with and it is quite likely that there is no solution. But it seems to me much that has been said has not been directed to that point.

Kaysen: Who wants to respond to that?

Dorsen: I'll say a word. First of all, I think you identify the problem correctly: the enemy is more amorphous. It is not as if we're in the Second World War, or even the Vietnam War, where you had a clear enemy, even if there may have been fuzzy edges. But the premise of your question is: if you are not sure if somebody is an enemy, you pick them up and hold them indefinitely and the problem will go away because some day that person will die. I don't think that premise is sustainable. But you could say to me, "But you, yourself have said we have this terrible threat. You can't just take that kind of a general proposition." Well, I assume there are ways of interrogating, there are ways of finding things out.

Koh: "Ways of making you talk."

Dorsen: How do we *ever* find that someone is a suspect? Don't forget: you don't have to prove that the person is guilty. All you have to do is find information – from what X says about Y, or what Z says about Y, or what Y may say about himself – that the person is legitimately a suspect. There should be ways of doing that in less than 6 months or 8 months, without even making public the names. Now, if you said to me, “Well, you are nevertheless taking a risk, to the extent that any of these people are released, to the extent that we don't hold them because any one of them might really be Bin Ladin's confederate,” I say you are right. And that's why I said there is a tradeoff at some point, that are we going to sit and say that the country can hold people for months and years, unknown, often without lawyers, or with lawyers and their conversations bugged. I don't say it's easy. I'm glad that it is not my responsibility. But the fact of the matter is there is a terrible problem with the other side of it.

Question: Could we have a little more enlightenment, maybe from Harold or from Mr. Dorsen, about the category of unlawful combatant? What are the origins of this and what is the status of the term? Is it an utterly illicit category from the point of view of international law? Has it any status? My understanding is that categories like spies and saboteurs fall outside of the range of the Geneva Conventions. Would they be an example of unlawful combatants? And have they rights or not under international law?

Kaysen: Harold?

Koh: The term has legal status, but it is being bent out of shape here. It is a narrow exception that is being now massively expanded. When the Nazi saboteurs in 1942 came behind US lines, or were captured, the Supreme Court upheld their sentence and their execution, opinion to follow later, and it came several months later in *Ex Parte Quirin*. If you read the historical accounts, the Court fastened on this category – “enemy belligerent” or “unlawful combatant” – which at the time encompassed people not wearing their insignias behind enemy lines. That is a definition that matches people like Mossaoui and Richard Reid. But it does not encompass Al Qaeda members roaming around outside the United States. It also, by the way, does not preclude the legal requirement that everybody under the Geneva Conventions is entitled to a prompt hearing before a competent tribunal to determine whether they are a POW or an unlawful combatant. That is the crux of the debate going on between Colin Powell and others in the administration. He believes that everybody should be given a hearing before a tribunal. The main point with these detainees is: it is a familiar problem in law to try to move from articulable suspicion to probable cause to making a case against them as a matter of proof. When you have Mafiosi or other kinds of terrorist networks or criminal networks, often they have not committed serious open crimes, and so you hold them on lesser charges which constitute overt elements of a conspiracy. We're being told that this is the largest criminal investigation in history. They must have some way of establishing that someone has committed certain acts that are sufficient to hold them and then try them. It is common in such circumstances, if you can't charge them with the actual event, to charge them with collateral events. After all, Al Capone was charged for tax violations or other kinds of smaller violations. So, I reject the notion that this is some sort of novel problem in law – figuring out who is in a network, who you have identified

as a problem, who is associating with people potentially conspiring to commit terrorist acts. They can be investigated, tried and charged in the usual way in U.S. courts.

Question: This has been a fascinating exploration of the domestic costs of some of these measures that have been described very ably by my good friend Norman Dorsen. But I would like to ask Harold if he would turn his attention a bit to some of the costs to the United States overseas of some of these measures. By that I mean quite specifically and perhaps most practically US military personnel who may themselves face overseas the kinds of tribunals and other actions that are being taken or considered in this country. And then more generally, how will we go about promoting the rule of law – which, underneath it all, is the ultimate objective of trying to root out terrorism – while at the same time engaging in these kinds of activities here, which we have repeatedly, in our human rights reports over the years, taken issue with in countries like Egypt, or Saudi Arabia or any number of other countries? I wouldn't want to be sitting in the shoes of either your successor or mine and have to put out the US human rights report this year, which will come out in a couple of days. I'm not sure how some of the egregious abuses that have been seen in the past are going to be treated in the report this year. So let me ask Harold if he could reflect on that.

