

## NATIONAL SECURITY AND THE RULE OF LAW

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I have long had a deep respect for the Federalist Society and for its principles, and so I feel particularly privileged to be at this podium tonight. For over twenty-five years, the members of this Society have committed themselves to vigorous and open debate about the pressing legal issues of our day and how they ought to be resolved under the constant and durable provisions of our Constitution. The Federalist Society is committed to taking the Constitution seriously and understanding it to be a legal document, rather than an empty vessel to be filled by the policy preferences of those who happen to be wielding the pen at any given moment. On this evening, I want to applaud your contributions to the nation's legal culture and your efforts particularly over the past eight years to elevate the discourse surrounding the most important legal and policy issues facing our nation.

It is my privilege to be here tonight with such distinguished guests, including members of the Supreme Court and the rest of the judiciary. There are also dozens of lawyers here who have served their country during this Administration, some of whom have now returned to the private sector and some of whom I have had the pleasure of working with during my tenure at the Justice Department. There are likely others in attendance who will have the opportunity to serve in the new Administration, all of which is a testament to those who founded this Society and who have a great deal to be proud of. The principles of the Society you founded have inspired a generation of lawyers and are now inspiring the next generation.

As we near the end of this Administration and as we approach the first transition that our government has seen since the attacks of September 11, 2001, I would like to focus on the successes of this Administration that relate to matters that con-

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cern this Society, the legacy that will remain when this Administration leaves office, and on a matter relating to our national security that I think should continue to receive the attention of this Society.

Perhaps of most obvious interest to the members of the Federalist Society are the judges and Justices whom the President has appointed to the federal bench. As the President recently explained to the Cincinnati chapter of this Society, he has sought out “judges who would faithfully interpret the Constitution—not use the courts to invent laws or dictate social policy.”<sup>1</sup> With the help of many in this room, the President has succeeded in this effort and appointed many well-qualified and accomplished judges who have understood their role in interpreting—not writing—the laws.

Most notably, the President has appointed two members of the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito. These men are no strangers to the people in this room—indeed, they both spoke to this Society last year. Both of these remarkably accomplished Justices will continue to serve the Nation for many years to come, and we are grateful not only for their service but also for their approach to the difficult questions of constitutional law and statutory interpretation that the Court faces each Term. The President is rightfully proud of his selection of both of these men, and the Federalist Society should be proud of the role it played in supporting their nominations.

The President also has nominated, and the Senate has confirmed, many other well-qualified judges throughout the federal courts. Unfortunately, still other good and well-qualified people were denied the same opportunity. We have seen the nominations of skilled, experienced, and well-respected candidates delayed or frustrated through procedural tactics. Quite frequently, it has been hard for these nominees to receive a vote in the Senate or even a hearing before the Judiciary Committee. For those who never received a vote or even a hearing, I offer my profound regret. You deserved better.

Tonight, however, we should take note of our successes. Indeed, this Administration’s judicial legacy includes sixty-one judges appointed to the courts of appeals and 261 judges ap-

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1. Sheryl Gay Stolberg, *Bush, Though Not Campaigning, Delivers a Message to Voters: ‘Judges Matter,’* N.Y. TIMES, Oct. 7, 2008, at A20.

pointed to the district courts. The President and the members of his Administration leave office in January, but these good judges will remain in place, many for decades to come.

The Federalist Society should be proud of the role it played in supporting these judges, but it also should be proud of the basis on which it did so. As the members of this Society recognize, the core meaning of judicial independence is independence from the political pressures and fashions of the moment. Otherwise, judges become simply politicians who are independent only in the sense that they have life tenure and so are not subject to the discipline of the political process—namely, elections. Although judges are appointed through a political process, once they take the oath they are confined to exercising a power that is, under Article III, judicial only. Which is to say, one that should involve a faithful, not a fanciful, reading of the laws and the Constitution.

