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Thomas McK. Sparks and Glenn M. Sulmasy (Editors)

XVIII

Debating the Issues

Kenneth Roth and Robert F. Turner*

Moderator: The last set of questions to the preceding panel members is a perfect segue to questions of law enforcement and military responses to fighting terrorism, and in this particular case, targeting terrorists. We are now going to take a closer look at questions of preemption and prevention, as well as specific techniques that might apply to combating terrorists and terrorist groups.

I am a journalist and generally examine the issue of targeting terrorists through a domestic lens focused on homeland security and criminal justice, so I am looking forward to a debate that broadens the focus to include international law and military operations. This debate is much more interesting when we start to compare activities conducted beyond the borders of the United States with activities conducted within our borders, and then determining what standards will be applied in targeting terrorists abroad versus within the United States.

Our first speaker is Mr. Ken Roth, who has been Executive Director of Human Rights Watch since 1993, and served as the deputy director of that organization from 1987 to 1993. Human Rights Watch is the largest human rights organization based in the United States. Its researchers conduct fact-finding investigations into human rights abuses in all regions of the world and then publishes those findings in dozens of books and reports every year, generating extensive coverage in local and international media.

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

Mr. Roth: It is an honor to be here. I am grateful for the invitation. I am also grateful to the Supreme Court for waiting to hear the benefits of today's conversation before deciding the *Hamdi* and *Padilla* cases now pending before it so that we can address the issues from a blank slate. What I will address this morning is the question: what are the limits to the war on terror. More specifically, when is the war on terror a real war and when is it a metaphor more akin to the war on drugs or the war on poverty or various other efforts to mobilize the population to pursue an important goal.

Obviously Afghanistan was a war. There is no question that armed conflict occurred there. Insofar as Iraq had anything to do with terrorism, no question, that was a war, too. But what about elsewhere? President Bush has spoken about the war on terror being global, since al Qaeda has cells around the world, so the war against it and the war on terrorism must be pursued globally. Is he speaking in a metaphoric sense or literally? The answer to that question is important because if we're talking only metaphor, then we are obviously applying the rules of peacetime law enforcement. And under those rules, as you all know, you have a duty to arrest a suspect if at all possible—indeed only arrest the suspect upon probable cause. Then the suspect is brought before a judge, represented by a lawyer, entitled to a trial, et cetera. Lethal force can sometimes be used but only if strictly necessary to stop a threat to life or a threat of serious bodily injury to another. And so lethal force is carefully circumscribed. In a war context, you look at the law of armed conflict. If you have detained an enemy combatant, there is no need to give him a lawyer, no need to give him a trial, no need to charge him with anything. In the midst of battle, you can shoot to kill. You don't have to attempt arrest. Obviously, if an enemy surrenders, you have to respect that. But if, for example, the enemy combatant is walking down the street or operating on patrol, you can shoot to kill. You don't need to first attempt an arrest. Those are big differences. The question is: which set of rules should apply to combating terrorists—those for law enforcement or those for law of armed conflict.

Unfortunately, the law of armed conflict provides relatively little guidance for making that decision. It sets forth detailed rules that apply once you have an armed conflict. But it is unclear, however, exactly when the circumstances are such that they may be considered to be an armed conflict.

If you look at the commentary to the 1949 Geneva Conventions, for example, there are references to the intensity of the violence and to the regularity of armed clashes. You can argue that the series of al Qaeda operations from the African embassies to the *USS Cole* to the World Trade Center are but a series of very important criminal acts, or you might argue that those are various acts of war. There is no

terribly good way to resolve that argument by looking to the Geneva Conventions and the accompanying commentary. You end up having a battle of metaphors.

What I propose to do is to look beyond the metaphors and to try to examine a few cases—some troublesome cases—to see whether they help us decide the point at which the real war on terrorism should end and the metaphor should begin. I would like to examine these cases from a policy prospective to determine what really makes sense. I'll conclude by proposing a general rule that might provide guidance in drawing that line.

The obvious place to start is the Padilla case. Padilla, of course, is the alleged "Dirty Bomber" who flew from Pakistan to Chicago's O'Hare Airport. It now appears that maybe he wasn't pursuing a dirty bomb; maybe he was going to blow up an apartment building. But whatever he was doing, he seems to have been up to no good. The US Government, after initially arresting him as a material witness, very quickly moved to classify him as an enemy combatant and then shipped him to the naval brig in South Carolina. There he was denied access to his lawyer for long periods of time on the grounds that he didn't have to be charged with a crime.

Now, does that make sense? Is Padilla, who was far from any traditional battlefield, an enemy combatant? One way to address that question is to seriously consider what it would mean if Padilla really were an enemy combatant. Because if stepping off that plane in O'Hare Airport and through the terminal to pick up his luggage were sufficient to make him an enemy combatant as alleged, there would be no duty to arrest him. He could simply have been shot under the provisions of the law of armed conflict that entitle a belligerent to kill enemy combatants.

I am troubled by that conclusion. I suspect many of you are as well. But it leads me to question whether the characterization of an individual, even if he is up to no good, as an enemy combatant is appropriate. One of the reasons I am troubled is that there was a functioning legal system in the United States. Padilla easily could have been arrested and brought before it. Indeed, he was, as a material witness, before being made an enemy combatant.

Another enemy combatant who was arrested in the United States was al-Marri. He was arrested in his house in Peoria, Illinois. We now know his main offense was being a nephew of the alleged 20th hijacker but at the time it was alleged that he was a member of a sleeper cell. Again if he was really an enemy combatant, he could have been shot as he came to open the door. He didn't have to be arrested. Is that really where we want to go?

