

Speech:[†] Liberty and the Rule of Law After September 11

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It is truly a great pleasure to be here. This conversation should be controversial, and I hope that it will add to the national conversation that President George W. Bush has called for since the State of the Union in terms of how we go about transitioning from the sprint stage to the marathon phase in our War on Terror.

The topic before us today is liberty and the rule of law in a post-9/11 society. Their relationship is frequently presented as a trade-off, as if somehow liberty must yield in order to preserve national security at a time when we feel insecure as a nation and unsafe as people.

In this conversation, I am reminded of Benjamin Franklin, who said: “They that can give up essential liberty to obtain a little

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temporary safety deserve neither liberty nor safety.”¹ For at the core of this conversation are the essential questions: What does one mean by liberty? What does one mean by security? I will start with the first.

I. THE CONCEPTION OF ORDERED LIBERTY

My conception of liberty is that which I adopt from Edmund Burke in his address to the citizens of Bristol during a contested moment in their history, when he said: “The only liberty I mean is a liberty connected with order: that not only exists along with order and virtue, but which cannot exist at all without them.”² This conception of liberty, going back for a number of centuries with derivation from the earliest philosophers, distinguishes liberty from license and posits that true liberty only exists in a state whereby order is preserved. In this conception, each of us can pursue our individual ends, rather than exercising unfettered license to deprive others of their liberty to pursue their own ends.

Order and liberty, therefore, are not competing, but rather are symbiotic concepts. Each is necessary to the stability and legitimacy that is essential for a government under law. You cannot have liberty without order, nor can you have order without liberty. It reminds me of that old Frank Sinatra song; like love and marriage, and a horse and carriage, you can’t have one without the other.³

Our founders recognized the dangers of the unfettered use of force, unconstrained by law. Fisher Ames declared in 1787: “Liberty we had, but we dreaded its abuse almost as much as its loss; and the wise, who deplore the one, clearly foresaw the other. True liberty, therefore, only exists in an ordered society with rules and laws that govern the behavior of men.”

1. BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759).

2. Edmund Burke, Speech at His Arrival at Bristol Before the Election in That City (Oct. 13, 1774), *quoted in* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 64 (1996); *see also* http://www.blackmask.com/thatway/books171c/burketwo.htm#1_0_4 (quoting 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 87 (Boston, Little, Brown & Co., 1865)).

3. FRANK SINATRA, *Love and Marriage*, on SINATRA REPRIS: THE VERY GOOD YEARS (Warner Brothers 1991).

In *The Structure of Liberty*,⁴ Professor Randy Barnett, a libertarian constitutionalist now at Boston University, differentiated unbridled license and true liberty, and posited it to a building, the Sears Tower. License gives people the ability and right to congregate in a particular location, even a block square. But if all of us exercised that right to do so, we would be trampling on each other. None of us would be able to achieve what we wanted to in getting to that square.

By erecting onto this square a building, that building necessarily constrains the conduct of those persons who would congregate there: you cannot walk through walls; you cannot go up on a downwards elevator; you cannot access offices for which you do not have the key. That structure constrains our license to do what we want in that particular space, but also liberates us to pursue our individual ends in congregating at that place. Those who go there to work can follow the appropriate signage or path, as would those who go to reside or visit or shop. That essential structure, by inhibiting our license, enables us to achieve true liberty.

To illustrate the necessity of this structure, Barnett posited: “Like a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to act to accomplish the ends.”⁵ To illustrate the necessity of that structure, Barnett notes: “Imagine being able to push a button and make the structure of the building vanish instantly. Thousands of people would plunge to their deaths.”⁶ That is exactly what happened on September 11, 2001.

II. THE FACELESS THREAT OF INTERNATIONAL TERRORISM

Osama bin Laden pushed that button. Just as Barnett’s Sears Tower stands only as a symbol for the structure of liberty that underlies our society, al Qaeda attacked the Twin Towers because they symbolized the might and achievement of our democratic

4. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

5. *Id.*

6. *Id.*

capitalist system, which flourishes because of the liberty founded in our Constitution and protected by our rule of law.