I want to turn to another subject which I have taken from Day One to be my most solemn responsibility as Attorney General. That is ensuring that we put into place the institutions we need to keep our country safe from the continuing threat posed by al Qaeda and other international terrorists.

On September 11, 2001, nineteen terrorists inflicted the most catastrophic attack on our homeland since Pearl Harbor. What made that attack so devastating was not simply the toll inflicted on our country, but the idea that nineteen lightly armed terrorists could murder nearly 3000 Americans. The reality of such asymmetric warfare required us to dramatically reconsider how we should confront the threat of international terrorism.

When the terrorists attacked the World Trade Center in 1993, and when al Qaeda attacked the U.S.S. *Cole* in Yemen and our embassies in Kenya and Tanzania, the United States deployed the FBI to the scenes of these crimes to collect evidence, pursue leads, and ultimately indict and prosecute at least some of those responsible.

Following the September 11 attacks, however, it no longer seemed prudent to treat international terrorism solely as a criminal matter, where suspects are pursued and prosecuted only after they have perpetrated a crime. Indeed, at the time of the September 11 attacks, Osama bin Laden was already under criminal indictment for his role in the embassy bombings. Apparently, he was undeterred. Instead, the United States recognized the attacks of September 11 to be what they were: an act

of war—a war that had been declared years earlier by enemies of the United States, and indeed of civilized people everywhere. In response, this Nation, under our President, committed to a comprehensive offensive strategy against the terrorists abroad, using every resource at our disposal—military, intelligence, financial, and law enforcement.

The U.S. military deployed to Afghanistan, where al Qaeda had found a safe haven within the confines of the brutal and inhumane regime of the Taliban. When our forces or those of our allies captured members of the enemy, we detained them so that they could not simply return to the battlefield and, where we thought it appropriate, transferred them for detention to the U.S. Naval Station at Guantánamo Bay.

At home, the Administration sought to reorganize and modernize our government to reflect the new priorities of the War on Terror. We brought domestic security agencies, which historically had been scattered throughout the Executive Branch, under the umbrella of the Department of Homeland Security, and we established a Director of National Intelligence to ensure that our intelligence agencies would work together in tracking terrorist threats and preventing new attacks.

Within the Department of Justice, the FBI made preventing terrorism its top priority and restructured its resources accordingly. Since September 11, the FBI has transformed itself into a world-class intelligence agency designed to detect and prevent attacks before they occur, rather than simply investigating them afterwards. The FBI has doubled the number of intelligence analysts and translators in its ranks and opened sixteen new offices overseas, including in Kabul and Baghdad. We created the FBI's new National Security Branch to bring together divisions responsible for counterterrorism and intelligence and counterespionage, and we made similar institutional reforms in establishing the National Security Division at the Department of Justice.

The Administration worked with Congress in reorganizing our government and with passing new laws to promote the collection and dissemination of critically important intelligence. Shortly after September 11, Congress passed the PATRIOT Act<sup>2</sup>

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2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

to ensure that analysts and investigators could access the information they needed to protect our Nation, work together to “connect the dots,” and pursue a strategy of prevention. And this year, Congress did the same for our intelligence professionals, passing bipartisan legislation that modernizes the Foreign Intelligence Surveillance Act<sup>3</sup> to allow the intelligence community to quickly and effectively monitor terrorist communications while ensuring respect for our civil liberties.

Taken together, the Administration’s policies in the War on Terror represent nothing less than a fundamental reorganization of our government and will ensure that the next President has the tools he needs to continue to defend the country. The Administration’s strategy in defending the Nation from terrorist threats has not only been comprehensive, but has also been successful based on what matters most: Since September 11, 2001, al Qaeda has not managed to launch a single act of terrorism in the United States. This is a remarkable achievement that no one could have or would have predicted in the days following the September 11 attacks. The credit for that goes to many people, including many brave men and women in our armed forces, and many brave men and women in law enforcement and intelligence services, who put their lives at risk routinely in parts of the world that most Americans, to their great comfort, will never encounter. Much of the credit also goes to the President. In this area, as in many others, leadership and resolve matter.

