

LUNCHEON ADDRESS: SECURING LIBERTY[†]

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The single most important responsibility of any culture is the transmission of values from one generation to the next. The study and practice of law are disciplines where fundamental values of the American culture are protected and enriched. Nothing is more important to America than an understanding of our core value of liberty and the way in which we protect, enrich, and enhance that core value and its place in our culture.

The current security environment including large-scale threats by terrorists presents a new paradigm of peril that must be addressed. As threat potentials evolve, the defense of liberty must adapt. On March 5, 1946, in Fulton, Missouri, at Westminster College Winston Churchill sounded the alert, “From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the Continent.” He described a new paradigm of peril that would transform world politics. Citizens in the United States and around the globe would adjust their lives to accommodate a changed order for over half a century.

Similarly, the events of September 11, 2001, ushered in a new paradigm of peril, or at least made us acutely aware of it. It marked us anew and indelibly. It awakened us to the fact of an unprecedented level of lethality that is available to those who would attack freedom-loving communities such as the United States, assault our institutions, and seek to undermine our freedoms. It would mandate a change in the way we operate and how we respect and protect human dignity in the context of liberty.

The nature and scale of modern lethality is grossly different than it has ever been in history. We can compare today’s lethality with what existed in the early days of American culture. At the time of the American Revolution, black powder was among the most robust of explosives. If a container of black powder the size of this podium were detonated in a hall with several hundred people, it would kill a number of people, injure many more, and give everyone else a pretty significant ringing in their ears for a period of time.

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In the 1860s, Alfred Nobel found a way to combine and stabilize nitroglycerine so it could be an exponentially stronger explosive. Known as dynamite, it elevated the level of lethality significantly.

Add almost eighty years to Nobel's achievement and you get to August 6, 1945, when U.S. President Harry Truman announced to the world that America had won "the battle of the laboratories." The victory in the battle of the laboratories meant that America had found a way to use atomic energy in a way that would be decisive in the war. America unleashed that power over Nagasaki and Hiroshima. President Truman understood that technology was the way in which America could protect our freedom and win the peace. Yet, that formula for peace planted seeds, which today have grown into a lethal threat.

The nearly seventy years that followed Truman's announcement take us to the present day and the second component of the new paradigm of peril. The second part of that paradigm is that the new robust lethality is both transportable and deliverable in ways never before available.

During the American Revolution, according to David McCullough's recent book *1776*, Americans stood over the hills of Boston and watched the British fleet advancing across the bay. It is easy to imagine them stroking their chins saying, "If the winds don't change, they should be here in another twenty or thirty minutes or another hour or two. Let us go down to Starbucks and get a cup of Joe." Then, threats advanced against a culture at the speed of sailing vessels or horse drawn vehicles.

In revolutionary times, enough destructive capacity to disrupt a culture could only be transported by another culture. It took the capacity of a nation state to deliver something that was big enough to disrupt a state. But with modern miniaturization of lethality and jet-aged transportation, we face the potential of a nuclear weapon the size of this podium that could vaporize an American city and destabilize the entirety of the American culture. That kind of lethality and deliverability not only defines a new scale of peril, but it means that those who can threaten America are more numerous. Instead of having to prepare against threats posed only by nation states that have the scale and mass to disrupt America, we have to look to the potential disruptive capacity of individuals or small, non-state institutions, such as al Qaeda.

Another aspect of modern peril is its "fragmentability." In earlier days, an assault on a nation would require traceable troop movements. As we look back to 9/11 we find that the terrorists operated in small groups of individuals in scattered settings. The terrorists fragmented both their planning and implementation to avoid detection. The fragmentation of the terrorist threat necessitates integration and cooperation on the part of those threatened. America needs the

cooperation and help of other cultures to detect and prevent acts of terror before they can be coordinated and launched.

This cooperation is part of a necessary new plan of prevention. As a result of the modern paradigm of peril being more lethal, deliverable, fragmentable, numerous, and potentially dispersed, America has to be more agile, integrative, and cooperative in her new preparation and prevention.

On one hand, America has to be more focused; on the other hand, America has to be broader. America must cooperate internationally. One of the major conclusions about 9/11 is that the domestic security of the United States is no longer merely a domestic endeavor. Put differently, to secure America internally, we have to act externally—to secure America nationally, we must work internationally. The fragmentation of terror mandates the international cooperation and integration of law enforcement. If we do not understand that, we will be unable to detect precursor activities in order to disrupt the next attack.

When our forensic experts reconstructed the events of 9/11, they found that Afghanistan was the terrorists' training ground; Germany was a planning ground; and funding flowed from a variety of Middle Eastern communities. America herself became the task-specific flight training arena. Kuala Lumpur was a base where terrorists regrouped and fine tuned the operation. Seeing any one of those activities in isolation might not trigger an awareness of or reveal the real potential of the operation but, seeing those activities in an integrated way reveals that a coordinated response to the fragmented operation would be America's best hope to detect and defeat such an attack. An integrated response is part of the new plan of prevention that America must understand to overcome the paradigm of peril.