If you think about another war that is generally understood to be metaphoric—the war on drugs—we are dealing with comparable dangers in many respects. Drug trafficking is also an international phenomenon; there is a raging armed conflict in Columbia. Even though drug cartels send clandestine agents to the United States

who engage in violent activities that kill thousands of people, nonetheless we are uncomfortable treating drug traffickers as combatants. We don't start shooting them—we arrest and prosecute them. Why is terrorism different when we are in a situation where prosecution is possible?

Now let's look on the other side of the spectrum. This morning's panel discussed the 2002 attack on a senior al Qaeda operative in Yemen. This is an instance where I think it was appropriate to classify him as a combatant, but the United States never made a good case at explaining its reasoning. At the time, all we knew was that a CIA-operated Predator drone flying over Yemen launched a missile which struck a car carrying Abu Ali al-Harithi, along with several of his alleged coconspirators, and that they were all killed. Very little else beyond that was known. In fact, even that information was not supposed to be made public. No effort was made at the time to justify the killing of al-Harithi as an enemy combatant.

So let me try to do that in retrospect. I think that this was probably a circumstance in which it was appropriate to classify him as an enemy combatant. First, although it appears al-Harithi had been responsible for the attack on the *Cole*, in and of itself that would not be sufficient because if you've simply committed a crime in the past, that doesn't justify shooting you today. To be shot today, you have to be engaged in ongoing combatant activities. So the allegation has to be that al-Harithi was engaging in continuing terrorist activities—an allegation that the United States never made publicly. Yet my understanding is that this was believed to be the case.

Second, the United States never made the case publicly as to why he couldn't have been arrested. In fact, we know that it would have been very difficult to arrest him. In a prior attempt by Yemen forces to arrest him, a dozen Yemeni soldiers were killed. Al-Harithi stayed in the tribal areas of Yemen where he was basically beyond the reach of the Yemeni government.

You might ask, "Couldn't the United States, with Yemen's permission, send in troops to arrest him?" I understand that the United States considered this alternative, but apparently felt it would be impossible for troops to infiltrate that area without the tribal forces immediately knowing they were there. Under those circumstances, there would have been fierce resistance with casualties far in excess of those sustained in the Predator attack.

I think the case could have been made that with respect to al-Harithi you had an active combatant engaged in ongoing plans against the United States and no capacity to use traditional law enforcement means to arrest him. Under those circumstances, no one should contend that the United States could not take action to defend itself. Treating him as an enemy combatant and resorting to lethal force was appropriate. In that case, war rules were the right rules, even though the United

States didn't explain its case well. But the al-Harithi case is more of an exception than the rule.

Just to give you a few more examples, there were six Algerians arrested in Bosnia. In that case, the United States decided initially to employ the law enforcement approach and brought these individuals before a Bosnian court. The court, which had been created by the United States, agreed to accept the cases and asked for the evidence, but it then found the evidence insufficient to hold the suspects. The United States responded by saying that it had decided instead to treat the six as enemy combatants and whisked them off to Guantanamo Bay despite the fact that the Bosnian court order directed their release.

That I find troublesome because here was an available, clearly functioning legal system, hardly hostile to US interests, in which honest justices looked at the case and determined they had not been provided sufficient evidence to warrant prosecution. Rather than produce the evidence, rather than using the functioning judicial system, the United States sent them off to Guantanamo Bay.

Something very similar happened in Malawi where five al Qaeda suspects were picked up. The local court system looked at the evidence, determined there was no evidence of criminal conduct, and ordered them released. The United States said, "No problem, we'll treat them as enemy combatants," and detained them anyway.

In that case, sometime later the United States decided that in fact the Malawian court was correct; there was no evidence. The suspects were then released. This illustrates the problem with allowing war rules to be applied globally even where law enforcement is an option. Frankly, it means that there is nothing that prevents the US Government from picking up any one of us, declaring us an enemy combatant, and whisking us away without access to a lawyer. Indeed, as we know from al-Harithi, there's nothing to stop the US Government from shooting us by declaring us enemy combatants and just firing away. I had the chance to ask Attorney General Ashcroft about this and he said, "Oh, trust us; we've only done this twice," referring to the *Padilla* and the *al-Marri* cases.

I think it's fair to say those are test cases. If the Bush Administration gets the ruling it wants from the Supreme Court, we are going to see many more of those cases. We already have many more of them outside of the United States. This is particularly worrisome in terrorism cases because much of what is said to be known about terrorists is based on intelligence that can be of varying reliability. Particularly in that situation, you want the evidence tested in an open court in some kind of adversarial process.

With those dangers in mind, I would like to propose a three-part test, a series of rules that I believe should govern our efforts to draw the line between war rules and law enforcement rules.

Obviously, you have Afghanistan and Iraq (at least in the initial stages of the military campaign) as traditional battlefields. But in the absence of a traditional battlefield, I would first argue that you need to be able to make the case that there is a regularity and level of intensity to the violence such that it is fair to characterize the overall campaign as one of war; that a mere criminal act here or there will not be sufficient.

Second, in determining whether a particular individual is a combatant, he must be a direct participant. Here I refer to the traditional rules on when an irregular or civilian can be treated as a combatant. You need some direct participation in this violent activity, although that does not necessarily imply carrying a gun or placing a bomb. I understand the role of planners or organizers, but the case has to be made that this is a direct participant, not a sympathizer or a financier. We have to keep in mind the traditional line that we draw even in a classic war between combatants and others who provide support, but who may not be directly targeted.

Finally, and most important, law enforcement options have to be unavailable. If someone can reasonably be arrested, if there is a functioning court system, those avenues should be pursued. We should reserve the use of war rules to situations when armed combat is really the only option—situations like those that exist in the tribal areas of Pakistan or in Afghanistan before the conflict broke out, where you had an uncooperative government that was sheltering individuals who were actively in the process of launching attacks against the United States. Those are not circumstances where we want to require the law enforcement option.