Koh: My predecessor as Assistant Secretary of State for Human Rights and I faced the same problem, which is: to what extent in a war against terrorism will the United States forgive crimes or human rights violations by friendly dictators which we would have called attention to before September 11th? We're speaking specifically about Russia in Chechnya, China and the Uighur Muslims, Uzbekistan, Pakistan, Egypt, Saudi Arabia, and a host of others, not the least of which is Israel. All of those countries are currently pushing the United States government for some sort of absolution. Putin, for example, has made a big point of saying to President Bush: "We are now joined together in a war against terrorism, so you can do what you want against your terrorists, and we can do what we want against the Chechens." Buying into this is very dangerous and a direction we need to avoid.

Second, the questioner makes a point that I should have made, which is that the person who most clearly matches the description of "unlawful combatant" is someone like Johnny Michael Spann, a US CIA agent who was killed on the ground in Mazar I Sharif. Such a charge could probably be leveled against journalists or others who are captured, like Daniel Pearl. So the unlawful combatant category, once expanded, can really put our own American citizens very dramatically at risk.

Finally, I do think that we need to be very serious about democratization in Afghanistan. If human rights were the justification, then I don't think that we can simply step away at this point and say that it doesn't really matter whether women are represented in the government of the new Afghanistan or not. That is a long-term objective (and as President Bush said, a "nonnegotiable demand" of United States foreign policy, and should be advanced.

Question: I am asking an opinion, a political opinion, in this case, from the members of this panel. What frightens me more than terrorism is fascism. I grew up during World War II in fascist Italy. And when we are told that criticizing the present administration is unpatriotic, that it is treason, three things come to my mind. Hypothesis 1: this is a fascist degeneration of our conservative right. Hypothesis 2: this is a way to win the next elections. Don't criticize the administration and they will win in a landslide. Hypothesis 3: equally worrisome is that after twenty years of peace, our political class has lost the capability to govern. And so, in an extreme situation like this, they confuse spin control with governing. Having grown up in another country, having not experienced directly what McCarthyism is, can you express an opinion to answer my question.

Kaysen: Let me repeat the question as I got it, which may not be accurate. The speaker, referring to his having grown up in another country, a fascist country, views with some concern the proposition that criticizing the government in general, and the president in particular, is unpatriotic, and offered three equally disagreeable hypotheses to explain this phenomenon. One, that it is the beginning of a fascist streak. Two, that it is a way to win the next election. Three, that the governing elites are lonely without a war, and it's some time since we've had one so let's find one. And he asks (I don't know if this was directed to a specific member of the panel, but I think that perhaps every member of the panel might give a brief comment): which hypothesis, if any, seems appropriate to the phenomenon. Harold?

Koh: In a time of crisis, authoritarianism often ends up getting supported, even though the people who assert that as a position may not be fascist. As Norman said, I think that people in the government are trying to do their job. But the thing for which they are getting the most credit at this point is an effective response, not the response that is most sensitive to civil liberties concerns. I think that leads inevitably to concentration of power. If you haven't read *Ex Parte Milligan* recently you should, because it describes how the checks and balances of our constitutional system are designed precisely so that in a moment of just such crisis, we have some other checking force to counteract those forces that would naturally seek to concentrate power in the executive.