It is that attack on the ordering mechanism of the rule of law that differentiates this enemy from traditional enemies we have confronted on the battlefield or in domestic law enforcement. September 11 woke us up to the fact that in one day, nineteen individuals were able to achieve that which no nation-state has ever been able to achieve. These nineteen individuals, with a couple hundred thousand dollars, inflicted the most massive casualty in human life in the history of this country.

It illustrates that there are those who not only have the will and the intent, but also the means to inflict war-like damage on the nations of this world. I say “nations” because the threat is not only to America, but to Turkey, Indonesia, Australia, Spain, Germany, and all freedom-loving democracies around the world. The terrorists are not pursuing a geographical agenda of political sovereignty, as has traditionally been seen in wars against nation states. It is even different from the guerilla warfare of Latin America or Southeast Asia that we saw in the 1960s, 1970s, and parts of the 1980s, because in those times too, the objective was either geography or sovereignty over a defined area. Unlike the traditional nation-state, the terrorist acts with impunity in the sense that he or she does not have the responsibility of sovereignty. He or she moves across international borders and does not have a population to defend or territory to protect. He or she aims not only to bring about particular deaths, but to terrorize those who survive into adopting or at least accepting their fundamentalist ideology. In this way, the enemy is faceless, impregnable, and therefore much harder to defeat.

Under the traditional conception of sovereignty-based international order arising from the Thirty Years’ War and the Peace of Westphalia, we would divide this world into a club of 191 members (193 if you count the Holy See and Taiwan) composed of international communicative nation-states or juridical individuals that will largely get along with one another. To be sure, the arrangements break down on occasion; the balance of power resembles 193 kids on a playground in perpetual recess with the teachers always absent. The bullies sometimes rise and beat up other children, and the children sometimes gang up and knock down the bullies in a system of give-

and-take that we call international security or sovereignty-based international order. We respect the autonomy of each member of this particular club. But that autonomy is disregarded by the terrorists, who have the sole purpose of bringing down that system of international order. The terrorist threat thus poses a fundamental challenge to the sovereignty-based system of international order that has arisen over the last four hundred years and that defines our world today.

Terrorists do not incorporate the entire cost of their bellicose actions. When they are armed with the ability to inflict a mass destructive damage on the nation, they act not like juridical persons but like a virus infection that moves facelessly, imperceptibly across these various persons and seeks not only to do a nick here, a cut there, but rather to bring down the entire body politic in their attempts to challenge this entire system of sovereignty-based international order.

That, I submit, poses a fundamental challenge not only to America but to the entire coalition and community of civilized nations who exist and coexist sometimes imperfectly, but who have existed together in the last four hundred years based upon this system of sovereignty-based international order.

III. THE PREVENTION PARADIGM

How, then, are we to confront this enemy? At any time of crisis, of course, we always remember what I call the heart of darkness problem; that is, how do we go about defeating the enemy without becoming the enemy ourselves? We do so by steadfastly adhering to the rule of law and the system of international order based upon sovereignty. We seek to uphold and defend that system of order and the rule of law, and we protect our freedom through that system of law, not in spite of it.

However, we have to recognize that the terrorists do not play by the same rules. How, then, are we to use our rules to fight and combat those who would not adhere to them, but rather who openly exploit the liberal nature of our democracy and the generosity of spirit that defines our country's history?

The traditional conception to the problem of crime in America—even exorbitant, well-organized, significant crime—has been the traditional justice model. We wait until the crime happens. We investigate. We prosecute. That model obviously does not work with respect to acts of catastrophic terrorism. Take September 11th. Three thousand people are dead. The nineteen primary suspects have already paid the highest price that they can pay—that any human being can exact on those suspects—and so we are left counting the bodies, sifting through the rubble and asking what went wrong.