Now let me just briefly say a word about torture.

I don't have to repeat the international humanitarian law rules prohibiting torture for this audience; you know these all too well. I want to note that even in situations where the Geneva Conventions are inapplicable; there is a parallel body of law that military lawyers often forget about, that is, human rights law. That law applies even in the absence of the Geneva Conventions. So, for example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits torture in any circumstance. There are no exceptions whatsoever. In explicit terms, it similarly prohibits cruel, inhuman or degrading treatment. Similarly, the International Covenant on Civil and Political Rights prohibits both torture and cruel and inhuman treatment. It is clear that both of those are nonderogatory. Even in a public emergency you can never use torture. You can never engage in cruel, inhuman or degrading treatment. With that background, this should be an open and shut case, and we should have nothing to address on that issue.

In fact, a series of decisions by appointed lawyers in the Bush Administration did set us on that road where torture and cruel and inhuman treatment are being openly discussed by the American (and international) public. The decisions were taken step-by-step. The first was to decide that the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War was inapplicable not only to al Qaeda, but initially to the Afghan conflict. This decision was reached using some combination of a novel failed-State theory and/or by arguing that the Taliban didn't distinguish itself from the civilian population even though every Afghan knew exactly who the Taliban was by the turban and the dress they wore. Nonetheless, facts didn't get in the way of the Bush Administration, which declared the Geneva Convention inapplicable. That was step one.

Step two was to completely ignore the parallel requirements of human rights law. The initial decisions made in January 2002 determined the Prisoners of War Convention was inapplicable but did indicate that those who were in US hands were to be treated humanely. Until August of that year, there was no public mention of the Torture Convention at all.

When we finally see mention of the Torture Convention it is in that notorious August 2002 Jay Bybee memorandum from the Justice Department. In that memorandum, we see that the use of torture is dealt with in an extremely narrow way. There is no mention of the parallel prohibition of cruel, inhuman or degrading treatment, other than to say torture is much worse than that. There is not a hint that there is actually a requirement to refrain from cruel, inhuman or degrading treatment. I think the reason for that is that the Torture Convention doesn't require criminalization of cruel and inhuman treatment, only of torture, and the Justice Department lawyers were mainly worried about avoiding prosecution.

It wasn't until June 2003, after a series of meetings that Human Rights Watch staff members and others had with Condoleezza Rice, the National Security Adviser, that the Bush Administration mentioned publicly the prohibition on cruel, inhuman and degrading treatment. The Department of Defense General Counsel stated (in a well thought out statement) that the prohibition on cruel, inhuman and degrading treatment proscribes the same conduct in the United States under the US Constitution as international law proscribes overseas. In other words, if you can't do it at the local police station, you can't do it anywhere. This correct statement of the law was, as evidenced by the various interrogation techniques that we now know were authorized, promptly ignored. In some cases, the authorized interrogation techniques even involved torture.

Indeed, even after meeting with Condoleezza Rice a few weeks ago to press her to disown coercive interrogation as contrary to the US Army's *Intelligence Interrogation* manual and contrary to the prohibition of cruel and inhuman

treatment, the Bush Administration still insists that there is a realm of coercive interrogation that is permissible and appropriate. Thus, this is not an issue of individual aberrant interrogators but one of policy involving senior levels of the Administration.

We're all aware that various defenses have been offered for the Bush Administration's decisions. I won't spend much time on them other than to say it is embarrassing to a see a lawyer putting them forward. The first is that the President, in the exercise of his commander-in-chief authority, can authorize torture—can, in effect, rip up the Torture Convention and the Geneva Prisoners of War Convention. The second theory put forward is that in self-defense you can torture. Of course, war involves self-defense but in that instance the use of force is governed by a whole body of law—the law of armed conflict. That law is absolutely clear in prohibiting torture—you simply can't do it! The Bush Administration's decisions may be equated to the rules for a barroom brawl—anything goes.

Finally, the Bush Administration puts forward the argument of necessity—if you really have to, it's permissible. But one of the requirements of necessity is that the legislature has not prohibited a certain type of response. The Administration states the rule of necessity, but then ignores the US ratification of the Torture Convention with its provision that you can never torture or use cruel or inhuman treatment, even in extreme situations. There is no exception to this prohibition in the Convention.

What this all adds up to is a highly permissive environment when it comes to coercive interrogation. We don't have evidence yet of orders from the top. I doubt we ever will find an explicit order to torture. But we do have a group of politically appointed lawyers who, rather than conscientiously applying clear international prohibitions, were basically looking for legal loopholes of enormous dubiousness and sending the signal, "do whatever you want, we'll get you off." It should be no surprise under this circumstance that torture and abuse were the result. Thank you.

Moderator: Thank you, Mr. Roth. Our second speaker is Professor Bob Turner, who serves as the Associate Director of the Center for National Security Law at the University of Virginia School of Law. Professor Turner knows these issues from both a personal and academic standpoint having served two Army tours in Viet Nam. He has served in the Pentagon as Special Assistant to the Under Secretary of Defense for Policy, in the White House as Counsel to the President's Intelligence Oversight Board, at the State Department as Principal Deputy Assistant Secretary for Legislative Affairs, and as the first President of the congressionally established United States Institute of Peace.

Professor Turner: Our time is limited. I want to leave a lot of time for not only questions but also comments because there are many people in the audience who know as much about these issues as I do and almost as much as Ken does, so we'll cut to the chase.

