Keynote Address

After September 11th

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The common sense of shock has lingered since September 11th. On that infamous morning, I was flying from New Haven to Washington in a small plane, and did not know initially why we were suddenly diverted to the airport in Baltimore. Only on arrival did we learn of the al Qaeda attacks on the World Trade Center in New York City and the Pentagon. We watched the trade center towers collapse, over and over again, on the television news broadcast. The sense of dread was unavoidable. The terrorist career of Osama bin Laden has shown an unremitting ambition over the last decade, and a gargantuan appetite for violence. In 1999, when I looked closely at bin Laden's handiwork,[1] it was apparent that the al Qaeda chief was seeking a nuclear device. On September 11, 2001, no one knew whether this ultimate weapon of mass destruction might already be in his arsenal. The New York City attacks could have killed 25,000 people or more, had the building evacuations not succeeded, and al Qaeda's attack on Washington had other targets beyond the Pentagon. Bin Laden has passed beyond any escalatory threshold, unchecked in his hostility to the West. With full-throated nihilistic violence, bin Laden defies the possibility of compromise.

The events have made plain the fragility of any liberal society. The qualities we take most for granted and cherish most dearly -- such as privacy and freedom of movement and the diversity of a multi-ethnic society -- are the very sources of our vulnerability. Economic globalization, touted as the answer for the next century, has been challenged by a globalized skein of cooperating terrorist networks, skilled at moving men, money, and materiel from region to region, from the Philippines to Afghanistan to Europe and now to North America. Al Qaeda framed its attacks against buildings that stood as symbols of international commerce,

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1. *See generally* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999).

as if to trumpet the globalization of violence against the more secular view of a world economy.

Bin Laden and al Qaeda pose unique problems as adversaries. To be sure, dealing with non-state actors is nothing new for veterans of the 1990's. We watched the ethnic communities in the African Great Lakes and the Balkans tear their countries apart, and occasionally we applied the law of war to their activities, through the ad hoc international criminal tribunals. Yet these communities had programmatic demands. The Bosnian Serbs, for example, wanted union with Serbia and contiguous territory for Republika Srpska. But here we have an adversary who does not have a set of worldly demands. Holding fast to martyrdom, al Qaeda members cannot be deterred in an ordinary fashion.

The single-minded violence of al Qaeda is also pernicious because the network has no other competing interests. States usually have other fish to fry. States have a territory and population to protect, as well as commercial relationships. But here we face an adversary who really does not seem to care about earthly things, only about the triumph of an eschatological ideology.

What this means operationally is less clear. We will have occasion to act multilaterally and rally against terrorism. Some of the older treaty projects embarked upon by the U.N. are useful in this effort. The terrorism treaties of the 1970's condemned aircraft hijacking and aircraft bombing and attacks on diplomats, and then used universal jurisdiction and the idea of international crimes to encourage their prosecution. The Terrorism Working Group of the United Nations General Assembly Sixth Committee has lately produced other useful treaties on the financing of terrorism and on terrorist bombing. These were initially intended to address the problems of civil wars such as the fight between the Tamils and Sinhalese in Sri Lanka, fueled by financial booty from expatriates around the world. But the treaties have broader application, against the financial networks that sustain al Qaeda. The U.N. has pressed for these two new conventions, trying to keep fuel away from the fire.

The decentralized structure of al Qaeda is a particular challenge. We will have to rely in large part on police work to root out its scattered groups in Europe, Asia, and elsewhere. With the member countries of the U.N., the G-8, OECD and NATO, we are going to need an active campaign of police work, to unravel the threads and burst the cells of the network.

Bin Laden underestimated American resolve to carry the fight to his center of gravity in Afghanistan. His second strategic error is in placing even the Europeans in doubt of their own safety and stability. The planned attack on the Strasbourg market and the chemical plant explosion in Toulouse have frightened the French. The discovery of cells in Milan, Hamburg, and elsewhere have shown that Europe's tradition of guarding data

privacy and reticent police tactics has been exploited by al Qaeda.

Yet our erstwhile European allies became faint of heart in the 1990's when it came time to counter Saddam Hussein's Iraqi program to develop weapons of mass destruction. The Europeans have commercial ambitions in the region and diverse immigrant populations. One hopes for real-time cooperation in policing, after these earlier defections that served narrower interests.

The great debate at the moment poses a paradigm choice -- under what regime of law should we think about and act against al Qaeda? Should we think of the network in criminal justice terms, as we have throughout the 1990's, or in war and armed conflict terms? Lawyers have a vested interest, some might suppose, in choosing criminal justice. But the law speaks as loudly in armed conflict as it does in criminal justice. The scope of the damage caused on September 11th makes the language of war seem apropos, and this has some important consequences.