America is struggling towards such a program of prevention. As America struggles, we hope that we can remain secure and uninjured. There are cultural trends in America that make it difficult for us to accommodate the new demands of the paradigm of peril with the new demands for the priority of prevention.

An aspect of modern American liberty is a trend towards specificity in rule-making and regulation. On one hand, the idea is that we govern everything with a predetermined legalism that anticipates and forecasts all circumstances. It assumes we can craft ways of directing and refining our activities so that no matter what happens we will act within a predetermined set of rules that have been negotiated, enacted, signed into law, and implemented. On the other hand, there is a need for additional agility and flexibility that is occasioned by the constantly evolving new paradigm of peril characterized by greater lethality, deliverability, fragmentation, and difficulty in tracking. This need for agility and flexibility is in tension with our cultural demand for specific

rules and hard, clear answers determined in advance on all the issues. As a result, it is most important to have robust, clear, and transparent focused discussions about what is necessary for us to accommodate the realities of the world. Winston Churchill talked about the realities in 1945; we need to talk about the realities in these times of vastly accelerated changes in threat capacities.

The culture of legalism, some might say, is at odds with the acknowledged concepts and ideas of national security that require agility, flexibility, and responsiveness. Fighting terrorism is tougher today than defending America has been in previous settings. It is tougher because there are identity issues—who is the enemy? We did not have a whole lot of trouble figuring out who the enemy was after Pearl Harbor—not a difficult task. Terrorism attempts to destroy our liberty and disrupt our culture by targeting civilians. That has not been the case in the past. There is a difference between the kind of threat that we endured in Pearl Harbor and 9/11—what happened in New York, what happened in Washington, what happened in Pennsylvania.

When terrorists target our civilian population, America is forced to defend a much broader set of resources. Virginia happens to be one of these locations in our country where every place you put your foot is a battlefield of some kind. They were, however, conventional sorts of battlefields. When Virginia was a battlefield, at the end of the day, from time to time, a truce would be called and the commanders or generals who had been roommates or classmates at West Point would stroll through the battlefield, supervise the collection of the wounded or the dead, agree that they had been enemies and that they would be enemies, and go back to the lines to resume the battle the next day. Defending the civilian population was not the same concern in the way it is in the war against terror. The defense of the civilian population of the United States of America is a matter of focused concern in the war on terror. Because we are all targeted, terrorism threatens liberty of the civilian population in ways that other attacks against America have not.

There are some individuals who want to minimize the impact of terrorist attacks. For too long we have misstated and misunderstood the full impact and consequences of terrorism. In no way do I downplay the horrific attack on Pearl Harbor, but we must remember that the Pearl Harbor attack, infamous for its casualties, had fewer casualties than 9/11. It was a terrible attack; yet, it was not an attack on an American state. In 1941, Hawaii was not yet a state. Unlike 9/11, the attack on Pearl Harbor attacked a military target, not a civilian target. We have to understand that finding ways to address the new paradigm of peril with a new paradigm of prevention is a struggle.

In this effort, there are those who want to talk continually about balancing freedom and security. I believe the notion of balancing

freedom with anything should be rejected. There are no parallel values to liberty in my pantheon. Freedom is *the* value. When we talk about security, we should ask: secure what? The right answer for filling in that blank is securing freedom. The purpose of security is to enrich freedom. It is not to counterbalance freedom; it is not to somehow offset it.

The right thing to do with liberty is to secure it. When thinking about security, one should ask a simple question: is our liberty going to be worth more if we add this security than if we do not add this security? If our liberty is not worth more with that security, then we should not have it.

Some may want to return to the shop-worn idea that the enactment of laws inevitably result in a net loss of liberty. I reject that notion. If you are in a state of nature and there are no laws, passage of a law prohibiting murder and rape enhances liberty; it does not restrain liberty. Amending the Constitution and enacting laws against slavery enlarged liberty. They did not diminish it. The purpose of law is to enhance freedom, to enlarge and enrich liberty. Laws that fail to do so should not be enacted, or if enacted should be repealed. If the net liberty value of laws relating to security is ever negative, they should be abandoned.

But there is great confusion in American culture about how to respond to the new paradigm of peril and how to construct a new paradigm of prevention. Part of the great confusion results from courts inserting the Judicial Branch into a decisionmaking role that was intended by the Founders to be reserved to the political branches of government. Of late, the judiciary has rushed in where Founders feared to tread. One noted jurist wrote that he wanted to have clear rules but, “in extreme cases” the President simply would have to break the laws in order to defend the security, integrity, and liberty of America. The jurist proposed that America have laws governing most situations but that we should expect the President to break those laws, even to act criminally in order to defend the country. I simply cannot understand how you would want to have the person responsible for enforcing the federal laws in the country pledge in a presidential debate, “Yes, I will break the laws, and this is when I might do it.” In the event of such a situation, the President would then have to throw himself on the mercy of the prosecutors, hoping that they would not prosecute. Although this is an unrealistic position, it comes from well-respected members of our judicial and legal communities.

Can you imagine a President having to consider how popular he was on other domestic agenda items because he would have to throw himself on the mercy of potentially politically ambitious prosecutors having defended the United States?