There are a lot of differences between us; but I think, at its core, the difference is going to be about whether the law enforcement paradigm or the law of armed conflict paradigm ought to govern in the war against terrorism. On that issue we profoundly disagree. I don't deny we have the legal option of arresting enemy combatants and trying them in Article III federal courts, but we also have the option of resorting to traditional methods of self-defense under the law of armed conflict, which include the legal right to target enemy combatants, even enemy leaders who take no actual part in the hostilities, and to detain them without trial until the end of the conflict.

I was pleased to hear Ken recognize that. I would remind you that during World War II the United States detained hundreds of thousands of German and some Italian prisoners of war within our territory without judicial oversight and without access to lawyers. During the more than eight years that some American pilots were held as prisoners of war in North Viet Nam, not once did we ask the North Vietnamese to give them a right to a lawyer nor did they receive a judicial hearing.

We understood that under existing international law, in the Geneva prisoners of war convention, during a period of armed conflict it is permissible to essentially "warehouse" enemy soldiers for the duration of the conflict. To be sure, if they are accused of criminal behavior they then obtain a number of procedural rights and essentially international due process of law. But even in that setting they're not supposed to be sent into Article III courts. Article 84 of the Geneva Convention provides expressly that if POWs are accused of criminal behavior, either committed while prisoners or war crimes committed during the conflict and before they were captured, they are to be tried only by military courts.

Ken and I disagree about whether law enforcement or law of armed conflict rules should apply. But that's not a hard decision to make and it seems to be important to ask who ought to make that decision. It seems to me one can argue under our constitutional system that, as chief executive officer, as commander in chief in charge of fighting our wars, and so forth, maybe it is the President's decision to make.

Our very first speaker at this conference told us that the war on terrorism is in fact a war. He said terrorism is an act of war. That I think is clear. I don't think anybody will dispute this.

The President views this war as governed by the law of armed conflict. But then again, maybe we can say that it's not the President's decision; that it ought to be the law-making authority that makes this decision so maybe it's a decision for

Congress. Or perhaps this is really a question of international law, so maybe it ought to be the United Nations—and since it involves the issue of war and peace, perhaps it's the UN Security Council, which is the primary organ of the United Nations for the maintenance of international peace and security.

The response to the suggestion that it is other than the President's decision, I would submit, is that it was determined on September 18, 2001, when the United States Congress, by overwhelming votes in both houses, enacted Public Law 107-40, which authorized the use of US armed forces against and, I quote, "those nations, organizations or persons, he [the President of the United States] determines planned, authorized or committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future act of international terrorism against the United States."

Thus, I would submit the war on terrorism is not really a metaphor like the "war on poverty" or the "war on drugs." The United States has been the object of numerous armed attacks within the United States and abroad that have claimed thousands of human lives and Congress has by law authorized a military response against those persons whom the President determines played a role in the 9/11 attacks or belonged to an organization involved in those attacks.

That Joint Resolution was the constitutional equivalent of a declaration of war. And there is no provision in the statute for judicial review, no provision saying that before you can target an enemy terrorist you have to take him before an Article III judge and make a determination beyond a reasonable doubt that he did belong to that organization or did take part in that activity. That is not the way wars are fought.

Ken may not like it, many of us may not like it, but the decision has been made by our President and our Congress that the law of war governs. And ten days after Congress authorized the use of armed force on September 28, 2001, the UN Security Council unanimously passed Resolution 1373, which reaffirmed that all acts of international terrorism constitute a threat to international peace and security and may be combated by all means. Not just by law enforcement means, but by all means, specifically mentioning the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations.

Once again, this is the language of armed conflict, not the language of law enforcement. And earlier this year, in Security Council Resolution 1526, the Council again reaffirmed the need to combat, "by all means in accordance with the Charter of the United Nations and international law threats to international peace and security caused by terrorist acts."

Now, I submit that at least until the Supreme Court orders otherwise, and I would say personally I'm delighted the Supreme Court is looking at this, this issue

has been resolved and the law of armed conflict is an appropriate paradigm in the war against international terrorism.

I might add that if Human Rights Watch and other NGOs really believe that this is only a law enforcement problem, it's hard to understand all the concerns we've heard from them about the Geneva Conventions in the last few years.

It is true by definition that terrorists do not abide by the law of armed conflict and thus do not qualify under international law as lawful combatants. But the argument that this misconduct should somehow entitle them to preferred treatment to that given to lawful combatants when engaged in acts of war eludes me.

I am not suggesting that there is not an important role for the law enforcement paradigm in the war on terror. Various Security Council resolutions have noted, for example, the importance of using law enforcement tools to criminalize the provision of funds to terrorist organizations and the like. We have the *option* of arresting and trying terrorist suspects. When those individuals are US persons, that may well be the most appropriate approach.

Again, I'm pleased the Supreme Court is looking at the *Padilla* and *al-Marri* cases. When you are dealing with US persons under our legal system you sometimes get a different situation than dealing with foreign nationals.

Now, it is true that mistakes can happen and that innocent people honestly believed to be terrorists might be apprehended and detained against their will and in violation of fundamental principles of justice. Despite the best intentions of everyone involved, sometimes innocent people are *killed* in wartime. It's happened in Iraq. It's happened in Afghanistan. It happened in Viet Nam. It happened in World War II.

There may be a war in history where mistakes were not made or innocent people were not killed, but I am unaware of any such situation. War is often a necessity, a choice between lesser evils, and if we demand that no enemy be targeted unless we are absolutely certain of their identity and that no collateral damage will occur, we are not going to win very many wars and a lot of good people on our side are going to be killed by the enemies we elect not to target.

Under the law enforcement paradigm, presumably when Jose Padilla arrived in the United States with instructions to explore the possibility of exploding a radiological weapon, we should have told the FBI, "Hey, this guy may be up to no good, kind of keep an eye on him. Don't violate his rights, don't profile him, don't harass him. Follow him around a little bit if you can. If you happen to see him kill a million people, bring him in so we can try him." That is the criminal paradigm.