Rather than depending on an after-the-fact effort to investigate and prosecute, we needed to do a fundamental culture shift within the Department of Justice and the law enforcement community in order to instill an ethic of prevention. For this, I think nobody should make any apologies because the cost of the failure to deter, detect and prevent what is essentially a militarist act is too catastrophic to contemplate. We had to move the FBI and the Department of Justice into thinking proactively, acting in a way that interdicts terrorist threats before they happen. How can we be consistent with our rules when we move to such a fundamental shift in our strategy?

We do not have the luxury of certain countries such as France and Germany, whose tradition derived from an ecclesiastical or a civil system of law in which preventive detection is a recognized tool to prevent crime or terrorism. Our Fourth Amendment, obviously, does not permit such a regime. What it does permit, however, is prosecutorial discretion to use all the tools at our disposal in order to prosecute for crimes already committed. The Department of Justice has been very clear in its strategy that we will not wait for the big conspiracy to develop. Rather, when we suspect somebody of terrorism, we will use all the tools at our disposal in order to bring charges that may not be as sexy, do not give us long enough prison sentences, and do not make very many headlines, but do achieve the fundamental goal, which is to remove these persons from the street. There is no constitutional, legal or moral right to violate the laws of the United States or the laws of any other country, and if you are a terrorist, the message has been clear: we will stick to you and use our full prosecutorial discretion to prevent you from carrying out your terrorist threats.

This solution not only is consistent with our constitutional and legal regime, but also utilizes the tools of that structure to move the paradigm to where we need to be to combat this faceless, impregnable enemy. Of course, the terrorist is not only a criminal, but also a warrior who does not adhere to the traditional rules and notions of fair warfare conduct. That is why we need to develop intelligent information regarding the threat that is posed. We saw after 9/11 that the terrorists were openly exploiting inter-jurisdictional conflicts and segregating their plans and execution amongst various jurisdictions: training was held in one place; financing from another country; fine-tuning in Florida and Arizona; and final staging in Maine or Boston or elsewhere. That segregation of activities inhibited our ability to collect information and/or prevent such an attack as September 11. That is why it is critical that Congress and the administration propose in the USA PATRIOT Act⁷ a relaxation of the law denying judicial communities of intelligence and law enforcement so as to enable the development of actual intelligence and allow law enforcement officials to take action based upon that intelligence.

My final comment here is with respect to how we wage the war proper, a third element of this strategy against terror.

How do we go about facing down combatants who are clearly our enemies and have violated not only the rules of our domestic society but also the rules of acceptable uses of force that have developed over the century among civilized nations in the international community? Here, I am talking about individuals like Jose Padilla or Yassir Hamdi or others who have been detained as enemy combatants by the Department of Defense and whose cases have since been adjudicated by the Supreme Court. I think it is of paramount importance for the Supreme Court to stand where it did in June, to say very clearly that the rule of law exists even in a time of war, even against those whom we have the undisputed authority to shoot and kill on the battlefield. But once in our custody that ability is subject to the restraints of governmental authority imposed by our constitution and our system predicated upon the rule of law. The decision of the Court in the June

7. 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. 271 (2001).

terror trilogy importantly reaffirms our rule of law even in a time of crisis, while at the same time not unduly hampering the ability of the executive to prosecute this war in the short term and to win it in the long term.

The functional effect of what the Court said in June was basically that we will require, as a matter of law, that which the executive had already committed to as a matter of policy for these individuals that achieves both the necessity of upholding our constitutional principles, while recognizing the competing necessity of giving sufficient evidence to the executive, and of giving the executive and even our defense officials sufficient tools in order to prosecute and win this war against terror.

As Karl Llewellyn, the renowned contracts professor, said in one of his articles on the quality of legal education: “Ideals without technique are a mess. But technique without ideals is a menace.”⁸

At this time, in this place, in this great institution of learning, it behooves us not only to reaffirm the ideals of democracy and liberty, but also to discern the techniques necessary to secure those ideals against those who seek to kill us simply for being who we are.

8. Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935).