As the courts have invaded the national defense arena, the ability of hard-working legal analysts to provide counsel has become increasingly difficult and has been challenged more and more pervasively. If the rule of law means anything, it means that there is freedom for people to understand what they can and cannot do—which actions are legal and which are illegal. When it cannot be determined what is legal and what is illegal, two things happen. First, uncertainty induces paralysis because one cannot know what is legal or illegal. Second, multiple legal opinions and analyses are sought in search of certainty, thus elevating legal costs.

The syllabus of *Hamdan v. Rumsfeld* lists the position of the United States Supreme Court justices as follows:

Stevens, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI-D-iii, VI-D-v, and VII, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined, and an opinion with respect to Parts V and VI-D-iv, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a concurring opinion, in which Kennedy, Souter, and Ginsburg, JJ., joined. Kennedy, J., filed an opinion concurring in part, in which Souter, Ginsburg, and Breyer, JJ., joined as to Parts I and II. Scalia, J., filed a dissenting opinion, in which Thomas and Alito, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined, and in which Alito, J., joined as to all but Parts I, II-C-1, and III-B-2. Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined as to Parts I through III. Roberts, C. J., took no part in the consideration or decision of the case.¹

If the rule of law means anything and if the law should in any way be a guide to behavior, it is challenging, to say the least, to expect the rule of law to be followed by law-abiding public officials and citizens in a context where the Supreme Court itself is fragmented in more ways than a windshield hit by a tombstone.

The Justice Department's responsibility is to advise the administration. There is not a group of individuals more dedicated to giving the correct advice and counsel to the President of the United States than Justice Department lawyers. I am not talking about Republicans or Democrats. I have never met a person in the Justice Department who did not sincerely desire and attempt in every respect to offer the best advice.

The Justice Department's advice in regard to defense policy was given on numerous occasions and was tested in court. The Supreme Court ruled in four notable cases: *Rasul v. Bush*,² *Hamdi v. Rumsfeld*,³

¹ 548 U.S. 557, 564 (2006) (syllabus).

² 542 U.S. 466 (2004).

³ 542 U.S. 507 (2004).

Hamdan v. Rumsfeld,⁴ and *Boumediene v. Bush*.⁵ The Supreme Court overruled the Justice Department and the lower courts in some measure in each of the cases.⁶ At the Court of Appeals level, in the four cases mentioned, all but one judge voted with the Justice Department.⁷

What would cause that many judges of the Courts of Appeals to misunderstand what the Supreme Court would later recite as the law? The Courts of Appeals are a little closer in time to the real events, possibly making concepts like “necessity” have a different influence on the decisionmaking. The Courts of Appeals are also bound by precedent in ways that the Supreme Court does not see itself bound. Regardless, it is curious that the American legal system operates in such a way that makes it most difficult for even Courts of Appeals judges to anticipate the correct disposition of vital national security issues.

In such a matrix of uncertainty, when the solution is—according to some members of the federal judiciary—that we need public officials who are willing to violate the law and then throw themselves upon the mercy of the public in order to save the democracy from attack, you begin to grasp the importance of discussing these issues and coming to a resolution that actually confronts the new paradigm of peril with appropriate plans for prevention. It should not, however, involve ways that call upon public officials somehow to be expected to disobey the law.

The defense of freedom is the single most important responsibility we have. The maintenance of a culture in which people grow by virtue of their freedom to be creative and productive is at the top of all of our lists.

There are numerous cultures that might allege they are better than other people, but we cannot be better than other people because we *are* other people. It is the character of freedom in our culture that makes this the best place, hands down, for anybody from anywhere. We are all

⁴ *Hamdan*, 548 U.S. 557.

⁵ 128 S. Ct. 2229 (2008).

⁶ *Id.* at 2275 (overruling the Government’s use of the Detainee Treatment Act as an adequate review procedure for habeas corpus petitions); *Hamdan*, 548 U.S. at 613 (overruling the Government’s use of military commissions to punish individuals criminally as violations of the Uniform Code of Military Justice and the Geneva Conventions); *Hamdi*, 542 U.S. at 535 (rejecting the Government’s insistence under separation of powers principles on a limited role for the courts during a state of war); *Rasul*, 542 U.S. at 484 (granting the federal courts jurisdiction to hear habeas corpus petitions from executively detained aliens at Guantanamo Bay over the Government’s objection).

⁷ *See* *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007) (Judges Randolph and Sentelle voting in favor the Justice Department’s position); *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005) (Judges Randolph, Roberts, and Williams voting in favor the Justice Department’s position); *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003) (Chief Judge Wilkinson, Judges Wilkins and Traxler voting in favor the Justice Department’s position); *Al Odah v. United States*, 321 F.3d 1134, 1135 (D.C. Cir. 2003) (Judges Randolph, Garland, and Williams voting in favor the Justice Department’s position).

from someplace else. It is the nature of our freedom that makes the difference. We need to be clear about the fact that it must be defended. We must provide a capacity for the defense of freedom that is intelligible enough for people to be able to make good decisions and to make those decisions with character and integrity.