One may say he was already guilty of conspiracy. An interesting bit of information is that when he was in Afghanistan and Pakistan he in fact did meet with senior

al Qaeda leaders and came back home on a mission that was a conspiracy to commit some horrible felonies.

Thirty-five years ago, as a junior Army lieutenant, I had the experience of going through a chemical-biological-nuclear warfare course. Every graduate of that course, even those who weren't paying much attention, focused on the discussion of radiological poisoning and the symptoms and the painful death that follows. And I can tell you with reasonable certainty, because we talked about it during the breaks, that if any of us were told there's going to be a nuclear war and you have the choice of being at ground zero or being far enough away that it's going to take you a few weeks to die of radiological poisoning, every one of us would have said, "Please God, let me be at ground zero." It is one of the most painful ways to die I can think of.

As I say, perhaps Padilla was involved in a criminal conspiracy when he stepped off that plane. But I doubt seriously we could have proven that in federal district court without seriously compromising our counterterrorism infrastructure.

Hearsay prohibitions do not exist in international law or most of the world's legal systems, but presumably US evidentiary rules would have required us to bring in our most sensitive intelligence sources from Pakistan or Afghanistan to be identified and cross-examined in open court in order to get a conviction of Mr. Padilla. That means, of course, those sources would not have been able to return to al Qaeda cell meetings to find out what targets were planned for next week and next month. That obviously is too high a price to pay for one conviction. So under Ken's preferred paradigm, we would have been limited to following Padilla around, again without violating his rights, in the hopes that perhaps if he murdered a few thousand or a few hundred thousand or a few million of our fellow citizens with a radiological device we might be able to catch him in the act and get a conviction. Of course, even to get that conviction, we would likely have to disclose in open court how we managed to keep track of him, the various technologies used to monitor his activities, to intercept his communications and the like, and his friends would no doubt be sitting there taking careful notes. If they didn't, in reporting on the trial, *Time* magazine would help the American people and al Qaeda understand what tools the United States can use that al Qaeda needs to avoid.

Let me turn briefly to the issue of targeting individual terrorist leaders, an issue that is incorrectly described as "assassination." Some of you know this has been an issue close to my heart going back many, many years to my service in Viet Nam, where one of my jobs was investigating acts of terrorism and assassination. In fact, I wrote a very long classified study called *The Viet Cong Tactic of Assassination* in 1970. I don't think it went anywhere. They couldn't get it declassified so it probably was left behind. These are issues of interest to me.

For five years in the mid-70s I worked as national security adviser to a member of the Senate Foreign Relations Committee and followed both the Church and the Pike hearings. The Church Committee issued a several-hundred-page report at the end of which they concluded they could not identify a *single* incident anywhere in the world where the CIA had ever assassinated anyone. That didn't make the front pages. Most surprising today!

In 1981, a few days after President Reagan issued Executive Order 12333, I was hired by the White House to be the Counsel to the President's Intelligence Oversight Board charged with the job of overseeing the activities of all of the intelligence community and reporting directly to the President any violation of the law or of Executive Order 12333. As most of you know, Section 2.11 of that Order provided, and I quote, "Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in assassination."

Now again, by way of background, you may remember Frank Church being very indignant about the role of the CIA. Prior to the Church Committee coming into existence, two CIA directors—Director of Central Intelligence William Colby and his predecessor Richard Helms—had issued internal regulations prohibiting assassination by anyone in the CIA.

So this issue was not really a major problem. But again, this is an issue I have been thinking about and working on since 1974, if not before. And I think it is very important we define our terms. The Executive Order does not define "assassination."

Over the years, I have come up with almost two dozen different definitions in various dictionaries and legal dictionaries and the like, and in almost every instance one word is used—"murder." A typical definition is that assassination is the "murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people for political motives; e.g., the assassination of President Kennedy."

I would suggest what we are talking about is not *murder* at all, and thus it is not assassination, but rather it is the intentional targeting of terrorists as an act of self-defense. Approaching the subject in that way eliminates a lot the very burdensome baggage of being linked with Abraham Lincoln, John Kennedy and Martin Luther King. I think we should agree that "assassination" is wrong and ought not to be an option.

On the other hand, "self-defense" is a good thing, at least a relatively good thing considering the alternatives. What I am talking about are situations in which the intentional taking of life of one wrongdoer might be expected to prevent the slaughter of large numbers of innocent people. I would submit that directing our

force primarily against the leadership of terrorist groups is morally preferable to a strategy that kills large numbers of their foot soldiers. It is difficult to deter people who really want to die for their religion, although I have my doubts about the eagerness to die of some of their leaders. You will note, for example, we haven't seen Osama bin Laden rushing out in front of gunships waving his arms and saying "please make me a martyr."

There are numerous aspects of this issue that time simply will not permit me to address. One thing I do want to emphasize is that in using lethal force that right is, of course, limited by the duties to avoid unnecessary suffering and to mitigate collateral damage.

In conclusion, let me emphasize that the war on terrorism is serious business. It is not a game. An overwhelming presumption in favor of the terrorists is neither mandated by the law or by prudent policy. If we relax our guard and tie the hands of our leaders and our militaries, al Qaeda will be given an opportunity to kill vast numbers of our fellow citizens. Be assured that they will take full advantage of that opportunity. I, for one, will be surprised if they don't hit us again hard before November.

At the same time, if we sacrifice our Bill of Rights in the war on terrorism, Osama bin Laden will have won a far greater victory than was apparent as we dug through the rubble of the World Trade Center and the Pentagon in September of 2001 looking for survivors.