As the end of this Administration draws near, you would expect to hear broad praise for this success at keeping our Nation safe. Instead, I’m afraid what we hear is a chorus with a rather more dissonant refrain. Instead of appreciation or even a fair appraisal of the Administration’s accomplishments, we have heard relentless criticism of the very policies that have helped keep us safe. We have seen this in the media, we have seen this in the Congress, and we have heard it from the legal academy as well.

In some measure, these criticisms rest on a very dangerous form of amnesia that views the success of our counterterrorism efforts as something that undermines the justification for continuing them. In an odd way, we have become victims of our own

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3. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

success. In the eyes of these critics, if al Qaeda has not struck our homeland for seven years, then perhaps it never posed a threat after all, and we didn't need these counterterrorism policies.

Other critics question the premise—almost universally accepted following the September 11 attacks—that the United States is engaged in a war against al Qaeda and other groups. Even more common is the casual assumption among many in the media, political, and legal circles that the Administration's counterterrorism policies have come at the expense of the rule of law. I am quite familiar with these criticisms, having heard many of them myself during my tenure as Attorney General.

Now it is hardly surprising that the questions of how we confront the terrorism threat could generate vigorous debate. These questions are among the most complex and consequential that a democratic government can face. There is, understandably, passionate debate about where the legal lines are drawn in this new and very difficult conflict and, as a matter of policy, how close to those legal lines we should go.

As the members of the Federalist Society know, however, answering legal questions often involves a close reading and a critical analysis of a text—the Constitution, statutes, judicial decisions, and the like. Regrettably, this point is much too often lost in the public discourse on the subject. Newspapers, commentators, and even prominent lawyers often discuss critical questions about national security policies with barely any acknowledgement that the answers may depend on the language of, say, the Constitution or a statute. And critics of this Administration's policies rarely draw distinctions between whether a course of action is permitted as a matter of law and whether that course of action is prudent as a matter of policy.

For example, earlier this year, the head of a legal organization that prides itself on what it calls its "nonpartisan approach to the law" gave a speech condemning what he called "the oppressive, relentless, and lawless attack by our own government on the rule of law and our liberty."<sup>4</sup> According to this person, we live now in a "time of repression," where the word "'Patriot' names a statute that stifles liberty," and where we face

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4. Michael Traynor, President, Am. Law Inst., Address at the American Law Institute Annual Dinner: Remarks on Liberty, Equality, and the Rule of Law 8–9 (May 20, 2008), available at <http://www.ali.org/doc/Traynorspeech-5-20-08annotated.pdf>.

“assaults by our government on constitutional rights, the Separation of Power[s] and the Geneva Conventions.”<sup>5</sup> We can practically hear the rumble of tanks in the background.

It is interesting and telling that even in the published written version of these remarks—by a lawyer—the references and footnotes largely ignore statutory text, the Constitution, treaties, or laws. Instead, the author relied on such authorities as the *New York Times*, *Washington Post*, and *New York Review of Books*. This style of criticism can be called many things—provocative, perhaps, or evidence that the author could be regarded by some as well-read—but what it cannot be called is a reasoned legal critique.

Also completely absent from these remarks, and from many remarks like it, is any fair appraisal of the legal issues actually involved or an acknowledgement of the difficulty or novelty of the legal questions confronted by the Administration lawyers who made these decisions. Nor was there any discussion of the atmosphere in which these decisions were made. I was in New York City when the two planes hit the Twin Towers, and I know what it was like to be in the city at that time. But I cannot speak from any experience of my own of what it was like to be a lawyer in the Justice Department at that time. There must have been almost unimaginable pressure, without the academic luxury of endless time for debate. The lawyers called on to make critical legal judgments at that time, and in real time, certainly had no time to consult the *New York Review of Books* when looking for answers to these difficult and pressing questions.