To intercept al Qaeda's plans for future attacks, it is crucial that we go beyond retrospective historical reconstruction. Criminal charges look backwards and include only selected individual offenders for the sake of a manageable trial. Criminal justice supposes that deterrence is possible. We need to think about the anticipatory moves that one makes in war. We need, and have newly obtained, the pooling of information between the domestic criminal justice agencies and the intelligence agencies. The Patriot Act now allows domestic criminal justice agencies to share with intelligence agencies both grand jury information and criminal justice wiretaps that often yield important information on network plans.[2] The effective sharing of foreign counterintelligence wiretap information will also be encouraged. We have resisted both in the past. The thought in the 1970's in the aftermath of the Church Committee hearings was to segregate intelligence and military matters from the domestic realm. Intelligence agencies could operate only beyond the water's edge. But on a homeland battlefield, that bright line has faded. When you are fighting a transjurisdictional globalized network, a coastal Maginot line doesn't work. It will take a network to fight a network. If we have the CIA operating overseas and the FBI conducting onshore investigations and they cannot marry up their data, there will be little ability to anticipate the adversary's moves. Following network activities, foreseeing and disrupting al Qaeda's plans, involves matching up thousands of pieces of data -- car rental agreements, hotel leases, student ID's, double endorsements, ambiguous remarks on wiretaps, surveillances of physical movement -- and this cannot be done

2. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, § 203, P. L. 107-56, 115 Stat. 272 (2001).

through a single liaison officer in the CIA counter-terrorism center. You have to have the equivalent of joint terrorist task forces, with intelligence people and domestic criminal investigators working side by side to reconstruct in real time the RICO style architecture of these networks. For those reared in civil libertarian households, where intelligence agencies were to be confined and exiled overseas, this is a bit of a startle. But in the exigencies of our time, a rank ordering of relative dangers is necessary. In my own view, it was long overdue to have the sharing provisions of the Patriot Act, and indeed the statute should be further extended to allow some limited sharing with foreign intelligence officials and with state and local officials. The *right* to share also has to be *acted upon* through a changed culture in all affected agencies.

We also need to think creatively about the modalities of trial, if we catch people who are alleged to belong to al Qaeda. In debates after the attacks, I have had a constructive disagreement with my good friends Professor Anne-Marie Slaughter of Harvard and Professor Harold Koh of Yale. America chose to use full dress civilian trials in the Southern District of New York for the first World Trade Center bombing case in 1993 and the East African embassy bombings in 1998. We obtained convictions, but al Qaeda did not slow down. Now we have to be discerning about what the structure of ordinary criminal trials may mean for our efforts to interrupt and intercept future al Qaeda plans. In a federal trial, the government is traditionally expected to have almost open-file discovery. Any evidence offered against the defendant, even from a highly classified source, must be presented in open court. The transparency is desirable in ordinary circumstances, but in the middle of a conflict, the adversary can read the trial record along with the public. This might argue for putting criminal justice aside until the conflict is over and detaining combatants as prisoners of war or unlawful combatants, straight up. In the alternative, we may take a page out of Justice Jackson's book and adapt the forms of trial to the situation. We may wish to consider a liberal version of the military commission, a forum under the law of war used by the Allies in the Second World War to try war crimes in Europe and the Far East. A military commission was used for the trial of German saboteurs captured on Long Island and Florida, German nationals in China, and the Japanese commander in the Philippines, General Yamashita. These commission proceedings were approved by the Supreme Court on three separate occasions.[3]

A military commission allows two things: some latitude in the admission of reliable evidence, and some ability to close limited portions of a

3. *See Ex parte* Quirin, 317 U.S. 1 (1942), Johnson v. Eisentrager, 339 U.S. 763 (1950), and *In re* Yamashita, 327 U.S. 1 (1946).

trial to avoid the gaze of the adversary. Our sensibility is different from the 1940's. In the Supreme Court review of habeas corpus petitions from the commission trials, some justices dissented from perceived deficiencies of the trials. It will require a sensitive brush to adapt the picture of 1945 to our own political and philosophical aspirations. But we must keep in mind that fifty years ago, civil court procedures were also quite different from our present view. We surely should not educate an adversary about the engineering stability of skyscrapers or the source of our wiretaps of al Qaeda operations. In the first World Trade Center trial, the question was asked whether the Trade Center could withstand certain kinds of shocks to its system. We all learned, and al Qaeda learned too, that the Trade Center could withstand the impact of a Boeing 707 jet airplane, but the implication lingered -- a larger plane might exceed the buildings' engineering tolerance.