If we demand unrealistic and inappropriate standards, insisting that the war on terrorism be waged in federal district court by law enforcement rules, while our enemy is using military weapons and tactics against our civilian population, we will likely soon be burying large numbers of our citizens—and the cause of civil liberties will not be served by the likely public reaction.

Preserving the rule of law is critically important in our struggle against terrorism, but preserving the lives of our citizens is also important. The constitutional framework set forth in the Fifth Amendment establishes three values I think are particularly important. They are that no person shall be deprived of *life*, *liberty* or *property* without "due process of law." But it is not an alphabetical list. We cherish life above liberty because we understand that when your life is taken from you so also expire your liberties. In the war on terrorism, these are in fact values we have to balance. If we err on the side of civil liberties, our fellow citizens may pay with their lives. Civil liberties are one of the things that have distinguished this country from so much of the world. They are cherished values we have to uphold. But the Congress, the President, and the UN Security Council all recognize that the law of armed conflict is the appropriate paradigm in this struggle.

International law makes Osama bin Laden and other al Qaeda leaders lawful targets for the intentional application of lethal force. That is not, in my view, a close call. Thank you.

Moderator: Thank you, Professor Turner. In the interest of keeping this a little bit more a like a debate, I'll give Ken maybe two minutes to rebut and then we'll go to the audience for questions.

Mr. Roth: On the *Padilla* case, Bob seemed to sort of vie back and forth between a nuclear explosion and a radiological weapon, which we know are quite different. In any event, the government now admits he wasn't going to use a radiological weapon; he had some other bombing plan in mind.

Be that as it may, the alternative was not to try to follow him until he kills thousands of people. The alternative was quite simply to arrest him on criminal charges, demonstrating probable cause. To do that would not have required any revelation of clandestine techniques.

An FBI agent or some other law enforcement official could have come before an Article 3 judge and said a source has told me under the following circumstances that Mr. Padilla was plotting to blow up buildings. That would have been sufficient to arrest him. Hearsay works. I can speak from experience—personal experience—here. You don't need eyewitness testimony to get an arrest warrant.

So you get Padilla arrested under probable cause. Then under the Speedy Trial Act you make application for an interest of justice exclusion to delay his actual trial until such time as it is possible to produce whatever witnesses need to be brought to court. This is a doable proposition.

We should be realistic here that there were quite genuine law enforcement options that were not pursued because the Bush Administration wanted to push their radical theory that anyone they pick up is an enemy combatant.

Second point. It is a red herring to say that Human Rights Watch or critics of the Bush Administration believe that terrorism has to be fought simply through law enforcement agents. I thought I made that clear at the outset: there are times when war is perfectly appropriate. Indeed there are traditional battlefields where clearly war rules apply. Afghanistan is a perfect example of that. The question is: does some declaration of the war against al Qaeda justify war rules around the world. Because if it does, what that means very simply is that we have taken a couple of centuries of due process protections, international human rights law and constitutions, and set them aside. It means that governments, simply by declaring someone an enemy combatant can, without any evidence, lock that person up for forever. That is a radical notion, but that is what the global application of war rules entails.

You should be very reluctant to do that. We should insist that war rules be applied only in circumstances when there is some level of actual armed conflict. We should not be handing out this extraordinary power that essentially obliterates our civil rights. Thank you.

Question and Answer Period

Question: Professor Turner, you mentioned the Joint Congressional Resolution. I think it is important to assess the scope of that Resolution in light of another statute, Title 18 USC § 4001A, known as the Non-detention Act that Congress passed, about 35 years ago. That statute said the government can't detain a United States citizen even for offenses like espionage or sabotage. Shouldn't we at least read the Joint Resolution and that statute together to provide that any enemy combatants are subject to procedural safeguards like judicial review and right to counsel?

Professor Turner: That is a good question. I have not spent a lot of time looking at that issue and I don't have a complete answer to it. I think perhaps an answer might be, but this is very much a lay opinion, that what Congress is talking about is the American judicial process or domestic law and that an exception exists in international armed conflict settings, but I don't know if that is the answer.

To the extent the President has independent power to do this, the question then becomes can Congress take away that power even by statute. I would argue, despite separation of powers in many areas, the President does have constitutional authority to do some things that can effectively amount to a taking away of a statutorily derived right. You don't amend the Constitution by a statute that Congress passes purporting to tell the President he must do thus and so.

I will just give you one example. Bob Dole, when he was running for President against Bill Clinton, pushed through a statutory amendment that provided that the President had to move the American embassy from Tel Aviv to Jerusalem. I can't imagine why, in an election year, he'd want to be bothered with something like that, but he seemed to think it had some benefit. The Supreme Court has determined that the decision as to where to site an embassy is part of the decision on what government is to be recognized as the lawful government of a foreign sovereign, and thus an act of Congress trying to usurp power that clearly belongs to the President is null and void.

I think a case can also be made, particularly after Congress has authorized use of lethal force—has authorized war—that the President has certain powers that cannot be limited by statute, and the best way to interpret the statute is to narrow its reading so as not to infringe upon the President's power.

This is really an off-the-cuff response to your question. It is a good question. Maybe somebody else has a better answer to it. Another option is that you may well be right. It is an issue that needs to be raised. I was delighted that the Supreme Court took these three cases. I think that it is fairly clear from the existing precedents that there were one and arguably two German soldiers in the *Quirin* case who were US persons. I think two of them claimed citizenship and I believe the Court concluded at least one was an American. But the Court said when a US citizen joins the armed forces of the enemy he becomes subject to the same consequences that enemy soldiers face. It seems to me that principle governs until the Supreme Court decides otherwise. But I am delighted it is considering these cases and I look forward to reading the opinions when they come out.