If you listen only to the critics, you might assume, for example, that this Administration, by asserting that habeas corpus did not apply to enemy combatants, had tried to deprive the judiciary of a time-honored role in second-guessing our military commanders’ decisions concerning whom to detain on foreign battlefields. Of course, before this armed conflict, federal judges had never asserted the authority to afford habeas corpus to alien enemy combatants captured and detained abroad.

As even the majority in *Boumediene* acknowledged, the Supreme Court had, in its words, “never held that non-citizens detained by our Government” outside the United States had

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5. *Id.* at 9, 11.

“any rights under our Constitution.”<sup>6</sup> Indeed, following World War II, the Court had specifically rejected that habeas corpus would apply in that context.<sup>7</sup> The Administration’s position in *Boumediene* thus was at least arguably justified by text, history, and precedent. A majority of the Supreme Court may have disagreed, but the Administration’s position hardly constitutes the attack on habeas corpus asserted, but not explained, by critics like the author I quoted.

And when people denounce a purported assault on the “Geneva Conventions,” you might expect some level of specificity in the charges. One cannot “assault” a treaty as an abstract concept; one can only violate a treaty by acting contrary to its words. The Geneva Conventions contain 319 articles, of which 315 are plainly addressed to armed conflicts among the nations that signed the Conventions.<sup>8</sup> It is hardly surprising that the United States concluded that those provisions would not apply to the armed conflict against al Qaeda, an international terrorist group and not, the last time I checked, a signatory to the Conventions.

One common article appearing in each of the four conventions, Article 3, provides rules that govern “conflict[s] not of an international character,” such as civil wars.<sup>9</sup> The President concluded early on that the global war against al Qaeda had a decidedly “international character.” In *Hamdan v. Rumsfeld*, a majority of the Supreme Court disagreed.<sup>10</sup> This narrow legal dispute—again turning on an Administration interpretation that was both reasonable and indeed consistent with text, history, and precedent—hardly warrants the sweeping, dismissive, and entirely conclusory criticisms so frequently heard.

I focus on these types of criticism not because they are so extraordinary, but because they are, unfortunately, so typical of

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6. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

7. *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950).

8. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

9. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 8, 6 U.S.T. at 3318.

10. 548 U.S. 557, 630–31 (2006).

people who substitute their policy views for any serious legal analysis and would turn a good-faith legal disagreement into a battle over the purported existence or nonexistence of the rule of law. The irony, of course, is that the law requires a serious analysis of text, precedent, and history, and it does not serve the rule of law to substitute a smug sense of outrage for that kind of analysis. In fact, this Administration has displayed a strong commitment to the rule of law with all that it entails, and I suspect—and I admit that it is a suspicion tinged with hope—that the next Administration will maintain far more of this Administration’s legal architecture than the intemperate rhetoric in some quarters would seem to suggest.

I remain concerned, however, that when relentless criticism of this Administration’s policies moves beyond simply disagreement into a realm where critics and even public officials seek to invoke the criminal justice system to vindicate their policy views, we are in a difficult time. For instance, in June of this year, fifty-six members of Congress sent me a letter requesting that I appoint a special counsel to conduct a criminal investigation of the actions of the President, members of his cabinet, and other national security lawyers and intelligence professionals, into the CIA’s interrogation of captured members of al Qaeda.

The members who signed this letter offered no evidence that these government officials acted based on any motive other than a good-faith desire to protect the citizens of our nation from a future terrorist attack, nor did they provide any evidence or indication that these government officials sought to authorize any policies that violated our laws. Quite the contrary: it has become well-known that before conducting interrogations, CIA officials sought the advice of the Department of Justice, and I am aware of no evidence that these DOJ attorneys provided anything other than their best judgment of what the law required.