A greater range in admitting evidence for evaluation is consistent with civilized methods of trial. Both European trials, international trials, and American bench trials admit reliable forms of hearsay. The European doctrine of *mittelbarkeit* says that one can admit hearsay, and critically evaluate its appropriate weight. Eyewitness testimony is preferred, needless to say. But even hearsay evidence may be entitled to some weight. Osama bin Laden is said to have telephoned his mother before September 11th to warn her of the event. Bin Laden's mother surely would not testify. Yet, say that she told a good friend about the call. In federal district court the jury would not get to hear of the matter at all, even where the friend is willing to testify and has no apparent reason to distort. The Anglo-American system has distrusted the capacity of juries to give appropriate weight to varied forms of evidence, but other tribunals would permit its consideration. The Federal Rules of Evidence are not the only model of fairness.

Our ability to adapt civilian courts to handle these practical problems is limited by three decades' constitutionalization of civilian criminal procedure. Beginning in the 1960's, the Supreme Court embarked on a long project of reforming federal and state criminal procedure, using the due process clause of the Fifth and Fourteenth Amendments as the instrument. The reforms may be judged a success for ordinary cases. But the use of the Constitution as a vehicle for change now means there is less sure room to adapt American civilian trials to these radically changed circumstances. At a minimum, it would warrant the consideration of the Congress to judge whether federal district court trials can be adapted to the felt problems of intelligence protection and wider-ranging admission of available evidence, within the bounds of our civil constitutional norms. For the moment, the older venue of military commissions, authorized by the Congress in Title 10 and long serving as the trial venue for war crimes, provides an alternative forum.

Apart from trials, we need to understand the limits of criminal justice as an alternative to national security decisionmaking, when it comes to planning our responses. The Washington Post published an extraordinary report on October 3rd in an article by Bart Gellman -- asserting that there was a bypassed chance to seize Osama bin Laden in 1996.[4] The Khartoum government was reportedly willing to force bin Laden to leave his lair in Sudan, and hand him over either to America or the Saudis. We did not push the Saudis to take him captive. We did not try to intercept his airplane. Rather, we let bin Laden fly to Afghanistan where he reestablished his enterprise with the visible results of September 11th. The reason for this lapse was the misapplication of criminal justice standards. The director of the Federal Bureau of Investigation reportedly advised the White House that there was not yet a fully-formed criminal case against bin Laden and hence no way to detain him.[5] The White House wrongly assumed that criminal justice was the only standard by which one could act against an adversary, and let bin Laden fly off to Afghanistan where he was able to operate with impunity.[6] But self-defense and military rules of engagement are different from civilian criminal court. One need not have trials before self-defense. The National Command Authority does not report to the FBI.

In the 1998 response to the Embassy bombings, the United States used Tomahawk missiles to attack bin Laden's camp at Khost, Afghanistan, and a pharmaceutical plant in Khartoum that was believed to have links to bin Laden and the manufacture of chemical weapons. My colleague Jules Lobel of the University of Pittsburgh School of Law has argued in debate that it was improper to use military force until the criminal investigation was complete and that all justificatory evidence should be made public.[7] In my view, this is a highly impractical standard, when faced with a dangerous foe and continuing threat.

On the military side of things, we have some hard choices. The United States has the largest military budget in the world – as high as 3.5 percent of our Gross Domestic Product. The Europeans consistently lag behind – generally limiting their commitment to international security to amounts that range from 1.5 to 2 percent. In the debate on United Nations dues,

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4. Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts to Capture Bin Laden or Have Him Killed; Sudan's Offer to Arrest Militant Fell Through After Saudis Said No*, WASH. POST, Oct. 3, 2001, at A1.

5. The former United States Attorney for the Southern District of New York, Mary Jo White, was not informed about the Sudanese offer.

6. *See* Ruth Wedgwood, *The Law at War: How Osama Slipped Away*, NAT'L INT., Jan. 1, 2001, at 69.

7. *See generally* Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999).

American policymakers could not help but notice that we paid the lion's share of NATO expenses, the deterrent that provides authority to many U.N. Security Council resolutions.

But even our military might is challenged by the task that we have at hand. The Pentagon began the current Quadrennial Defense Review asking how one could both modernize the force, go into space and cyberspace, and rejuvenate old equipment. The proposition was seriously entertained before September 11th that we might demobilize two active army divisions, four reserve divisions, a marine expeditionary force, and a carrier battle group. The civilian leadership wisely polled the views of the Joint Chiefs of Staff who argued that the operations tempo of military personnel was already at the breaking point. With the future that now lies ahead, with a limited land conflict in Asia, any idea of going below ten ready divisions is even more questionable. So in the future, without significant increases in spending, what do you give up? Modernization? Going into space? Or the chance to renew aging equipment? None of these alternatives is attractive. Liberals and conservatives alike have a duty to consider that, even with our philosophy of limited government, it may be necessary to make a substantially higher investment in international security over the long term. For many decades the U.S. has been the keystone in the architecture of deterrence in Asia, the Middle East, and Europe. This will not change soon.