Question: First, a comment. Both speakers, by desperately trying to keep within the confines of current international law, are contributing to the undermining of basic principles of the law of armed conflict. As we have been discussing throughout the conference, the ultimate legal justification to target and kill terrorists, which I agree is not assassination, is based on the right of self-defense. Yet combating terrorism does not fall within the traditional definitions of either international or non-international armed conflict. Obviously I agree that terrorism must be combated under the right of self-defense and that the use of military force must be part of that effort, but rather than attempting to apply the law of armed conflict, which was developed initially to regulate wars between States, in circumstances for which it was not intended, the focus should be on the development of a new legal regime governing what can be done to address the threat of terrorism.

When we attempt to apply the law of armed conflict to the conflict between States and non-State actors, we are shaking the very fundamental principle of the law of armed conflict—the principle of reciprocal rights and obligations between States in a truly international armed conflict. The "war on terror," if I may call it that, raises novel issues that simply defy analysis under the law of armed conflict since one party to that war is not a State. Thank you.

Mr. Roth: I'm not entirely sure I understand the point. There is much of the law of armed conflict that isn't entirely dependent on reciprocity among governments. Take Common Article 3. In this case we're dealing with an internationalized, but not an intergovernmental conflict. I know the Bush Administration is taking the view that Article 3 only applies to civil wars, but I don't know the basis for that position. There's no reason why it can't apply across borders as well.

Yes, of course, there's the right of self-defense. Nobody challenges that. But does that right allow you to use war methods every place or is there some kind of limit to

that? You can certainly launch a war wherever you want. Once it looks like a real war we know that classic war rules apply. But can you go into a country and when you fail to arrest the people through judicial means declare a war for that five minutes it takes to detain them and pull them out as enemy combatants? I don't think so. That kind of playing games with war rules is the problem.

Professor Turner: I agree with most of the points you made as I understood them. It seems to me when the Security Council and the US Congress have authorized measures of self-defense that you have the option of resorting to law enforcement, but since both the Security Council and Congress clearly identified al Qaeda as the source of the attacks, you can engage in self-defense actions against individual members of al Qaeda. Should you decide initially to arrest them and then change your mind and decide you would rather use a law of armed conflict approach, I don't have a problem with that.

To me it is unjust to tell the President that you can't arrest someone who you honestly believe to be an enemy combatant and hold them in detention. If that is the case, it would seem to follow with a lot more force that you obviously can't make a decision to shoot them or can't order a cruise missile strike vice arresting them. If we're going to apply law enforcement rules, presumably every soldier needs to be told before you take a shot at that guy on the other side who's pointing a rifle at you, you need to first take him back to the 9th Circuit, perhaps to the Supreme Court, to obtain a ruling that there is no doubt about this person's identity.

By the same logic that says the President is allowed to authorize a private (hopefully through a general, a colonel and maybe a lieutenant) to kill a suspected enemy combatant, it would seem to follow that they could also detain him under the rules of the law of armed conflict.

Comment (Audience Member): I too share the fears of the questioner about undue categorization. I would like to make a comment about the war on terror. In March 2004, the Human Rights Committee of the United Nations made a very important general comment, General Comment Number 31. It states that international humanitarian law and human rights law are complementary. It's not a question of either/or. Now, if we are faced with a war on terror and this war that will never end, a war in which there will never be a ceasefire or a peace treaty, we really have to rethink the interaction between human rights law and the law of armed conflict. I believe that's something we really need to think about. In fact, it could be the subject of a conference in its own right.

Question: Mr. Roth, you talked about the troublesome hypothesis of the government shooting Mr. Padilla upon his arrival at O'Hare Airport. Let's change that hypothetical slightly. Say he vaulted over his would-be captors and was about to step into a taxi. The law enforcement choice would have been to kill him or to let him go. What is your solution to that situation?

Mr. Roth: Well, under classic law enforcement rules you are allowed to use lethal force if you are a cop on the beat and it's necessary to stop an imminent threat of loss of life or serious bodily injury.

Now my understanding of Padilla is that he was nowhere near posing such an imminent threat. In that case, a mere fleeing suspect cannot be shot. If you change the hypothetical a little bit, if he's about to go and plant the bomb, of course you can shoot him. You do not need international humanitarian law to do that.

But in a situation like this where there is a sole operator and you have everybody tracking him and an available judicial system, there is no reason why you shouldn't use law enforcement rules. The danger of allowing war rules is that it potentially applies to all of us.

Professor Turner: There is a reason we authorized the President to delegate the authority to take human life without a judicial hearing. It has to do with the nature of war. Just as we authorized the President to fight a war against al Qaeda, if the President really wanted to order a cruise missile to be launched against one of us, I am not sure what formal check on his authority would prevent that. I know what the aftereffects of that will be. I know the American people will be outraged over it. I know the American Congress would be outraged over it. There are checks in our system that are less formal.

When I spoke recently in Munich, I made the point that if the United States, which has this unchecked military power, uses that power in an aggressive manner, the American people aren't going to tolerate it. Just as they stopped the war in Viet Nam, they will stop the war on terrorism if they conclude, rightly or wrongly, that violations are going on.

There are lots of quieter checks if the President were to give an order to launch a missile at John Kerry's home. You would have lots of people in that chain of command presumably resigning, going public, doing whatever was necessary to prevent that from happening. But the difference between that situation and a situation where you say a federal district court has to authorize the taking of life in armed conflict is tremendous.

The President has to be able to protect the nation to save lives. If that means a decision is made to shoot Mr. Padilla, that may be a decision with which some

would disagree. And, of course, it would be a particularly unfortunate decision if Mr. Padilla or someone similarly situated turns out to be an innocent person.