Casual requests for criminal investigations, as well as the even more prolific conflation of legal disagreements with policy disagreements, reflect a broad trend whose institutional effects may outlast the current Administration and could well endanger our future national security. I have spoken in more detail about these concerns in several recent speeches in which

I drew substantially on former Assistant Attorney General Jack Goldsmith's book, *The Terror Presidency*.<sup>11</sup>

Let's all remember what Professor Goldsmith has said about what he saw during his time in the Administration. Although he may have disagreed with some of the legal reasoning employed in making these decisions, he made it perfectly clear that despite his disagreement he saw no evidence that those who provided that advice did so in bad faith, for any reason other than to protect the country during a time of war, or with the belief that what they were doing was in any way contrary to the law.<sup>12</sup> It is important for those who are so quick to condemn the attorneys who were working nearly around the clock for months on end in the wake of September 11 to keep that in mind.

In his book, Professor Goldsmith describes what he calls "cycles of timidity and aggression" among political leaders in their attitudes toward the intelligence community.<sup>13</sup> These cycles have played out before, from the 1960s through the 1990s, but those past cycles are now mainly of historic interest.<sup>14</sup> The most recent cycle is of much more than historic interest. As Professor Goldsmith explains, following the September 11 attacks, "The consistent refrain from the [9/11] Commission, Congress, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse."<sup>15</sup>

After going seven years without another terrorist attack, our intelligence professionals and national security lawyers now hear a quite different message. When fifty-six members of Congress request a criminal investigation of the professionals and lawyers, they should have no doubt that those lawyers, and certainly their successors, will get the message: If they support an aggressive counterterrorism policy based on their good-faith belief that such a policy is lawful, they may one day be prosecuted for it.

The competing imperatives to protect the Nation and to safeguard our civil liberties are worthy of public debate and discussion, and congressional oversight and review of our intelli-

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11. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

12. *Id.* at 10, 34, 38.

13. *Id.* at 163.

14. *Id.*

15. *Id.* at 74.

gence activities is vitally important. But it is equally important that such scrutiny be conducted responsibly, with appreciation of its institutional implications. We want lawyers to give their best advice to those who must act, and we want those who must act to know that they can rely on that advice.

As this Society knows, the rule of law is not undermined by stating with clarity and precision exactly what the law requires. To the contrary, both our law and our democracy gain strength when we separate legal disputes from policy disputes and when we permit our policy disputes to be aired in good faith.

In a democracy, of course, the appropriate way to resolve policy disputes is through the ballot box. We just had an election, and a new Administration will soon take the reins in Washington. What I have done as Attorney General has been to try, along with others in our government, to make sure that our counterterrorism efforts stand on sound institutional and legal footing so that the next Attorney General and the new Administration have what they need to assure the safety of the Nation.

The next Administration will have the opportunity to review the institutions and legal structures that this Administration has relied upon in keeping the Nation safe over the past seven years. I am neither so proud as to think that the next Administration will be unable to make improvements, nor so naïve as to think that the policy choices or even the legal judgments that they make will be identical to ours.

What I do hope, however, is that the next Administration understands the threat that we continue to face and that it shares the priority we have placed on remaining on the offense to prevent future terrorist attacks. Remaining on the offense includes not simply relying on the tools that we have established, but also encouraging a climate in which both legal and policy issues are debated responsibly, in a way that does not chill the intelligence community and deter national security lawyers from making the decisions necessary to protect us.

And I am hopeful that some time from now, after the next Administration has had the chance to review the decisions made and the legal advice provided, it will acknowledge that, despite any policy differences, the national security lawyers in this Administration acted professionally and in good faith and that the country was safer as a result.

The loyal opposition, of course, remains as important a part of democracy as the majority in power. In that regard, I take

comfort in the fact that whether in office or not, many members of this Society will remain a part of the public debate and will help ensure that the next Administration acts responsibly and effectively to protect our country and to protect the ideals on which it is based. For that, and for your support based on the principles that support this Society, I am grateful, and I can say with certainty that the Nation is grateful.