The American academy and political leadership also have a separate burden, in particular, a short-term and long-term engagement with Islam. In my mother's expatriate girlhood, the primary historical event taught in French schools was the victory of Charles Martel at the Battle of Tours, beating back the Saracens so they could not pass beyond the Pyrenees, saving France for Christianity. This was a central event in French self-identity. Even now the Europeans have not liked to recognize how intermingled they are and always have been with Islam. The glory of Cordovan Spain was as a center of Islam. The Omayyeds of Spain were not a peripheral suburb of Middle Eastern Islam, but the powerhouse of Islamic scholarly thought. Abd ar Rahman the Third made Cordova an intellectual center of Europe for all scholars -- Christian, Jewish and Islamic alike.[8] The Islamic scholar Averroes was recognized by Thomas Aquinas as a crucial philosopher in the one truth of God. Yet the embrace between Islam and the West now seems to have fallen by the side. The fault lies with both parties, dare I say, but one part of it is the adoption of an almost truculent closed identity by Europe, as well as the decay of Islamic-Arab intellectual independence.

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8. Maria Rosa Menocal, *A Golden Reign of Tolerance*, N.Y. TIMES, Mar. 28, 2002, at A31.

Europeans uneasily recall the role of the Turks in Central Europe. The Ottomans were at the gates of Vienna in 1683, and lingered in Budapest until 1686. The Ottoman Empire was a key actor in the Balkans throughout the nineteenth century (hence the Serb sobriquet that all Bosnian Muslims are "Turks"). With the collapse of the Ottoman Empire in World War One, the Allies were inclined to punish Turkey by carving it up, initially intending to neutralize the Dardanelles, consign the Aegean coastline to the Greeks and Italians, and leave Turkey as a pastoral upland plateau. This plan, of course, was countered by the resistance of Mustafa Kamal, and followed by ethnic bloodletting in the coastal city of Smyrna that prolonged Greek-Turkish antipathy long after the exchange of populations under the Treaty of Lausanne. The antipathy has not yet given way, despite Turkey's charter membership in NATO and its key alliance with the West in the Cold War. Turkey is a secularized administrative state. It has resisted Islamist fundamentalism. It has a close military relationship with Israel. Yet, even now, the self-identity of Europe as Christian marks the divide, even while individual Muslims have emigrated and make up large segments of Europe's population. A strange and unhappy resistance to Turkey's candidacy for the European Union has continued, even while Cyprus has been proposed for membership. Though there are sharp divisions within the Muslim world, still the example of Europe's inhospitality strikes home.

A cure for the current antipathy between the West and Islam also depends on Muslim intellectuals and political leaders, both at home and in Europe. It is startling to see that even after the events of September 11th, a whole generation of European-Arabs has remained silent. Living and studying in Europe for decades, nonetheless few have felt able or willing to take it as their own task to confront the militant brand of Shiite and Wahabi fundamentalism that so rudely attacks any embrace of modern civic nationalism or secular culture.

But the divide is our own challenge as well. Rather than seeing the study of Islam as the recondite specialty of a few scholars such as Bernard Lewis and Fouad Ajami and an occasional professor of religion, we need to understand enough to speak in resonant terms to a generation of Arab students and Turkish students and Persian students. We need to revive the study of Islam, both its historical engagement with the West, and though it might be presumptuous to try, the sources and arguments of Islamic theology. Our students should be able to speak intelligently about the world view of militant Islam and its violent account of jihad, as well as the Islamic world view that is more pacific and engaging. Though moderate Islamic intellectuals may feel intimidated at the moment, even with greater courage, they need to have a cohort within which to revive a different conversation. They will need the indirect support of the West. And we also have the duty of speaking directly to the Arab street. We cannot

leave it to Saudi-funded charities to provide elementary education in Pakistan, but rather, need to find a way to provide secular education and scientific education to youngsters in Egypt, Pakistan, Afghanistan, and elsewhere, that does not leave them captive to mullahs who are destructive in their plans.

Some proposed cures remain wishful. Money alone is not the answer, for Egypt has shared generously in the five billion dollar annual aid package used to sustain the Camp David accords. The Saudi economy is not as wealthy as once it was, but Saudi Arabia's oil reserves could provide a regional Marshall Plan; many Muslim countries share resentment at Saudi unwillingness to invest in the region. Money alone is not going to change the governments that are undemocratic, that do not try to develop their economies, and that do not embrace their disaffected youth through any other mechanism than sheer repression.

America needs to be hard-headed and act robustly in self-defense, especially when the stakes are so high. But at the same time, we may address an intellectual challenge to our cultural institutions and also to foreign governments. For the sake of our own breadth of view, as well as for self-protection, we need to understand all the roots of our civilization, not only within Judaism and Christianity but within Islam as well.