But the consequences of the alternative, the alternative of saying you can't take human life, you can't deprive someone of due process or personal liberty, are far greater. Do you want the President to be able to authorize the US armed forces to take the lives of people that they have strong reason to believe are al Qaeda operatives? I think most of us want him to be able to do that. To those who argue that it is permissible to shoot al Qaeda members but they can't be detained, I say there is a disconnect in the logic that I can't understand.

Question: Mr. Roth has referred, on a couple of occasions, to the question of the application or characterization of a war zone on a global scale. I would suggest that a state of war exists. We have an adversary who is pursuing a set of policy aims through the use of armed force. That is what distinguishes this from metaphorical wars, like the war on drugs or the war on poverty. In terms of the place of execution, or the battlefield as it were in which that war is executed, one of the things that we teach at the Naval War College is that the enemy gets a vote. Al Qaeda has chosen the battlefield of the world and the nontraditional battlefield of soft targets worldwide. The choice is theirs, not ours. The choice that is ours is do we respond, do we fight back, do we engage in a war that has been declared against us, or do we not. To get to the question, I would prefer to see the panelists address the issue, which is very real, of given that situation, which is almost unprecedented, of how do we protect our civil liberties and how do we protect the values of our culture while still fighting in that battlespace.

Mr. Roth: Let me say it's not so easy to distinguish the war on drugs. It's worth taking that analogy seriously because there too you have clandestine groups that have chosen a global battlefield, routinely use violence, and kill many, many more people than terrorism does. Nonetheless we have chosen to keep it a metaphorical war because we understand the consequences of not doing so would be devastating for the type of democracy in which we live.

Similarly, al Qaeda has chosen to use violence worldwide. I don't doubt that. How should we respond? If we choose to respond with lethal force using traditional military means as in Afghanistan, then war rules apply. But should we be responding elsewhere, such as in Hamburg, as if it's a war? I think to do so would be devastating.

I think we need to draw those lines establishing that in some instances the use of military force operating under the law of armed conflict is the appropriate response, but in other instances law enforcement means should be used. As a matter

of policy—and of prudence—I would argue, it would be a mistake to respond as if the war is global, because the consequences for the civil rights that we view as the center of our society would be quite severe.

Comment (Audience Member): If I may, just one follow-on comment. It is a challenge and that is what I am asking you to try to respond to. It is a war and it is global because there are policy objectives being pursued by our adversary through the use of armed force. The drug lords don't have policy objectives. They have profit objectives. That is part of the distinction that defines war and makes this a state of war that is, in fact, occurring on a global battlefield. We can't change that. What we can change or what we can address, and hopefully will, is how to protect our freedoms while fighting on the battlefield that they have chosen.

Mr. Roth: The profit motive is not the distinction. Saddam invaded Kuwait for profit. Yes, al Qaeda is using violent means. As a matter of policy that is what it's doing. That still begs the question of how we should respond. We should be very selective in how we apply war rules. In some instances, the option of law enforcement means should be preferred because that is more likely to produce the kind of society that we desire.

Professor Turner: Under our constitutional system, the President has been given a great deal of unchecked power. In *Marbury v. Madison*, Chief Justice John Marshall wrote that certain matters, which are of a political character, are confided to the President's discretion. But he said these things affect the nation, not individual rights, and that Congress has the primary responsibilities for preservation of individual rights. By passing the equivalent of a declaration of war, Congress decided that the United States may use lethal force against al Qaeda and other terrorists wherever they may be found. If we find them in Germany, however, we don't launch cruise missiles into Germany.

Let me raise a more fundamental question about human rights because some feel, since 9/11, that I've become the poster boy for government repression because I've sat on so many panels addressing the issues that have been discussed at this conference. I'm convinced that if the American people become really scared, they're going to make a decision to demand lessening restraints on the use of force and more limitations on civil liberties.

I will give you one example to think about. Go back 62 years to a decision made by President Roosevelt. Of all of our presidents there are very few that had a better record in civil liberties and humanitarian issues. Yet President Roosevelt issued an order to arrest, to apprehend, and to detain thousands of American nationals, most

of them US citizens and many of them native-born Americans. Most of them were not even suspected of the slightest wrongdoing. These thousands of our fellow citizens were sent to detention camps, which were, in many respects, the equivalent of concentration camps except folks were not killed when they arrived.

These people were quite properly outraged. They applied for release to the federal courts. Who argued the case before the courts that this detention was a lawful act? Earl Warren, then the Attorney General of California, who later became Chief Justice of the United States. He argued that the order was a proper exercise of presidential authority because it was believed that the security of the United States was threatened. The case finally made its way to the Supreme Court on appeal. The Court unanimously upheld President Roosevelt's order. Who was the justice who wrote the opinion in that case? Justice Hugo Black. There probably has never been a finer civil libertarian in the history of the US Supreme Court and yet he, like President Roosevelt, was afraid. In that fear they sacrificed the human rights, the civil liberties, of tens of thousands of innocent people.

Now, one reason that I favor reasonable measures, even understanding they may involve the unjust detention of a few innocent people, is because I understand if the fundamental responsibility of protecting the lives of our people is not carried out, the demand for casting aside the Bill of Rights is going to be overwhelming. We saw that in 1942. We will see that in 2004, 2005, or 2006, if we don't continue an effective war against terrorism.

The thought of losing our civil liberties terrifies me, but if you look at public opinion polls, the American public will support it. We must preserve our lives if we're going to preserve our liberties. Thank you.

Moderator: Thank you Mr. Roth and Professor Turner for your insightful discussion of very important issues. As is often the case in discussions such as this, one doesn't necessarily reach specific conclusions, but the dialogue is very helpful in outlining those things that must be considered in reaching those conclusions.