Dorsen: I hope that I am not forced to select one of the three options that you put before us. But I would just say that it is very important for the public to feel free to criticize the government and that there is a surprising lack of that in the current situation. I have thought about that a little bit. What I think we need are the kind of people who always are most difficult for those who like things to be orderly. We need some members of congress to say some wild things. I can't imagine that 40-50 years ago, if this had happened, even during the McCarthy period, there were people in Congress, whether it was Margaret Chase Smith, or Herbert Lehman, or a few others, who said things for which they were pilloried by McCarthy. People lost their seats. Maryland Senator Tydings was ridiculed and defeated, even though he was one of the most important members of the Senate. I don't see enough shirtsleeve kinds of comments by the media or the political elite. This isn't a field that I am a professional in. But I do think that there is (and I won't call it incipient fascism; I would not select that word) a feeling they are conscious of the next election. I guess the two things I would pick are the next

election and that people like to see their policies vindicated. When they come to the conclusion that a certain policy is right, after a lot of meetings, a lot of internal debate, well it *is* right. It is what Nixon was saying: if the president says it's legal, it's legal. And if they say this is the right policy, it's the right policy. Who the hell is somebody else who doesn't know as much as they do to object (partly because of the government's secrecy)? How can they know enough to criticize us? So, we are in a situation where there isn't enough open debate. Where it will lead we will have to see.

Question: Professor Koh said that we have managed to have a number of successful prosecutions of terrorists and to protect intelligence sources and methods. I have seen this argument made and I have seen some of the facts attached to the argument. But I would be interested in the view of the whole panel on whether or not they think this is a fair statement. Are they going to be able to protect intelligence sources and methods that will be needed in the future? Because now we know that it is a rather large organization that we are going after. And sources and methods to continue to pursue terrorists we don't have yet assume a very high value for us now. So, I would just be interested in hearing a set of comments on that point.

Dorsen: I don't think that I have anything to add on this profession. I've never had that responsibility. It is obviously an important issue you raise. But I don't think that I have anything that I can contribute here on this point that would be worth the time that it would take to say it.

Koh: I am just struck by the contrast between the attitude of the career prosecutors in the Justice Department who have tried these cases, who want to keep trying these cases in US courts (and indeed one of them has been detailed to Alexandria, Virginia to try the Moussaoui case) and the attitude of Attorney General Ashcroft, who, when asked about that possibility invoked the image of "Osama TV" and the OJ Simpson case, as a kind of norm of American judicial practice. This makes a mockery of what the Senate Judiciary Committee does. It is an attitude that says that the very prosecutors the senators confirm and the very federal judges they confirm are not competent to handle the very cases that they capably handled before September 11th. Our other institutions – the postal system, the executive branch – are all functioning. So, why don't we equally trust our 200-year-old judicial system, of which we are justifiably proud?

Kaysen: I think that we have time for two more questions.

Question: The German nationals who were accused of attempted sabotage were practicing their acts inside the United States. But I have heard it said that the term "illegal combatant" can apply to people who are in a foreign country. That doesn't seem to make much sense. Is that not incorrect? Is there any precedent for the use of the term "illegal combatant" for people who are in a foreign country but who have conspired or committed acts against one's own country? That's certainly incorrect. There's no precedent for that, is there? It would then apply to all the people in a government, all the sides, everybody in a foreign government with which we might be at war even.

Koh: I agree

Dorsen: Apparently so

Kaysen: You've convinced the lawyers.

Question: On the basis of what you said, I wonder whether you agree with me that one of the most frightening things at the moment is that Bush has over 80% consensus and trying to keep it. That's the real danger.

Kaysen: The questioner expressed anxiety that in these circumstances the president has an 80-85% approval rating. I'll comment. Why are you surprised? There is some serious political science research that shows that in the outbreak of a war, support for the president always rises, even in wars which are quite unpopular. Korea, and Vietnam were our two most unpopular recent wars, and perhaps our most unpopular wars for a long time. Both showed a bump up, a significant bump, up in the approval rating of the president, and with respect to Mr. Truman, an unpopular president. And before the September 11th, Bush was a moderately popular president. So you might say that this increase is not unexpected. I don't know to what extent that answers the question.

Let me thank the panelists, thank the audience, and end up with a comment about an issue to which Norman Dorsen made a bow, but not enough of a bow. That is the question, what is the goal? I think if you say the goal is punishing criminals, almost everything our two legal scholars said seems to me a propos and important. If you say the goal is anticipation, prevention, and damage limitation, in a contest to the kind of threats with which we have been discussing, then maybe punishment is only one element of deterrence (how big is arguable, especially with people who are ready to commit suicide). And it seemed to me that issue – which is a very important issue – was not as much engaged by the panel as it might have been. On the other hand, they had $\frac{3}{4}$ of an hour and what can you expect? Thank you very much.